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SANTA CLARA COUNTY et al. v. SUPERIOR COURT IN AND FOR SANTA CLARA COUNTY et al.

S. F. 17861.

Supreme Court of California, in Bank.
March 4, 1949.

Rehearing Denied March 31, 1949.

1. Constitutional law 🔑35

Constitutional declaration that constitutional provisions are mandatory and prohibitory, unless by express words they are declared to be otherwise, applies to all sections of the Constitution alike and to everyone subject to the mandate of the Constitution. Const. art. 1, § 22.

2. Counties 🔑3

The procedure under the Constitution for adoption of a freeholders' charter for a county is mandatory and prohibitory, and such procedure is exclusive. Const. art. 1, § 22; art. 11, § 7½.

3. Counties 🔑3

Though courts have jurisdiction under certain circumstances to determine whether mandatory steps under the Constitution leading to adoption of a freeholders' charter for a county have been followed, the timeliness of such judicial inquiry is a significant factor. Const. art. 11, § 7½.

4. Constitutional law 🔑70(1)

Where the only step remaining to be taken in adoption of proposed freeholders' charter for county was certification of the charter to the Legislature for its approval or rejection, board of supervisors of county could not be prohibited from certifying the charter, since prohibition would amount to judicial interference with legislative functions of board of supervisors. Code Civ. Proc. § 526, subd. 4; Civ.Code, § 3423, subd. 4; Const. art. 11, § 7½.

5. Counties 🔑3

If proposed freeholders' charter for a county should be approved by the Legislature, so as to become a part of the state law, then sufficiency of acts of board of supervisors of county under the Constitution with respect to the charter could be tested by some appropriate proceeding. Const. art. 11, § 7½.

6. Prohibition 🔑3(1), 10(1)

Prohibition is an appropriate remedy to arrest the proceedings of a court when such proceedings are without or in excess of the jurisdiction of the court, and where there is not a plain, speedy, and adequate remedy in the ordinary course of the law. Code Civ.Proc. §§ 1102, 1103.

7. Prohibition 🔑10(2)

Prohibition was appropriate remedy to restrain superior court from enjoining board of supervisors of county from certifying to the Legislature a proposed freeholders' charter adopted by the voters of the county, where action of superior court was an interference with the legislative functions of the board of supervisors. Code Civ.Proc. §§ 1102, 1103; Const. art. 3, § 1; art. 11, § 7½.

SCHAUER and CARTER, JJ., dissenting.

Original prohibition proceeding by Santa Clara County and others against the Superior Court of State of California, in and for the County of Santa Clara, the Honorable James L. Atteridge, Judge assigned thereto, respondents, to restrain respondents from proceeding further in connection with a temporary restraining order and order to show cause issued in an action commenced to prevent the Board of Supervisors of Santa Clara County from certifying to the Legislature a proposed freeholders' charter adopted by the voters of the county.

Peremptory writ issued.

Howard W. Campen, Co. Counsel, and Harry C. Nail, Jr., Deputy Co. Counsel, both of San Jose, for petitioners.

J. H. Machado and J. B. Peckham, both of San Jose, for respondents.

SPENCE, Justice.

Petitioners seek a writ of prohibition to restrain the respondent court from proceeding further in connection with a "temporary restraining order and order to show cause" issued in an action commenced for the purpose of preventing the Board of Supervisors of Santa Clara County from certifying to the legislature a proposed freeholders' charter adopted by the voters of that county. Respondents filed a demurrer and answer to the petition, but the material facts, for the purpose of this discussion, are not in dispute and their brief recital will suffice to present the problem at hand. It appears that in pursuance of section 7½ of article XI of the Constitution, the Board of Supervisors of Santa Clara County made publication of the proposed charter prepared by the duly elected freeholders; that thereafter at the general election on November 2, 1948, a majority of the voters approved said charter; and that in consequence of such favorable vote, the board of supervisors proposed forthwith to submit the charter to the legislature at the current session "for its approval or rejection as a whole." To prevent the taking of this final step in the prescribed proceedings, one Albert J. Levin, a taxpayer and voter in the county, filed an injunction action against petitioners in the respondent court. The complaint was premised upon the charge that the publication of the proposed charter was defective in the light of the constitutional requirements, and it therefore was not validly submitted to the voters at the general election for ratification. A "temporary restraining order and order to show cause" was thereupon issued. Petitioners demurred to the complaint in the respondent court, and then applied to this court for a writ of prohibition "commanding" respondents "to immediately cease and desist from any further proceedings" in the said injunction action "other than to dissolve [the] restraining order and * * * to discharge [the] order to show cause."

It is petitioners' position that the issuance of an injunction in the pending action in the respondent court would be "beyond the jurisdiction of respondents" as constituting an act of judicial interference with the legislative process. Petitioners further maintain that although the correctness of such injunction would be reviewable upon appeal, such remedy would not be adequate because of the time element here involved in that: (1) They are required to certify the proposed freeholders' charter to the legislature during the current session; (2) failure so to do "will render said proposed charter null and void and of no consequence whatever"; and (3) therefore "the submission of [said] charter to the legislature could be defeated by an adjournment sine die thereof pending the appeal"—considerations which leave "no doubt as to the propriety of this court's assumption of original jurisdiction." Glide v. Superior Court of County of Yolo, 147 Cal. 21, 27-29, 81 P. 225; Reclamation District No. 1500 v. Superior Court of Sutter County, 171 Cal. 672, 683, 154 P. 845. Careful analysis of the problem presented compels the conclusion that petitioners are entitled to the relief here sought.

[1, 2] Unquestionably, it must be recognized that our Constitution, art. I, sec. 22, makes its provisions "mandatory and prohibitory, unless by express words they are declared to be otherwise"; that this declaration applies to all sections of our Constitution alike, and every one subject to its mandate—county authorities as well as departments of the state government—must comply. So it was stated in Blanchard v. Hartwell, 131 Cal. 263, at pages 264-265, 63 P. 349, at page 350, that the "procedure" for the adoption of a freeholders' charter "was, under constitutional provisions, expressly declared to be mandatory and prohibitory, * * * that such mode is exclusive * * * one mode * * * is commanded, and all others are prohibited."

See, also, People v. City of San Buenaventura, 213 Cal. 637, 640, 3 P.2d 3. But in pursuing the prescribed procedure for preparation of the charter and submitting it to the voters for ratification as precedent steps to its certification to the legislature for "approval or rejection," the board of supervisors was acting as an arm or agent of the legislature in accomplishing part of the legislative process. Accordingly, as petitioners maintain, "judicial interference [therewith] by injunction" would "encroach" upon their "legislative, governmental and political functions" as county officers in undertaking to perform the duties imposed upon them by the Constitution for effectuating final action by the legislature whereby the proposed charter would either be accepted and passed into a law or rejected, as it should see fit. See Fragley v. Phelan, 126 Cal. 383, 403, 58 P. 923, concurring opinion. From this aspect of petitioners' acts being in conformity with the mandate of the Constitution—the state organic law—the present case involves considerations similar to those where an injunction has been declared improper if it would operate to "prevent the execution of a public statute by officers of the law for the public benefit." Code Civ. Proc., sec. 526, subd. 4; Civ.Code, sec. 3423, subd. 4; People ex rel. Attorney General v. Board of Supervisors of Shasta County, 75 Cal. 179, 181, 16 P. 776; Wright v. Jordan, 192 Cal. 704, 710, 221 P. 915.

In Taylor v. Cole, 201 Cal. 327, 257 P. 40, 41, the nature of the proceedings for the adoption of "charters and amendments to charters" was fully discussed, and it was declared, 201 Cal. at page 334, 257 P. at page 43, that "the ratification and promulgation of * * * charter amendments had all the essence of a plain legislative enactment." Accordingly, the recital in the preamble of the legislature's concurrent resolution registering its approval was deemed conclusive on the question of "whether or not mandatory jurisdictional steps were followed in the election which indorsed and proposed [the] charter amendments." 201 Cal. at page 333, 257 P. at page 42. Such view coincides "with the central idea of the Constitution in prescribing the independence and equality of the three great departments of the state." 201 Cal. at page 338, 257 P. at page 44. In so recognizing the whole proceeding as within the domain of the legislative branch of our state government, Const. art. III, sec. 1, the court pertinently continued 201 Cal. at page 338, 257 P. at page 44: "* * * the Constitution placed upon the Legislature the plain duty of seeing that the proceedings by which the charter amendments were proposed were regular in all respects. If jurisdictional defects existed, it was the duty of the Legislature to reject the documents tendered as a whole and withhold ratification. The legislature saw fit to accept the certificate of the defendant board and such other evidence as it may have taken and its conclusion that the election was regular is not open to question in court proceedings, at least in the absence of fraud."

Such analysis of the scope of the legislative process was recognized in Taylor v. Cole, 201 Cal. at page 334, 257 P. at page 43, to be directly "in conflict with the pronouncement * * * in the early case of People v. Gunn, 85 Cal. 238, 248, 24 P. 718, 720," where it was stated that "the municipal authorities and [the] people" rather than "the legislature" were the "law-makers" insofar as the adoption of a charter was concerned, and therefore the "regularity" of the proceedings was a "judicial question the determination of which belonged to the judicial [not the legislative] department of the government." [85 Cal. 238, 24 P. 720] It was the theory of the Gunn case that the legislature's passage of a concurrent resolution in approval of a freeholders' charter after adoption by vote of the people should be distinguished from its passage of a statute by bill, upon the premise that in the former case the legislature was not exercising the law-making power in the same sense as in the latter when it enacts a statute upon a subject entirely within its power, carrying with it "the presumption of regularity in what had gone before." On that point of distinction —that a freeholders' charter "approved" by the legislature does not have the same dignity and force as a law it directly enacts—the Gunn case was expressly overruled in Taylor v. Cole, supra, as out of line with settled legal principles resting upon the integrity of the legislative department as a coordinate branch of our state government, entitled to function within its domain without interference by the courts. Taylor v. Cole, supra, 201 Cal. 327, at pages 334–338, 257 P. 40, and cases there cited; in accord, see Whitmore v. Brown, 207 Cal. 473, 481, 279 P. 447; Allen v. City of Los Angeles, 210 Cal. 235, 239, 291 P. 393; People v. City of San Buenaventura, supra, 213 Cal. 637, 640, 3 P.2d 3; Bruce v. Civil Service Board of City of Oakland, 6 Cal.App.2d 633, 636, 45 P.2d 419; Yosemite Portland Cement Corporation v. State Board of Equalization, 59 Cal.App.2d 39, 42–43, 138 P.2d 39.

[3] While the courts have jurisdiction under certain circumstances to determine whether mandatory steps leading to the adoption of a freeholders' charter have been followed, the timeliness of such judicial inquiry is a significant factor. So in People v. City of San Buenaventura, supra, 213 Cal. 637, 3 P.2d 3, 4, *after* the legislative process was at an end and the charter had gone into effect as a part of "the law of the state," its validity was successfully attacked by quo warranto proceedings because an essential step as to its advertising prior to submission to the voters for adoption appeared, on the face of the legislature's "approving" resolution, not to have been taken. But that situation is distinguishable from this case, where judicial relief through injunction is sought while the legislative process is still uncompleted and in interruption of the procedure prescribed by the Constitution as within the law-making department of our state government. As the problem here thus narrows itself, it becomes a question of whether the respondent court has acted and is acting in *excess of its jurisdiction* in granting the temporary restraining order in prevention of petitioners' performance of their duty to submit the charter to the legislature in culmination of the charter proceedings as undertaken by them.

It is true that the courts have interrupted the legislative process in pursuance of what would be a void measure in any event, where there has been a showing of these equitable considerations in justification of the judicial relief sought: (1) Threatened or actual irreparable injury to the taxpayer or general public by the substantial waste of public funds in undertaking further prescribed steps; and (2) the absence of any other adequate remedy to prevent such waste or loss. Thus, in Harnett v. Sacramento County, 195 Cal. 676, 235 P. 445, an injunction was properly granted to restrain the holding of a county initiative election where it appeared that such proposed procedure "would be a waste of the public money of the county * * * and an improper and illegal expenditure thereof" in that "even if the [measure] were adopted by the electors, it would be a nullity" as being contrary to state law and beyond the power of the county as a legislative body. 195 Cal. 676, at page 679, 235 P. 445, 446. In considering "the point that an injunction cannot issue to restrain a legislative act," the court pertinently stated 195 Cal. at pages 682–683, 235 P. at page 448: "It is true that courts will not enjoin the passage of an act by the legislative body solely upon the ground that it will be a void enactment, nor as a general rule will they interfere with the holding of an election when the election is provided for by a valid law, and the forms prescribed by that law have been complied with by the authorities. Nevertheless, there are exceptions to these rules. For example * * [w]here it is proposed to hold an election for the submission of a measure to the popular vote, and that measure will be wholly void and inoperative even if adopted by the people, the courts may, at the instance of a resident taxpayer, enjoin the holding of the election upon the ground that it will be a useless expenditure and waste of public funds. Code Civ.Proc., § 526a. There is no other adequate remedy for the protection of the rights of the taxpayers in such a situation, and political rights are not curtailed. The present situation obviously merits the relief sought." Upon the same principle an injunction was granted in Livermore v. Waite, 102 Cal. 113, 36 P. 424, 25 L.R.A. 312, to restrain the holding of a state election on a constitutional amendment passed by the legislature and referred to the people but which, because of its defective terminology, would be "ineffective in accomplishing [the desired] change" even if approved by the people. 102 Cal. 113, at page 122, 36 P. 424, 427, 25 L.R.A. 312.

Similarly, in Wallace v. Board of Supervisors of County of Alameda, 2 Cal.2d 109, 39 P.2d 423, a mandamus proceeding, the timeliness of the application for judicial relief with regard to contemplated charter procedure appears significantly. There, with the record showing that the county in question did not meet the conditions specified in the Constitution, art. XI, sec. 7½a, as prerequisite for organization therein of a consolidated city and county government, a writ of mandate was issued to "compel the respondent [board] to take no action with reference to *calling an election* of a board of freeholders" to pursue charter proceedings under the authority of the cited constitutional provision. (Emphasis added.)

[4, 5] But here no like conditions prevail in justification for judicial interference with the legislative process. The county's expenditures with regard to the challenged charter proceedings—such as the special freeholders' election, the publication of the charter, and whatever proportion of the overall expense of the general election procedure would be assignable to placing the additional measure on the ballot—have all been made. The only step which now remains to be taken in completion of the legislative process is the petitioners' certification of the charter to the legislature for its "approval or rejection." Manifestly, such final act not only necessitates no further expenditure of public funds—any more than would the passage by the legislature of any one of its ordinary bills, whether valid or invalid—but in no sense does it involve any expenditure of the money of the county "taxpayer." Thus, unless and until the legislature approves the charter in question and an attempt is made to put it in effect, there can be no showing at all of the essential equitable considerations in support of the granting of injunctive relief—no threatened injury to the public or to any taxpayer which would derogate from the propriety of the completion of the legislative process, without interference, in the orderly manner prescribed by the Constitution as a matter within the domain of the legislative department of our state government. If the charter should be approved and so become a part of the state law, then the sufficiency of petitioners' acts, in the light of the constitutional requirements as to the mandatory steps to be pursued, may be tested by some appropriate proceeding. People v. City of San Buenaventura, supra, 213 Cal. 637, 642, 3 P.2d 3; cf. Johnston v. Board of Supervisors of Marin County, 31 Cal. 2d 66, 71, 187 P.2d 686.

[6, 7] From the foregoing observations it necessarily follows that "the temporary restraining order and order to show cause" should not have been issued, and there now remains the question of the availability of the relief here sought by petitioners. The writ of prohibition is an appropriate remedy to arrest the proceedings of a court "when such proceedings are without or in excess of the jurisdiction" of such court, Code Civ.Proc. sec. 1102, and "where there is not a plain, speedy, and adequate remedy in the ordinary course of law," Code Civ. Proc., sec. 1103. Here the respondent court had "jurisdiction over the subject matter and the parties in the fundamental sense," Abelleira v. District Court of Appeal, 17 Cal.2d 280, 288, 109 P.2d 942, 947, 132 A.L.R. 715, but its particular injunctive act in interference with the legislative process—contrary to the accepted doctrine of the separation of powers inherent in our tripartite form of government (Const., art. III, sec. 1)—was unauthorized and so "in excess of its jurisdiction." Evans v. Superior Court of City and County of San Francisco, 14 Cal.2d 563, 580, 96 P.2d 107, 116; see, also, Rodman v. Superior Court of Nevada County, 13 Cal.2d 262, 269–270, 89 P.2d 109, 116; Fortenbury v. Superior Court in and for Los Angeles County, 16 Cal.2d 405, 407-408, 106 P.2d 411; Abelleira v. District Court of Appeal, supra, 17 Cal.2d 280, 287–290, 109 P.2d 942, 132 A.L.R. 715. Moreover, as the exigencies of the time limitations governing the effectiveness of petitioners' proposed submission of the charter to the legislature at the current session were hereinabove noted, the remedy by appeal, if the injunction were granted in the taxpayer's suit, would not

be adequate under the circumstances. The "restraining order" is of a continuing nature and the fact that it has already been issued does not nullify the propriety of petitioners' application for a writ of prohibition to prevent the respondent court from proceeding further in connection therewith. Evans v. Superior Court of City and County of San Francisco, supra, 14 Cal.2d 563, 580, 581, 96 P.2d 107.

Let the peremptory writ issue as prayed.

GIBSON, C. J., and SHENK, EDMONDS, and TRAYNOR, JJ., concur.

CARTER, Justice (dissenting).

I dissent.

Plaintiff in the respondent court brought an action to restrain the county board of supervisors from submitting a county charter to the legislature for approval. His basis for that relief was that the board had not complied with the constitutional requirment that the charter be published, California Constitution, Art. XI, sec. 7½, in that the publication was fatally defective. It must be conceded that such defect was fatal to the proper adoption of the charter. The trial court granted a temporary restraining order in accordance with plaintiff's request. The board in this proceeding seeks by *prohibition* to restrain the trial court from enforcing the temporary restraining order.

The majority opinion is contradictory, inconsistent and unsupportable. It consumes several pages discussing the power of the court to interfere with the "legislative process," but does not base its conclusion that the restraining order should not have been granted, on that ground. It then shifts to the proposition that a court will interfere with the "legislative process" where otherwise irreparable injury will result and there is no other adequate remedy. *On that basis, and that basis alone,* it finally concludes that the temporary restraining order here should not have been granted. An erroneous act of the trial court in granting the order, insofar as those factors are concerned, is nothing more than *an error at law.* Therefore, there is no *jurisdictional* question that may be tested by *prohibition.* But to get around that obvious barrier, the majority shift back to the proposition discussed in the first part of the opinion—that a court cannot interfere with the "legislative process" and, therefore, when it purports to do so it acts in excess of its jurisdiction and prohibition will lie—a proposition which the majority concede is not a ground for refusal of an injunction in a proper case. All the trial court is deciding, is whether it is one of those proper cases involving interference with the "legislative process," a question which it has *jurisdiction* to decide rightly or wrongly, hence prohibition is not available.

Turning to the merits of the controversy, the authorities are in hopeless contradiction. The main case, after the old case of People v. Gunn, 85 Cal. 238, 24 P. 718, dealing with the nature and scope of the authority of the legislature to approve or reject a charter, was Taylor v. Cole, 201 Cal. 327, 257 P. 40. In that case the attack on the ordinance was made *after* the legislature had approved the charter. The charter had not been published as required by the constitution, yet the court held, overruling People v. Gunn, supra, that the *approval by the legislature constituted a final and conclusive determination that there were no unconstitutional irregularities in the adoption of the charter, and therefore the court lacked authority to examine the proceedings.* In other words the court held that the legislature could override a *constitutional* requirement and it was beyond the power of the courts to interfere—a doctrine manifestly at odds with established law. The court said, 201 Cal. at page 338, 257 P. at page 44: "In the case before us, the constitution placed upon the Legislature the plain duty of seeing that the proceedings by which the charter amendments were proposed were regular in all respects. If jurisdictional defects existed, it was the duty of the Legislature to reject the documents tendered as a whole and withhold ratification. The Legislature saw fit to accept the certificate of the defendant board and such other evidence as it may have taken and *its conclusion that the election was regular is not open to question in court proceedings,* at least in the absence of fraud." (Emphasis added.) If that is the law, that is the end of the case at bar, for the *legislature, not the courts, has exclusive jurisdiction* over whether there has been a compliance with the constitutional requirements. Therefore, the writ of prohibition would lie. Although cases subsequent to the Taylor case are wholly inconsistent with it, yet the majority see fit to perpetuate the confusion by quoting with approval from the Taylor case, and also the later cases. In People v. City of San Buenaventura, 213 Cal. 637, 3 P.2d 3, it was held that a charter could be voided by the courts for constitutional defects in the proceedings even though the legislature approved it. The only difference between that case and the Taylor case was that in the San Buenaventura case the legislative resolution of adoption showed the defects, but as pointed out by Mr. Justice Langdon, in his dissenting opinion, that should make no difference. *Thus under the San Buenaventura case the legislative approval is not conclusive and final.* Yet the majority cite both of these decisions with approval. Later, in Butters v. Board of Supervisors, 217 Cal. 515, 19 P.2d 983, and Ault v. Council of City of San Rafael, 17 Cal.2d 415, 110 P.2d 379, this Court entertained proceedings *before* the charter was submitted to the legislature and cited the San Buenaventura case with approval.

The law is settled, therefore, I take it, that the legislature does not have exclusive jurisdiction to determine whether the constitutional procedure has been followed in the adoption of a charter. The courts may declare the charter invalid for failure to comply with the constitutional requirements. This is tacitly admitted by the majority, for after it finally gets down to the meat of the case, that is, that equity may restrain the continuation of the procedure for the adoption of a charter for failure to follow the required steps, where, as the majority opinion puts it, there is "(1) threatened or actual irreparable injury to the taxpayer or general public by the substantial waste of public funds in undertaking further prescribed steps; and (2) the absence of any other adequate remedy to prevent such waste or loss," it then proceeds to determine that there is no irreparable injury, and there is another adequate remedy, and for those reasons the trial court *should not have issued the restraining order.* In other words, *the proper equitable considerations were lacking for giving injunctive relief.* But how does that go to the jurisdiction of the court and hence justify prohibition? Those are the very things decided in every injunction case—that the court has jurisdiction to decide correctly or incorrectly. Any error is merely one of law—not jurisdictional. And in that connection I desire to point out that there is a *sound* ground for prohibition and that is that a *constitutional question is involved.* See Rescue Army v. Municipal Court, 28 Cal.2d 460, 171 P.2d 8.

The court below based its issuance of the temporary restraining order on the verified complaint wherein it was alleged: "* * * that before such election it was the duty of said Board of Supervisors to cause said proposed charter to be published for at least ten times in such a newspaper, and accordingly said Board ordered such a newspaper to publish said proposed charter for such a number of times; *that said newspaper failed to publish said proposed charter any greater number than five times before such election; and no such publishing for ten times was made in any such newspaper.* * * *" The trial court accepted that allegation as true and we cannot do otherwise. We must accept as a fact that the *constitutional publication requirements were not met.* Hence the application for a writ of prohibition must be denied. It is not important whether the case was a proper one for equity action—that is a matter for the trial court to decide, erroneously or rightly. It does not go to its jurisdiction. The only jurisdictional question is whether the *Constitution* was complied with. The plaintiff in the superior court action alleged, and that court decided, that the Board of Supervisors had not so complied, and, therefore, the trial court has jurisdiction, and the writ should be denied.

Conceding, for the sake of argument only, that the courts have no jurisdiction to interfere with a proceeding for the legislative approval of a charter after the same has been approved by the electorate, even though there are jurisdictional defects in the proceedings, a practical problem is presented which should appeal to the reason and common sense of those who are seeking to have the charter approved. Should the legislature, as it did in the San Buenaventura case, supra, see fit to expose the jurisdictional defect in adopting the resolution approving the charter, then even under the reasoning of the majority in this case, the charter could then be successfully attacked by a quo warranto proceeding. In other words, under the theory of the majority, even though jurisdictional defects exist in the proceedings for the adoption of the charter, these defects can not be tested in the courts after the election at which the charter is approved and before the final approval of the charter by the legislature, but may be tested in the courts after the legislature has finally given its approval. If any sound reason exists for such an absurd doctrine, it has not been made apparent in the majority decision in this case. It would seem more in harmony with considerations of public policy that jurisdictional defects in such a proceeding be tested at the earliest possible moment, to the end that when the charter is finally approved and ready to be put into operation, its validity can no longer be the subject of successful attack in the courts. The problem, as I see it, is whether the legislature or the courts should be the ultimate arbiter of any issue relative to compliance with constitutional requirements throughout the entire proceedings for the adoption of a county or municipal charter. If the power to pass upon this issue is exclusively legislative, then, of course, the courts have no power in that field. On the other hand, if the interpretation of the Constitution and its application to such proceedings is for the Judicial Department of the state, then, it seems to me, that this power should be exercised when, at any stage of the proceedings, it is plain that a jurisdictional defect has occurred because of failure to comply with the constitutional requirements. The majority in this case purport to seize both horns of the dilemma. They say that it is both legislative and judicial. In so holding, they become immeshed in a mass of conflicting rules of both procedural and substantive law which results in confusion worse confounded.

In my opinion, the determination of whether or not the constitutional requirements have been met in a proceeding of this character is clearly judicial, and such an issue may be tested in the courts at any stage of the proceedings. It must necessarily follow that the trial court had jurisdiction in this case to grant the temporary restraining order, and the application to this Court for a writ of prohibition should therefore be denied.

SCHAUER, Justice (dissenting).

I concur in the conclusion reached by Justice CARTER.

I believe that the question as to whether mandatory constitutional requirements have been met is essentially judicial in character and that the so-called "legislative process" theory has no application when relief is sought, as here, before the proposed legislation actually reaches the Legislature and upon the ground that there is no constitutional basis on which such proposed legislation *can* reach or be acted on by the Legislature. In such a case the procedure is not truly legislative; it cannot result in valid legislation; the Legislature acquires no jurisdiction to pass on the measure.

The majority suggest that the "legislation," if enacted, can be declared void. If it is void it will be so solely because the constitutionally prescribed legislative process—the basis for that process—was not followed. If the legislative process is not being followed—if the act in question is merely an idle one, completely sterile because it is beyond the legislative process and can furnish no base for that process—why should it not be enjoined?

Rehearing denied; CARTER and SCHAUER, JJ., dissenting.

33 Cal.2d 548

SAVAGE v. MAYER.

L. A. 20723.

Supreme Court of California, in Bank.

March 4, 1949.

1. Principal and agent 🔑69(1)

An agent is not permitted to make secret profit out of subject of agency. Civ. Code, §§ 2238, 2322, subd. 3.

2. Priincipal and agent 🔑69(1)

All benefits and advantages acquired, by agent as outgrowth of agency, exclusive of his agreed compensation, are acquired for benefit of principal, who is entitled to recover such benefits in appropriate action.

3. Principal and agent 🔑69(1)

Moneys received by a person in capacity of agent are not his, in absence of special circumstances, and law implies promise to pay them to principal on demand.

4. Principal and agent 🔑69(1)

A principal's right to recover from agent moneys received by him in such capacity does not depend on agent's deceit, but is based on duties incident to agency relationship and fact that all profits resulting therefrom belong to principal.

5. Principal and agent 🔑78(8)

The statute providing measure of damages for fraud in sale or exchange of property does not limit principal's recovery from agent because of secret profits made by him out of subject of agency to such damages, though profits were acquired through agent's fraudulent representations to principal. Civ.Code, § 3343.

6. Principal and agent 🔑78(8)

The statute limiting damages recoverable for fraud in purchase, sale, or exchange of property to difference between values of what defrauded person parted with and received, does not limit principal's recovery from agent because of secret profits, made by him from sale to principal of corporation stock purchased by agent for principal, to difference between market value of stock and price paid by principal, so as to preclude his recovery of anything in absence of showing of value of stock when purchased, but principal is entitled to recover full amount of such profits. Civ.Code, § 3343.

◆

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by John E. Savage against Rudolph W. Mayer to recover an amount wrongfully retained by defendant as secret profits made while acting as plaintiff's agent. Judgment for plaintiff, and defendant appeals.

Affirmed.

Prior opinion 193 P.2d 753.

Oliver O. Clark and Robert A. Smith, both of Los Angeles, for appellant.

A. S. Goldman and Charles I. Rosin, both of Los Angeles, for respondent.

GIBSON, Chief Justice.

This is an appeal from a judgment for plaintiff in the amount of $26,400, found to have been wrongfully retained by defendant as secret profits while acting in a fiduciary capacity.

Plaintiff was introduced to defendant in October, 1944, and after several meetings, primarily of a social nature, defendant asked if plaintiff would be interested in forming a group to undertake the management of a certain corporation by purchasing a controlling interest in its stock. Defendant explained that he knew a man named Gentles who owned 12,000 shares of the stock and that if defendant and plaintiff together would purchase another 12,000 shares the three would be in a position to bargain with the persons then controlling the corporation. Plaintiff agreed to the plan, and at a meeting in Los Angeles, in which plaintiff was introduced to Gentles, the latter agreed to join them. It was arranged that defendant should go to San Francisco and, with the assistance of Gentles, purchase the necessary shares on the stock exchange at the market price. Plaintiff and defendant were each to take one-half of the stock so purchased.

A few days later defendant informed plaintiff that 6,000 shares had been procured through the San Francisco Stock Exchange at $20 a share, which he said was the lowest quotation he could get. Defendant told plaintiff that 3,000 of these shares, which he had bought for him, were being held by a Los Angeles bank. The shares were accompanied by a draft drawn in defendant's favor for $60,000, and plaintiff, believing that defendant had procured the shares for him at that price, paid the draft and took delivery of the stock. About one week later defendant informed plaintiff that Gentles had been able to procure an additional 6,000 shares for them at $20 a share, and that 3,000 of these shares had been purchased for plaintiff and were being held by the bank. Plaintiff took delivery of this stock, paying a second draft for $60,000 drawn in defendant's favor. Several weeks later defendant told plaintiff that he had found that the persons then in control of the corporation were unwilling to deal with them while Gentles was "in the picture" and that it would be necessary for plaintiff and defendant together to take half of Gentles' stock at $20 a share. Defendant said that other interests would purchase the remainder of Gentles' stock. Plaintiff thereafter sent $60,000 to defendant with which to buy 3,000 shares of Gentles' stock on his behalf.

The representations made by defendant to plaintiff regarding the manner in which he obtained the stock were false. None of the shares was obtained through the stock exchange, but instead, all of the 9,000 shares which plaintiff purchased were secured by defendant from Gentles upon the representation that the venture had been abandoned. Gentles received only $17 per share from defendant who paid for the stock out of the funds sent by plaintiff to cover the supposed purchases at $20 per share. Defendant kept the difference between the price paid by plaintiff and the amount received by Gentles.

The trial court found that defendant was plaintiff's agent, that he fraudulently misrepresented the transaction to plaintiff, and that he retained the sum of $26,400 belonging to plaintiff, which sum was the difference between the cost of the stock and the price paid for it by plaintiff, less $600 expended by defendant on plaintiff's behalf in making the purchases. The evidence clearly supports the findings of the trial court.

It is defendant's contention that plaintiff's recovery is limited by section 3343 of the Civil Code * to the difference between the market value of the stock and the price paid by him, and that since no showing was made of the value of the stock at the time it was purchased, plaintiff was not entitled to recover anything.

[1-6] An agent, however, is not permitted to make any secret profit out of the subject of his agency. Langford v. Thomas, 200 Cal. 192, 198, 199, 252 P. 602; Shaw v. Shaw, 160 Cal. 733, 737, 739, 117 P. 1048; Calmon v. Sarraille, 142 Cal. 638, 641, 642, 76 P. 486; King v. Wise, 43 Cal. 628, 634; Thompson v. Stoakes, 46 Cal.App.2d 285, 289, 290, 115 P.2d 830; see Civil Code, §§ 2322, subd. 3, 2238; Rest., Agency, §§ 387, 388; 1 Mechem, Agency (1914) §§ 1224–1226. All benefits and advantages acquired by the agent as an outgrowth of the agency, exclusive of the agent's agreed compensation, are deemed to have been acquired for the benefit of the principal, and the principal is entitled to recover such benefits in an appropriate action. 1 Mechem, Agency (1914) § 1225; Rest., Agency, § 403. In the absence of special circumstances, moneys received by one in the capacity of agent are not his, and the law implies a promise to pay them to the principal on demand. De Leonis v. Etchepare, 120 Cal. 407, 409, 410, 52 P. 718; see also Oil Well Core Drilling Co. v. Barnhart, 20 Cal.App.2d 677, 67 P.2d 696; 1 Mechem, Agency (1914), § 1342.

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* Section 3343 of the Civil Code reads: "One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction. Nothing herein contained shall be deemed to deny to any person having a cause of action for fraud or deceit any legal or equitable remedies to which such person may be entitled."

It follows that the principal's right to recover does not depend upon any deceit of the agent, but is based upon the duties incident to the agency relationship and upon the fact that all profits resulting from that relationship belong to the principal. Thus section 3343 of the Civil Code, which provides the measure of damages in a suit based upon fraud in the sale or exchange of property, does not operate to limit a principal's recovery to those damages even though the profits may have been acquired through fraudulent representations to him. Adams v. Harrison, 34 Cal.App.2d 288, 299, 300, 93 P.2d 237; see also recent cases which allowed full recovery of secret profits without discussing section 3343: Kinert v. Wright, 81 Cal.App.2d 919, 185 P.2d 364; Thompson v. Stoakes, 46 Cal.App.2d 285, 115 P.2d 830; Schwarting v. Artel, 40 Cal.App.2d 433, 105 P.2d 380.

The judgment is affirmed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

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90 Cal.App.2d 479

MILLER et ux. v. EISENBERG.

Civ. 16476.

District Court of Appeal, Second District, Division 1, California.
March 8, 1949.

1. Sales 🔑52(7)

In buyer's action to rescind contract for purchase of a coffee bar business on ground that seller misrepresented that business grossed between $50 and $75 a day, evidence sustained finding that such representations were made by seller and that they were false.

2. Sales 🔑38(7)

Fact that buyers of coffee bar business which seller had represented grossed between $50 and $75 a day, were in possession of the coffee bar for about 12 days before closing escrow and continued in business for approximately two months before giving notice to seller of recission of contract, did not establish that buyers had opportunity to investigate the truth or falsity of the representations by the seller before completing the contract.

3. Sales 🔑38(7)

Buyers of coffee bar business were entitled to rely on seller's representations that the coffee bar grossed between $50 and $75 a day, and were not obliged to make an independent investigation to determine the truth or falsity of the representations.

4. Sales 🔑126(2)

Fact that during 12 days when buyers of coffee bar business were in possession of the coffee bar before closing escrow and completing contract of purchase, their daily receipts were not as high as they had been lead to anticipate by seller's representations that the business grossed between $50 and $75 per day, did not require the buyers to stop the escrow and immediately rescind the contract in order to entitle them to rescind.

5. Sales 🔑126(4)

Whether buyers of coffee bar business to whom seller falsely represented that the coffee bar grossed between $50 and $75 a day, were guilty of laches in remaining in possession of the business for about two months before giving seller notice of rescission, was for jury in action to rescind the contract.

6. Sales 126(1, 4)

One seeking a rescission of a contract of sale must act promptly and will not be permitted to speculate on the seller's fraud, but laches is always a question of fact.

7. Appeal and error 🔑1010(1)
Sales 🔑126(1)

To determine the diligence of a party rescinding a contract of sale, every circumstance illustrating the buyer's actions should be considered, and, after such consideration by the trial court, a reviewing court is loath to disturb the holding if reasonably supported.

Appeal from Superior Court, Los Angeles County; Charles A. Paulsen, Judge.

Action by Frederich Miller and Berniece Miller, husband and wife, against Joseph Eisenberg to rescind a contract for the purchase of a business by plaintiffs from the defendant, on ground of allegedly false representations by the defendant, to recover amount paid to defendant on account of the purchase price, and to have note and chattel mortgage given for the balance of the purchase price declared void. From an adverse judgment, the defendant appeals.

Judgment affirmed.

Harry M. Umann, of Los Angeles, for appellant.

No appearance for respondents.

WHITE, Justice.

Plaintiffs and respondents recovered judgment in an action for recission of a contract whereby they purchased from defendant and appellant, for $3,000, the business known as "Joe's Coffee Bar" on West Third Street in the City of Los Angeles. The trial court found that during the negotiations the defendant falsely represented that he was grossing between $50 and $75 per day, which representation was relied on by plaintiffs. It was adjudged that plaintiffs recover the sum of $2,100 paid by them on account of the purchase price and that the note and chattel mortgage given by them for the balance be declared null and void.

On December 12, 1946, plaintiffs paid defendant the sum of $1,300 outside of escrow and deposited in escrow $800 and their note and chattel mortgage to secure the balance of the purchase price. Plaintiffs took possession of the business on December 13, and thereafter operated it. The escrow was closed on December 24. Plaintiffs gave notice of rescission on February 19, 1947.

Appellant contends (1) that the court erred in finding that defendant made false representations or that the plaintiffs relied thereon, in that the testimony clearly showed that plaintiffs made an independent investigation and were in possession of the business for approximately 12 days before closing the escrow and continued in business for approximately two months before giving notice of rescission; (2) that the court erred in not finding that plaintiffs had made an independent investigation or had an opportunity to do so, and therefore were not entitled to rely upon any representations where they knew the true facts to be otherwise and had an opportunity to rescind before close of escrow, in that the evidence disclosed that plaintiffs did not rely upon any representations after the first day they were in possession of the premises; (3) that the court erred "in determining that plaintiffs sustained damages in the amount of $3,000.00 in that under no view of the evidence is such a figure justifiable and the same rests entirely on speculation."

[1] The record contains substantial evidence to support the finding that the representations were made and that they were false. Appellant's position appears to be that respondents, being in possession of the business on and after December 13, 1946, had the opportunity and duty to investigate the truth or falsity of the representations; that although the daily receipts were not up to their expectations they nevertheless permitted the escrow to be consummated and did not give notice of rescission until February 19. Appellant further directs attention to testimony by plaintiffs that they did not rely upon the statements of defendant at any time after they had taken possession of the business, but the record is replete with testimony that in purchasing the business they "depended on his statement on the strength that I bought the place".

[2, 3] Appellant's position cannot be sustained. From our examination of the record, we conclude that the question of whether plaintiffs made or should have made an independent investigation is not involved herein. There is substantial testimony that the plaintiffs entered into the sale in reliance upon defendant's representations. They were entitled to so rely and were not obliged to make an independent investigation. When they took pos-

session, operated the business and discovered that their receipts were below expectations, they had already paid out $2,100 in reliance upon the representations and had virtually fulfilled all the terms of the agreement by them to be performed.

[4-7] The sole question presented, so fas as discovery of the fraud is concerned, is whether the plaintiffs, under all the circumstances, rescinded promptly and were not guilty of laches. There is testimony that when, shortly after taking over the business they found that their daily receipts were not as high as they had been led to anticipate, plaintiffs nevertheless advised that they should "give it a fair trial", and when, after about a month, the receipts were still disappointing, they conferred and decided to "give it a little try more". It cannot be held that, as a matter of law, plaintiffs were required to stop the escrow and immediately rescind because during the first two weeks of operation their suspicions might have been aroused. Under the evidence there was presented a question of fact for the trial court as to whether or not, considering all the circumstances, the plaintiffs rescinded promptly and were not guilty of laches. While it is the rule that one seeking a rescission must act promptly and will not be permitted to speculate upon the fraud, yet laches is always a question of fact. To accurately and fairly determine the diligence of the party rescinding, every fact and circumstance illustrating his actions should be considered, and after such consideration by the trial court, a reviewing court is loath to disturb the holding if reasonably supported. Long v. Los Altos Country Club, Inc., 122 Cal.App. 116, 120, 9 P.2d 600; Hunt v. L. M. Field, Inc., 202 Cal. 701, 704, 262 P. 730; Fabian v. Alphonzo E. Bell Corp., 55 Cal.App.2d 413, 415, 130 P.2d 779.

Appellant's third point is without merit, since if plaintiffs were entitled to recover at all, they were entitled to the return of the money they had paid and the cancellation of the note and chattel mortgage.

The judgment is affirmed.

DORAN, Acting P. J., concurs.

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90 Cal.App.2d 336

EL ZARAPE TORTILLA FACTORY, Inc. v. PLANT FOOD CORPORATION et al.

Civ. 16504.

District Court of Appeal, Second District,
Division 3, California.

Feb. 25, 1949.

Hearing Denied April 25, 1949.

1. Evidence ⚿**397(3), 417(12)**
Sales ⚿**1(1)**

Where sellers sent buyer a document confirming telephone conversation, and stating that they sold buyer one carload of "#2 White Corn", and thereafter buyer sent sellers a writing acknowledging receipt of confirmation of order and stating that confirmation was correct and sellers then sent an invoice for the corn, there was a complete contract of sale, and buyer could not, in action for breach of implied warranty of fitness, testify that there was an oral agreement that the corn should be fit for human consumption. Civ.Code, §§ 1625, 1735(1); Code Civ.Proc. § 1856.

2. Evidence ⚿**397(2)**

Where parties have reduced to writing what appears to be complete and certain agreement, importing a legal obligation, it will, in absence of fraud, accident, or mistake, be conclusively presumed that the writing contains the whole of the agreement between the parties, and parol evidence of prior, contemporaneous or subsequent conversations, representations, or statements will not be received to add to or vary the written agreement. Civ.Code, § 1625.

3. Evidence ⚿**384, 593**

The parol evidence rule is not a rule of evidence, but is a rule of substantive law, and if evidence of conversations and negotiations preceding or contemporaneous to execution of a complete and certain writing is admitted, such evidence must be ignored because without legal force. Civ. Code, § 1625.

4. Sales ⚿**261(1)**

In order to create a warranty, no particular words are necessary, and omission of the word "warrant" is immaterial. Civ. Code, § 1732.

5. Sales ⚿261(6)

Where terms of an agreement designate particular quality of a commodity to be delivered, in phrases well known in the trade of the particular commodity sold, such description and designation amounts to an "express warranty". Civ.Code, § 1732.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Express Warranty".

6. Sales ⚿261(4)

The rule that a sale of goods by a descriptive name well known in the trade amounts to an express warranty, merely holds the seller to deliver the goods which he had contracted to deliver. Civ.Code, § 1732.

7. Evidence ⚿47

District Court of Appeal took judicial notice that official grain standards of the United States Department of Agriculture prescribe certain standards for #2 grade corn.

8. Sales ⚿267

Code section dealing with implied warranty of fitness was not applicable in action to recover for alleged breach of warranty, where contract expressly warranted that corn sold should be "#2 White Corn". Civ.Code, § 1735(1).

9. Sales ⚿279

Sellers' warranty that corn should be "#2 White Corn" was an "express warranty" that corn would be of such grade, but was not a warranty that the corn should be fit for human consumption, and therefore buyer could not recover for breach of warranty because corn was allegedly not fit for human consumption. Civ.Code, §§ 1732, 1738, 1739.

10. Sales 262½

An express warranty negatives an implied warranty which is inconsistent therewith. Civ.Code, § 1732.

11. Sales ⚿439

Buyer could not recover for breach of alleged implied warranty that corn was fit for human consumption, where there was no evidence that corn was not fit for human consumption when delivered on July 29 to buyer by milling company, and it was not until September 6 after the corn had been stored in buyer's warehouse, that food inspector found that corn was not fit for human consumption. Civ.Code, § 1735(1).

12. Sales ⚿439

In action by buyer against sellers for breach of alleged implied warranty of fitness of corn, burden was on buyer to prove that corn did not conform to contract at time of sale and was unfit. Civ.Code, § 1735(1).

◆

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by El Zarape Tortilla Factory, Inc., a California corporation against Plant Food Corporation and Gordon Williams to recover for breach of an implied warranty of fitness in the sale of a carload of corn. From a judgment for the plaintiff, the defendants appeal.

Judgment reversed.

Boyle, Bissell & Atwill, of Pasadena, for appellants.

Theodore R. Coomber, of Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by defendants from a judgment rendered against them in an action brought by plaintiff for breach of an implied warranty of fitness under section 1735, subdivision (1) of the Civil Code in the sale of a carload of corn.

Plaintiff is engaged in the business of manufacturing tortillas. Defendants, Plant Food Corporation and Gordon Williams, its agent, are grain brokers.

Briefly, the complaint alleged: Defendants knowing of the manufacturing business of plaintiff and that plaintiff desired to purchase white corn to be used in the manufacture of "Tortillas", a product for human consumption, on July 25, 1946, sold and delivered to plaintiff 44 tons of white corn; defendants warranted the corn as fit and proper for use in the manufacture of tortillas for human consumption; plaintiff relied upon defendants' warranty; the corn proved to be unfit for the use for which it was represented in that it "contained rodent excreta, insect larvae, was contaminated and adulterated, and unfit for food"; as soon as this unfitness was ascertained, plaintiff notified defendants and offered to return the corn. In their answer defendants denied the foregoing allegations except that they alleged that "on or about July 10, 1946, defendant Plant Food Corporation sold plaintiff one carload of #2 white corn of standard specifications and of Eastern official grades and weights, which said corn at the time of said sale was in transit by rail to Los Angeles, California; that the sale price of the said corn was $5.45 per hundred pounds delivered at Los Angeles; that upon arrival of said corn at Los Angeles the Los Angeles Grain Exchange inspected and graded the said corn and certified it to be #2 white corn according to the official grain standards of the United States," and admitted the offer to return the corn and demand for the return of the purchase price.

The court, among other things, found that: On July 25, 1946, defendants sold plaintiff 44 tons of white corn; plaintiff at the time expressly stated to defendants that the corn "must be good clean corn and fit to be used for human consumption in that it would be made into tortillas"; defendants stated the corn was good clean corn and could be used for that purpose; defendants selected the corn and plaintiff relied upon their skill and judgment; on or about July 29, the 44 tons of white corn, sacked, were delivered at plaintiff's place of business; on September 3, the Department of Health notified plaintiff not to use the corn in that it was suspected of being contaminated; that tests were made of the corn and thereafter it was condemned as unfit for human consumption; on September 19, 1946, plaintiff rescinded the contract, offered the return of the corn to defendants and demanded the return of the purchase price paid therefor; "plaintiff did not purchase the corn by description as #2 grade white corn, but to the contrary, purchased white corn that was to be good, clean and capable of being used for human consumption." The court concluded that the defendants warranted that the corn would be fit for human consumption; that plaintiff rescinded the contract and was entitled to recover damages.

The facts of the case pertinent to the questions to be considered are:

On July 3, 1946, defendants purchased from Donovan Feed Co., of Omaha, Nebraska, two carloads of "#2 white corn or better."

On July 10, 1946, following a telephone conversation between Mario Carranza, plaintiff's general manager and buyer, and defendant Williams, defendant Plant Food Corporation sent the following document to plaintiff:

"7-10-46

To: M. Carranza % El Zarape Tort. Factory
2065 West Jefferson
L.A.

Confirming phone conversation this date between your
Mr. C
and our Mr. Wms
we hereby SELL TO YOU
the following:
Quantity 1 carload
Commodity #2 White Corn
Specifications Regular
Eastern Grades & wgts
Packing Bulk
Shipment In transit to L.A.
Price 5.45 Delvd L.A. Barn
Remarks

This confirmation will be considered correct unless errors or omissions are reported immediately. Please sign and return enclosed card to complete our records.
No. 1594

Yours very truly,
Plant Food Corporation
[Signed] Gordon Williams."

Two days later, and on July 12, 1946, defendants received from plaintiff the following writing: "Plant Food Corporation We hereby acknowledge receipt of your Confirmation No. 1594 and said confirmation is correct in every particular. [Signed] M. Carranza."

An invoice covering the transaction was also forwarded to plaintiff on July 10th. Omitting descriptive matter not material to the subject matter of the invoice it is as follows:

"Sold By
Plant Food Corp.
. . .
Shipped
To Los Angeles
Sold
To M. Carranza
% El Zarape Tortilla Factory
. . . F.O.B. Los Angeles

Terms	Sight Draft.........						
Units	Pounds	Tons	Material		Price	Amount	Total
Bulk	88,000	44	#2 White corn		5.45 cwt.	4,796.00	
			Less Freight				
			88,000# @ 60c	528.00			
			Tax 3%	15.84		543.84	
			East. Grds & Wghts B/L to LAGE				4,252.16

Weights final as invoiced

Please Note. No claims will be allowed for short weights, defective goods or on any account, unless reported within ten days of delivery interest at 6% per annum will be charged on all overdue accounts. * * *"

On July 15, 1946, the carload of corn arrived at Los Angeles. It was inspected by a duly licensed grain inspector of the Los Angeles Grain Exchange, who certified the grade of the corn as follows: "Kind and Grade: 2 White Corn. Factors: Wt. per. Bu. 56.0. Moisture 11.7. Total Damage 4.3. Foreign Material 2.5. Wild Oats ———". This certificate was forwarded to plaintiff, the bill of lading covering the shipment charged to its account, and on July 16th plaintiff paid defendants the sum of $4,252.16, the contract price of the carload of bulk corn.

On July 19, 1946, defendants sent another invoice to plaintiff covering freight costs on the carload of corn, prepaid by defendants, in the sum of $543.84. It contained the additional information that the terms were "net cash on receipt of invoice," and that the shipment had been "Diverted to Garden Grove for your [plaintiff's] acct."

The carload of corn so diverted was sent to the Star Milling Company to be cleaned, recleaned, and sacked. Plaintiff paid the charges for having it done and for the transportation from Garden Grove to its warehouse in Los Angeles.

On July 24, 25, and 26, portions of the corn milled, recleaned and sacked, were delivered by a general trucking company to plaintiff's warehouse; the balance was delivered from the milling company at plaintiff's request to other "users of the same type of business." One of the users took "more than half of the carload"; another took "a hundred sacks." When the balance of the corn was received by plaintiff it was put in its storeroom "and it just laid there until we got rid of it."

On September 6, a food inspector of the Department of Health of the State of California took samples of the milled corn stored in plaintiff's warehouse and on September 13, condemned 37,200 pounds of it as unfit for human consumption.

On September 17, plaintiff notified defendants by letter that it rescinded the sale and offered to return the corn.

Mario Carranza, the sole witness called by plaintiff, testified that some twelve or fourteen months prior to the sale of this carload of corn, he had been approached by defendant Williams, representing the defendant Plant Food Corporation; "He asked me if I was in the market for corn. I told him that I was. He asked me what corn we wanted or how we wanted it, and I told him we wanted nothing but the best grade of white cleaned, recleaned corn, sacked, that it had to be used for human consumption, for food purposes. * * * He said he didn't have any immediately but he would look for some for us. And eventually, it wasn't very long after that, that he told us he could get that corn for us." Thereafter, at different times, plaintiff purchased from defendants several carloads of corn which were delivered cleaned, recleaned, and "sacked" to plaintiff's place of business. About three months prior to the sale in question Williams again contacted him regarding orders for corn and was told plaintiff would require some within the next two or three months. "Some few days prior to this sale he called me and told me he had a car of corn; did I want it? I asked him if it was the corn that we customarily used, that we bought from him before, the same grade; the same kind. I am always careful to specify that it is for * * * I always asked him to give us white, cleaned and recleaned, sacked corn. Q. What did he say to you? A. He said he had such corn for us, that he could get that corn for us. The Court: Cleaned corn, sacked? A. Cleaned, recleaned and sacked, white corn." Carranza further testified that no particular grade of corn was necessary for plaintiff's use; that it could be #1, #2, or #3 grade; that he so informed Williams; that the "main thing is that it should be white, clean, free of all contamination, fit for tortillas, making of food products"; that it was understood that Williams would "arrange for us to have it cleaned and recleaned, and sacked. He made all the arrangements as to who should do the job; when the job was done they billed us for it"; that he had no personal contact with the Star Milling Company.

Defendant Williams testified that on the occasions prior to the sale of the corn involved the "basis" of the contract between the parties "would be that we would supply a car of No. 2 white corn or better"; that on the prior occasions when the corn was delivered "sacked" to plaintiff, "we would buy it that way. * * * It was bought from people that were in the business of doing the job of furnishing the grade of corn required, which was No. 2 or better, and were set up to do the job of recleaning and sacking, loading it in the car and transporting it to us out here. And we in turn would then have it delivered to Mr. Carranza." With respect to the sale of the carload of corn in question, he testified he telephoned Carranza; that Carranza had asked him to call whenever No. 2 white corn would be available; "I told him I had a car that was available; it was then in transit. It was a car of No. 2 white corn, it was then in transit to Los Angeles. It was a bulk car, he would have to make the necessary arrangements about recleaning and sacking, because this particular car of corn was not recleaned and sacked in the east. * * * He said he would take the car of corn, and make the necessary arrangements about recleaning and sacking it.

"Q. By Mr. Boyle. What actually happened, did he make arrangements or did you make arrangements? A. He tried to I believe, and contacted one of the mills here and they were very busy, and couldn't do it and he asked me if I could do anything to help him out. I said I would try. I contacted the Star Milling Company down at Garden Grove, talked to the manager there. He said that he would do the job of recleaning and sacking it at a certain charge, which it was—I don't remember the exact charge that was mentioned. That information I passed on to Mr. Carranza and asked him for further instructions. He said after the car got here to arrange to send it down to the Star Milling Company, Garden Grove, to have it recleaned and sacked. * * * The car came in to Los Angeles, was inspected again to make sure it was No. 2 white corn, double checked. It was found to have been that and it was then diverted down to the Star Milling Company at Garden Grove to carry out Mr. Carranza's instructions of recleaning and sacking the corn.

"Q. Did you have anything more to do with the corn after it left Los Angeles? A. Nothing more.

"Q. All charges were to be sent on to Mr. Carranza? A. He arranged for the pickup when it was recleaned and sacked."

The principal question involved on this appeal is whether the evidence is sufficient to warrant a conclusion of the breach of any warranty on the part of the defendants in the sale of the carload of corn.

Defendants objected to Carranza's testimony to the effect that at the time of the purchase of the carload of corn in bulk it was agreed that the corn was to be cleaned, recleaned and sacked and fit for food products before delivery to the plaintiff, on the ground that it was an attempt by parol to vary the terms of the written contract, but the trial court admitted the evidence on the theory that the written confirmation of the sale and plaintiff's written acknowledgement thereof were but evidence of the contract between the parties.

[1] Plaintiff's cause of action, the findings of the trial court and the judgment rest upon this parol testimony alone, and if, as contended by appellants, it was error to admit it, the findings are without support and the judgment resting thereon must fall. Appellants' contention is well taken.

The documents exchanged by the parties constituted a complete contract of sale. Together, they contain all of the essential elements of a completed contract: the parties, the subject matter of the sale, the purchase price, and shipping details. Defendants agreed to sell. Plaintiff agreed to buy. Tuso v. Green, 194 Cal. 574, 580, 581, 229 P. 327; Ring v. California Mortgage Co., 16 Cal.App.2d 14, 15, 60 P.2d 143; Pray v. Trower Lumber Co., 101 Cal.App. 482, 485, 281 P. 1036. The contract is silent as to any duty on the part of the defendants to clean, reclean and sack the corn before delivery to plaintiff. This omission is fatal to plaintiff's cause of action.

[2, 3] The principle is stated in Calpetro Producers' Syndicate v. Chas. M. Woods Co., 206 Cal. 246, 251, 274 P. 65, 67, quoting from 2 Mechem on Sales, sec. 1254: "'The rule is well settled that where the parties have reduced to writing what appears to be a complete and certain agreement, importing a legal obligation, it will, in the absence of fraud, accident or mistake, be conclusively presumed that the writing contains the whole of the agreement between the parties, and parol evidence of prior, contemporaneous or subsequent conversations, representations or statements will not be received for the purpose of adding to or varying the written instrument. If, therefore, such a writing exists between the parties, and it contains no warranty at all, no warranty can be added by parol; if it contains a warranty of some kind or to some extent, parol evidence will not be admitted to extend, enlarge or modify that which the writing specifies.'" To the same effect: Nimmo v. Fitzgerald, 202 Cal. 565, 569, 261 P. 1015; Kullman, Salz & Co. v. Sugar Apparatus Mfg. Co., 153 Cal. 725, 731, 96 P. 369; Germain Fruit Co. v. J. K. Armsby Co., 153 Cal. 585, 593, 96 P. 319; Merchants' Finance Co. v. Acosta Bros., 82 Cal.App. 431, 433, 255 P. 772; American Steel Pipe & Tank Co. v. Hubbard, 42 Cal.App. 520, 523, 183 P. 830; Monahan v. Watson, 61 Cal.App. 417, 421, 214 P. 1001; Civ.Code, sec. 1625. Neither mistake nor fraud is claimed. The validity of the contract is not in dispute. No ambiguity appears in the contract. It must, therefore, be considered as containing all of the terms agreed upon by the parties, and there can be no evidence of the terms agreed to other than the contents of the writing. Code Civ.Proc., sec. 1856. The ultimate effect of Carranza's testimony is to add by parol an additional term not embodied in the written contract. The parol evidence rule is not a rule of evidence. It is one of substantive law. If evidence of conversations and negotiations preceding or contemporaneous to the execution of the writing is admitted it must be ignored. It has no legal force. In re Estate of Gaines, 15 Cal.2d 255, 264, 265, 100 P.2d 1055; Pacific States Securities Co v. Steiner, 192 Cal. 376, 220 P. 304; Nourse v. Kovacevich, 42 Cal.App.2d 769, 771, 109 P.2d 999; O'Melia

v. Adkins, 73 Cal.App.2d 143, 148, 166 P.2d 298; Lifton v. Harshman, 80 Cal.App.2d 422, 432, 182 P.2d 222.

Appellants contend that under the written contract the term "No. 2 white corn" amounts to an express warranty of quality; that the term has a definite and well-known meaning in the trade; and that where, as here, there was delivery "F. O. B., Los Angeles" to plaintiff of a carload of "No. 2 white corn" the assurance of quality warranted by the terms of their written contract was fulfilled. Plaintiff stipulated at the trial that the carload of corn was No. 2 white corn "or better."

[4] No particular words are necessary to create a warranty. "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. * * *" Civ. Code, sec. 1732. The omission of the word "warrant" in the written contract is immaterial. Chamberlain Co. v. Allis-Chalmers Mfg. Co., 51 Cal.App.2d 520, 522, 125 P.2d 113.

[5, 6] Where the terms of an agreement designate the particular quality of a commodity to be delivered in phrases which are well known in the trade of the particular commodity purchased and sold, such description and designation amounts to an express warranty. Brandenstein v. Jackling, 99 Cal.App. 438, 446, 278 P. 880, 883, [where the term "No. 1 rice" was held an express warranty]; Barrios v. Pacific States Trading Co., 41 Cal.App. 637, 639, 183 P. 236, 237, [where the term "export cured codfish" amounted to an express warranty]; Firth v. Richter, 49 Cal.App. 545, 196 P. 277, 278, [where the term "Valencia orange trees" was held to be an express warranty]; Porter v. Gestri, 77 Cal.App. 578, 247 P. 247 [where the term "dried black grapes" was held to be an express warranty that the grapes were of the black variety]. Cf. Miller v. Germain Seed & Plant Co., 193 Cal. 62, 66, 222 P. 817, 32 A.L.R. 1215; Polhemus v. Heiman, 45 Cal. 573, 578; 24 R.C.L. 171, sec. 445; 22 Cal. Jur. 994, sec. 69. The rule that a sale of goods by a descriptive name well known in the trade amounts to an express warranty simply holds the seller to deliver the goods which he has contracted to deliver. Brandenstein v. Jackling, 99 Cal.App. 438, 446, 278 P. 880.

[7] The evidence is without conflict that: the term "No. 2 white corn" has a definite meaning in the general usages and customs of the grain trade; that before being graded as such it must comply with certain regulations and specifications laid down by the Department of Agriculture; when so graded it does not mean it is fit for human consumption; before corn in bulk can be used for human consumption it requires the additional process of cleaning, recleaning and milling; there is a general custom on the part of grain dealers not to warrant corn as fit for human consumption when sold according to the term "No. 2 white corn." We take judicial notice that the official grain standards of the United States Department of Agriculture prescribe the following standard for No. 2 grade corn:

"

			Maximum limits of—		
					Damaged kernels
Grade No.	Minimum test weight per bushel	Moisture	Cracked corn and foreign material	Total	Heat Damaged
	Pounds	Percent	Percent	Percent	Percent
. . .	. . .	. . .	. . .	. . .	. . .
2	53	15.5	3	5	.2
. . .	. . .	. . .	. . .	. . .	. . .

"

The inspection made of the corn on July 15 shows that upon delivery to plaintiff the corn came well within this standard.

Defendants performed all of the terms of their agreement to deliver the carload of bulk "No. 2 white corn" to plaintiff, f. o. b. Los Angeles, when it arrived in Los Angeles, was graded and certified as being such, and the bill of lading charged to plaintiff's account. Civ.Code, secs. 1738, 1739.

[8-10] Civil Code, section 1735, subdivision 1, relied upon by respondent, is not applicable. Section 1735, in part, provides: "Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows: (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose. * * * (6) An express warranty or condition does not negative a warranty or condition implied under this act unless inconsistent therewith." Any implied warranty "that the goods shall be reasonably fit" for human consumption, which may be said to have arisen by operation of this subdivision because of the testimony of Carranza, is inconsistent with the express warranty contained in the written contract. The contract warrants that the corn shall be "#2 white corn—bulk". Number 2 white corn in bulk is not fit for human consumption. An express warranty negatives an implied warranty which is inconsistent therewith. United Iron Works v. Outer Harbor Dock & Wharf Co., 168 Cal. 81, 85, 141 P. 917; Sutter v. Associated Seed Growers, Inc., 31 Cal.App.2d 543, 547, 88 P.2d 144.

[11, 12] We may observe that there is no evidence that the corn was not fit for human consumption when delivered to plaintiff by the milling company on July 24, 25 and 26, which was after it had been cleaned, recleaned and milled. Plaintiff had possession of the corn thereafter. It is a highly perishable commodity. The record is also devoid of any evidence that at any time thereafter and prior to September 6, 1946, the corn was not fit for human consumption. Therefore, if it should be assumed that there was an implied warranty, as respondent claims, there is no evidence of a breach of such warranty by appellants. The first occasion upon which it may be said that it was not fit for human consumption was September 6, 1946. The evidence is insufficient to sustain a finding that the corn at the time it was delivered to respondent was in the same condition as it was on September 6, 1946. The burden was on respondent to prove that the corn did not conform to the contract at the time of the sale. Because of the lack of such evidence, the judgment cannot be sustained. 22 Cal.Jur. 983, sec. 59; Riessen v. Pusateri, 229 App.Div. 432, 242 N.Y.S. 346; 4 Williston on Contracts, Rev. ed. 2750, sec. 996B.

Judgment reversed.

SHINN, P. J., and WOOD, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

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90 Cal.App.2d 440

GILMORE v. PLACER COUNTY BANK et al.

Civ. 7607.

District Court of Appeal, Third District, California.

March 2, 1949.

Appeal and error 🔑807

Where no extension of time for preparing or filing transcript was requested or made, and appellants, though duly notified of motion to dismiss appeal because of failure to file transcript, failed to appear or oppose motion, and, though affidavits of certain appellants gave as an excuse for failing to file transcript that county clerk refused to prepare it, counter affidavits denied that any request to have transcript prepared was made motion to vacate order dismissing appeal and to reinstate appeal would be denied. Rules on Appeal, rules 10, 41(c); Code Civ.Proc. §§ 12a, 939.

◆

Appeal from Superior Court, Placer County; B. G. Van Dyke, Judge.

Action by Lyman Gilmore, Jr., against the Placer County Bank, a corporation, the Consolidated Exploration & Mining Company, a corporation, and others, wherein the Consolidated Exploration & Mining Company, a corporation, filed a cross-complaint. From an adverse judgment, the defendants appealed, and the appeal was dismissed for failure of defendants to perfect the appeal by preparation and filing of transcript within time allowed. On motion by the Consolidated Exploration & Mining Company to vacate the order dismissing the appeal and to reinstate the appeal.

Motion denied.

Albert L. Wagner, of Sacramento, for appellants.

Fontaine Johnson, of Sacramento, and K. D. Robinson, of Auburn, for respondent.

THOMPSON, Justice.

The defendant and cross-complainant, Consolidated Exploration and Mining Company, seeks to be relieved from default in failing to perfect the appeal by preparation and filing of the transcript within the time allowed by Rule 10 of Rules on Appeal, or at all, and to reinstate the appeal. Upon notice duly served by plaintiff, at which hearing the defendants failed to appear, this court dismissed the appeal on November 13, 1948, 198 P.2d 910, under Rule 41 (c) of Rules on Appeal on the ground that the appeal was "deemed abandoned." This motion for relief from default and reinstatement of the appeal was heard on affidavits of respective parties. The affidavits are conflicting.

The last day for regularly filing a notice of appeal in this case under Section 939 of the Code of Civil Procedure was August 29, 1948, but since that was Sunday, we assume the notice, which was filed the following day, was within the statutory time. Sec. 12a, C.C.P. No transcript on appeal has been filed. The gist of the averments contained in the affidavits of Spencer and Adamson, filed on this hearing, in excuse for failing to file the transcript within the time allowed by law, is that the latter took a letter addressed to Spencer and signed by Buel R. Wood of Long Beach, California, to the County Clerk of Placer County, where the case was tried, on September 8, 1948, and requested the Clerk to prepare a transcript containing the "documents set out in said letter" and that affiant then "had sufficient money wherewith to pay any charge or demand" therefor, but that the Clerk "refused to prepare the papers designated in said letter and gave as the reason that there was a dispute with reference as to the filing of said Notice of Appeal." The motion to dismiss the appeal was thereafter duly noticed and made in this court. The affidavit of Spencer acknowledges the service of that notice on appellants. They failed to appear at the hearing, as we have previously stated, and the appeal was dismissed.

The Clerk of Placer County filed a counter-affidavit on this hearing, specifically denying that said Adamson or any other person in behalf of the appellants, or at all, interviewed her on September 8, 1948, or at any other time, regarding the appeal, or requested her to have the transcript prepared, or to furnish an estimate of the costs therefor. She avers that at no time did the appellants or anyone in their behalf request her in writing or otherwise to prepare said transcript or to estimate the costs thereof. She avers that at no time did she see said letter or talk with Adamson or any other person regarding the preparation of the transcript and that she never told him or any other person that there was a dispute regarding the validity of the notice of appeal.

Seven deputy clerks in that office filed counter-affidavits on this hearing substantially corroborating the essential averments of the Clerk regarding the asserted request of appellants for the Clerk to prepare the transcript. The court reporter also filed a counter-affidavit averring that he had never been requested to prepare the transcript of the documents in question. The Chief Deputy Clerk, Mary D. Fleming, did aver that she waited on Adamson and Wood, who appeared in the Clerk's office in Auburn on November 24, 1948, and asked to inspect the records in the case; that they examined the records and that the only conversation she had with them was that "Wood made the remark to affiant after examination of the file that 'something went sour in this case,'" and that no other statement was made.

The counter-affidavits which were filed on this motion are persuasive. At least, in view of the record on this motion, we would not be justified in setting aside the order dismissing the appeal. No extension of time for preparing or filing the transcript was requested or made. Moreover, the appellants were duly notified of the motion to dismiss the appeal, and they failed and neglected to appear or oppose that motion. No excuse is offered by them for that failure.

The motion to vacate the order dismissing the appeal and to reinstate the appeal is denied.

ADAMS, P. J., and PEEK, J., concur.

MOORE v. BELT et al.

Civ. 16302.

District Court of Appeal, Second District,
Division 3, California.
Feb. 16, 1949.

Rehearing Denied March 15, 1949.

Hearing Granted April 15, 1949.*

1. Physicians and surgeons 🔑14(4)

A physician is required to have and use only degree of learning and skill ordinarily possessed by physicians of good professional reputation in locality wherein he practices.

2. Evidence 🔑528(2)

Cases depending on knowledge of scientific effect of medicine or result of surgery must ordinarily be established by expert testimony of physicians and surgeons, but such rule applies only to facts peculiarly within such experts' knowledge and not to facts ascertainable by ordinary use of nonexpert's senses.

3. Appeal and error 🔑930(1)

All circumstances of case, with every reasonable inference therefrom, will be marshaled in support of judgment on jury's verdict fairly rendered.

4. Physicians and surgeons 🔑18(8)

To recover damages for physician's negligence in practice of his profession, plaintiff need not demonstrate conclusively and beyond possibility of doubt that such negligence resulted in plaintiff's injury.

5. Negligence 🔑134(2)

In negligence case, circumstances need not establish defendant's negligence as proximate cause of plaintiff's injury with such absolute certainty as to exclude every other conclusion.

6. Physicians and surgeons 🔑18(8)

In malpractice action, evidence that infection appeared in plaintiff's urinary tract about 24 hours after defendant inserted instruments and injected solution into plaintiff's male organ and urinary tract for purpose of cystoscopic examination, warranted jury in inferring defendant's negligence in failing to sterilize completely instruments or parts of plaintiff's body through which instruments were inserted, without expert testimony to such effect.

7. Evidence 🔑20(1)

A physician's failure properly to sterilize instruments inserted by him into patient's body, parts of body through which instruments are inserted, or both, is negligence as matter of common knowledge.

8. Appeal and error 🔑1064(1)
Trial 🔑194(14)

In malpractice action, instructions that physician is presumed to have possessed and exercised requisite degree of skill and care, in absence of expert testimony to contrary, and that jury, in determining whether defendant was negligent, must be governed solely by expert witnesses' testimony, was prejudicially erroneous as directing jury to return verdict for defendant without determining for themselves whether defendant's failure properly to sterilize instruments, inserted by him into plaintiff's body, or parts of body through which instruments were inserted, as shown by nonexpert testimony, was negligence.

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* Subsequent opinion 212 P.2d 509.

9. Appeal and error ⚿1066

An instruction excluding an issue supported by evidence is prejudicially erroneous.

10. Physicians and surgeons ⚿14(3, 4)

A physician and surgeon cannot be held to guarantee results of his professional services, but in undertaking treatment of patient, impliedly contracts and represents, not only that he possesses reasonable degree of skill and learning possessed by others of his profession in same locality, but that he will use reasonable and ordinary care and skill in application of his knowledge to accomplish purpose for which he is employed, and he is liable for injury caused by want of such skill or care

11. Trial ⚿203(1)

Where evidence conflicts, each party is entitled to instruction giving jury law applicable to his theory of case and his witnesses' testimony.

12. Trial ⚿203(1)

The trial court owes duty to give jury instructions expounding law on every reasonable theory of case supported by evidence.

13. Appeal and error ⚿1064(1)
Trial ⚿235(7)

In malpractice action, refusal of plaintiff's requested instructions that expert testimony is not required to establish danger in failing to perform commonly known duties of cleanliness or sterilization and that plaintiff could recover damages, if jury believed that defendant negligently used unsterilized instruments or solutions in examining plaintiff, thereby causing infection, was prejudicial error under evidence.

14. Evidence ⚿545

A party producing expert witness has right to question him as to his experience in particular matters concerning which he is to be examined, not only for purpose of establishing his competency to court's satisfaction, but to make plain to jury the strength of witness' grounds of knowledge and reasons for trusting his belief.

15. Evidence ⚿553(1)

In malpractice action, court erred in sustaining objections to pertinent and legal hypothetical questions, put by plaintiff to his expert witness, as to points on which plaintiff had produced no evidence. Code Civ.Proc. § 2044.

16. Evidence ⚿558(12)

In malpractice action, plaintiff's expert witness, compelled to answer "yes or no" to question asked him by cross-examiner, should have been allowed to explain his affirmative answer, as requested by plaintiff, on redirect examination.

17. Witnesses ⚿247

When question to witness calls for either "yes" or "no" answer, he is ordinarily permitted to explain answer.

18. Evidence ⚿553(2, 3)

In malpractice action, plaintiff's expert witness, called in rebuttal, should have been permitted to answer hypothetical question assuming facts developed by defense, though question did not assume as true very facts in issue, which were assumed in hypothetical questions propounded by defendant to his experts.

19. Evidence ⚿553(2)

A hypothetical question to expert witness is not objectionable because it does not include all evidence in case.

20. Evidence ⚿553(2, 3)

A hypothetical question to expert witness may be framed on any theory of questioning party, which can be deduced from evidence, and assume any facts within limits of evidence, on which expert's opinion is desired, or omit facts not deemed material to inquiry by questioner.

21. Evidence ⚿553(1)

Considerable latitude must be allowed in choice of facts as basis of hypothetical questions to expert witnesses.

SHINN, P.J., dissenting.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by H. T. Moore against Elmer Belt and others for malpractice. From a judgment for named defendant, plaintiff appeals.

Reversed.

E. Briggs Howorth and Walter R. Trinkaus, both of Los Angeles, for appellant.

Fulcher & Wynn and Gibson, Dunn & Crutcher, all of Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by plaintiff from a judgment for defendant Elmer Belt, a physician, entered on a verdict of a jury in an action for damages for alleged malpractice. It is not contended that the evidence is insufficient to support the verdict.

Appellant's assignments of error are: (1) the court erred in giving instructions requested by respondent and in refusing to give instructions requested by appellant, (2) the court erred in sustaining objections to questions asked the expert called by appellant for the purpose of establishing his qualifications, in sustaining objections to hypothetical questions asked the expert, in not permitting him to explain a "Yes" answer, and in sustaining objections to questions asked him on rebuttal which assumed facts developed by the defense.

The evidence germane to the first assignment of error will be related. Appellant went to Dr. Belt's office on June 7, 1944, for a cystoscopic examination. At the time he was a man 41 years of age. After giving the doctor a history, he was partially disrobed, the doctor palpitated his abdomen and examined his testicles. He was then taken to another room for further examinations and tests preparatory to the cystoscopic examination. He was disrobed and clothed with a surgical gown. His pulse and temperature were taken. A test was made of his hemoglobin. His lungs and teeth were examined. Samples of his urine were taken, tested, and found negative. His blood pressure was taken. A syphilis test was made. It was negative. A prostatic massage was performed and a sample taken of the prostatic secretion.

After a wait, appellant was taken to a cystoscopic examination room and assisted onto a table. The table was so constructed that he could be turned from a prone position to an erect standing position without being removed from the table. While on the table appellant could not see and did not know what was being done except what he could feel. A layman, called a technician, 26 years of age, in the absence of Dr. Belt, prepared appellant for instrumentation. The layman picked up a tray from a nurse in the next room. The tray contained an installator, swab, water tube, two syringes, a peroneal towel and a sheet. He washed appellant's male organ, injected an anesthetic therein and inserted a ¼" stopper to hold the anesthetic in place. Dr. Belt took a cystoscope from a tray in another room and went into the examination room. A cystoscope is an instrument about twice the length of a fountain pen, with a diameter smaller than a fountain pen, made of copper and nickel plated, with the end turned up and a hollow shaft. It was lubricated with a nonoily lubricant. The layman removed the stopper. Dr. Belt introduced the cystoscope into the opening, inserted it through the organ into the bladder and observed the interior of the bladder. The ureter openings into the bladder and the interior of the bladder appeared normal in every respect. Catheters were inserted through the cystoscope into the bladder through both renal pelves and pushed through the ureter to the kidneys. The catheters had been threaded into the cystoscope by someone not named in the evidence. A specimen of urine was collected through the catheters into test tubes and when examined it was found that there was no bacteria or pus present. A dye solution was injected into each uretral catheter and X-rays taken while appellant was in a prone position and also while he was in a standing position and while instruments remained in his body. The catheters were withdrawn and the solution remaining in the ureter was allowed to trail to the bladder as far as the prostate level and X-ray pictures taken of the area. All X-ray pictures were negative.

Dr. Belt testified that: the examination showed appellant's urinary tract from the kidneys down to the prostate was in a normal condition; it was a text-book picture of normalcy; after the examination he told appellant that his genito-urinary system was negative. He testified that fever which develops an unusual time after a cystoscopic examination is not the normal reaction therefrom. Dr. Belt told appellant that if any reaction occurred at all it would occur within two hours. He also told him that the examination was entirely negative, that the blood count, hemoglobin, heart pulse and respiration were normal. Dr. Belt told him that his prostate, prostatic secretion and urine were normal, that his prostate was normal in size, shape and consistency, that his bladder was normal, that both his prostate and bladder were negative as to any pathological condition, that his kidneys and ureters were normal, that he was a text-book picture of perfection.

About 24 hours later—4:00 o'clock the next day—appellant began feeling odd. He began having chills about 8:00 o'clock that night. He had chills and fever all night and all the next day, June 9. On June 10 he received some medicines from Dr. Belt's office which he understood were sulfa drugs. He started to take the sulfa drugs the afternoon of June 10. He continued to have chills and fever on June 10 and 11. On June 11, Dr. Guth, an assistant of Dr. Belt, went to appellant's home, examined him and told him to continue taking the medicine. Appellant continued to have alternate chills and fever. His temperature became progressively higher, running to 105° about 10:00 p. m. on June 11. He was then taken to a hospital on the advice of Dr. Belt's assistant. The chills and fever continued. The sulfa drugs were discontinued on June 13 at 2:30 p. m. but the fever and chills persisted until June 14. He remained in the hospital until the afternoon of June 16.

While in the hospital appellant was attended by Dr. Ebert, another assistant of Dr. Belt. Appellant, while in the hospital, asked Dr. Ebert what was causing his severe chills and high fever. Dr. Ebert replied, "That's hard to say. Everyone knows you have an acute infection of the urinary passages, but I can't understand how it got there. But that is why you are being given the sulfa drugs and pyridium. These medicines are for infections of that kind." Dr. Ebert, although still in the employ of Dr. Belt, was not called as a witness.

On June 27, when appellant was able to leave his home for the first time, he went to Dr. Belt's office. He was given a prostatic massage by Dr. Guth and samples of his urine were taken for tests. After the tests were completed, he asked Dr. Guth the results. Dr. Guth told him that the tests showed that he still had a 25% infection. Appellant was given prostatic massages by Dr. Guth until July 28, 1944. On each occasion Dr. Guth told him that he had an infection present in the urinary tract but that the amount was gradually decreasing so that at the time of his last visit the test showed only 10%. Dr. Belt was away from Los Angeles from June 9 to June 23. Sometime thereafter and while Dr. Guth was giving appellant a prostatic massage, Dr. Belt appeared and appellant said, "Dr. Belt, Dr. Guth just told me that I still have 10% infection present. I didn't have any infection when I came in here in June and I don't see why I should have any now." Dr. Belt replied that 10% was within normal limits. Appellant then asked Dr. Belt what had caused the infection in the urinary tract and the severe chills and high fever. Dr. Belt replied, "To tell the truth, I don't know." Dr. Belt did not deny having made this answer to appellant's query. Dr. Guth was in Wisconsin at the time of the trial. His deposition was not taken.

The expert called by appellant testified that the 24 hours between the time of the examination and the time appellant began to have chills and fever probably was an incubation period for bacteria introduced into the urinary tract in the preparation for, or in the making of the examination, that the introduction was evidently due to some defective condition of the instruments or carrying in from the opening of the meatus (the canal in the male organ), whose edges were not thoroughly cleansed, and that the treatment given in the hospital was for an infection of the urinary tract.

As we read the record, there is no evidence that either the stopper or the cystoscope or the catheters used in the examination were sterilized before insertion into appellant's body. Neither the lay technician nor Dr. Belt sterilized any one of them or saw any one of them sterilized. They assumed that they had been sterilized. No one testified that he sterilized any one of them. On the other hand, there is no direct evidence that they were not sterilized.

Appellant's contention is stated in his brief. He says, "(a) His genito-urinary system was in a healthy and normal condition on June 7, 1944, when he reported to respondent for a urological examination, every part of that system being free of infection of every kind and description. This was established by the records and testimony of respondent which showed that *immediately prior* to the cystoscopic examination and on the same date appellant was given various tests, including tests of his urine, prostatic secretion, blood, etc., all of which were negative and showed no infection present and, further, that the urological examination disclosed appellant's genito-urinary system to be in a healthy and normal condition. (b) About 24 hours after the cystoscopic examination had been completed by respondent, symptoms appeared showing that an infection had developed which the evidence established was within the confines of appellant's genito-urinary system. Appellant testified to the appearance of such symptoms approximately 24 hours after the examination. It was shown that 24 hours was the normal incubation period for a new infection of this type. And the fact that such infection, which did not exist immediately before the examination, did exist approximately 24 hours after the examination, was established by the uncontradicted admissions of respondent and his assistants, by the nature of the treatment given, and also by expert testimony offered through Dr. Webb. (c) This infection had been caused by infectious matter which had been carried into appellant's urinary tract during the urological examination. Proof of (a) and (b) give rise to this inference which is further and directly established by the expert testimony of Dr. Webb. (d) There was no issue raised regarding the professional skill or learning of the respondent. (e) The question involved was whether respondent or his employees or assistants were negligent in failing to effect and maintain proper sterilization for such examination. This negligence was established as a question of fact by proof of (a), (b), and (c), under the principles of Barham v. Widing, 210 Cal. 206, 291 P. 173, 174, and also by the inference of such negligence arising under the doctrine of res ipsa loquitur as announced in Ybarra v. Spangard, 25 Cal.2d 486, 154 P.2d 687 [162 A.L.R. 1258]."

[1, 2] The evidence which has been related puts the case squarely within the doctrine of Barham v. Widing, 210 Cal. 206, 291 P. 173, 175. In that case the defendant, a licensed dentist, extracted the left lower molar tooth of the plaintiff. In order to operate, a local anesthetic was administered by means of a hypodermic injection of novocaine. The needle was twice inserted in the gum of the plaintiff at a point over the ramus or ascending prong of the left lower jaw bone near the diseased tooth. After five or six days, an infection of the gum and jaw developed. A physician testified that the locality of the primary infection was the point where the hypodermic needle had been inserted in the gum, that it "was the center of the abscess; it was deep, very deep, so that it must have been necessary that the infection was introduced * * * on a needle, or perhaps an unsterile solution, because the pus was found very, very deep", and that, from his examination of the socket from which the tooth had been removed, the socket was not the seat of the infection. The plaintiff had judgment. On appeal, the defendant contended that "the judgment is not supported by the evidence, since there is a total absence of medical expert testimony to the effect that the operation and treatment of the patient in the extracting of the tooth did not conform

to the standard accepted method of the profession in that vicinity".

In affirming the judgment the court stated, 210 Cal. at page 213, 291 P. at page 176:

"The appellant asserts that the evidence is not sufficient to establish negligence on his part because there is no direct testimony that the needle or solution which was used in administering the anesthetic was unsterile; that a dentist, like a physician, is required to have and use only the degree of learning and skill which is ordinarily possessed by dentists of good professional reputation in that locality. This is the rule with respect to physicians. Hesler v. California Hospital Co., 178 Cal. 764, 174 P. 654. Undoubtedly the same rule applies to dentists. The jury was clearly instructed to this effect. It is equally true that cases which depend upon knowledge of the scientific effect of medicine, or the result of surgery, must ordinarily be established by expert testimony of physicians and surgeons. Perkins v. Trueblood, 180 Cal. 437, 181 P. 642. This rule, however, applies only to such facts as are peculiarly within the knowledge of such professional experts, and not to facts which may be ascertained by the ordinary use of the senses of a nonexpert. * * * [210 Cal. at page 214, 291 P. at page 176.] The judgment in this case must be supported, if at all, upon the theory of appellant's negligence in failing to sterilize his hypodermic needle and the mouth and gum of the patient before performing the operation of extracting the tooth. It is true that both the dentist and his nurse testified that the usual process of sterilization was followed. It is equally true that there is no direct evidence that he failed to sterilize either the needle or the surface of the flesh where it was inserted. Barham does state that he did not remember that the dentist sterilized his mouth or gum.

[3, 4] "'Under the circumstances of this case there is a remote possibility that that the infection developed from some cause other than the defendant's failure to sterilize the needle or the gum into which it was inserted, but the evidence is sufficient upon which to warrant the jury in finding that it was caused by his negligence in failing to follow these reasonable precautions in spite of his testimony to the contrary. The jurors were entitled to accept the solution to which these circumstances led them in preference, even, to the positive statements of the defendant and his nurse to the contrary. After the verdict of a jury had been fairly rendered, all the circumstances of the case, together with every reasonable inference which may be drawn therefrom, will be marshaled in support of the judgment. Because of the very subtleness of the origin and development of disease, less certainty is required in proof thereof. As the court says in the case of Dimock v. Miller, 202 Cal. 668, 671, 262 P. 311, 312:

"'"If * * * it is necessary to demonstrate conclusively and beyond the possibility of a doubt that the negligence resulted in the injury, it would never be possible to recover in a case of negligence in the practice of a profession which is not an exact science."

[5] "'It is not necessary in the trial of civil cases that the circumstances shall establish the negligence of the defendant as the proximate cause of injury with such absolute certainty as to exclude every other conclusion. * * *

"'In this case no question is raised regarding the professional skill of the dentist. It is conceded that he was reasonably learned and skillful in his profession. But it is asserted that he was negligent in failing to sterilize the hypodermic needle and the gum into which he inserted the instrument. There is no conflict regarding the fact that infection of the jaw caused the injuries to Barham. It is conclusive that this infection developed within a few days after the operation on the ramus of the jaw at just the point where the needle was inserted, and not in the socket from which the tooth had been removed. * * *

"It was not necessary for any dentist or physician to state that the conduct of the defendant was negligent or in conflict with the usual established practice of the profession in that vicinity to administer a local anesthetic for the purpose of extracting a tooth without sterilizing the needle or the flesh into which it is inserted. The court will take judicial knowledge of the necessity to use ordinary care to procure sterilization under such circumstances. This case was tried upon the theory that everyone concerned recognized this duty. We are, therefore, of the opinion that the evidence will support the judgment in this regard.'" 210 Cal. 216, 291 P. 177. See, also, McBride v. Saylin, 6 Cal.2d 134, 56 P.2d 941; Inderbitzen v. Lane Hospital, 124 Cal.App. 462, 12 P.2d 744, 13 P.2d 905; Thomsen v. Burgeson, 26 Cal.App.2d 235, 79 P.2d 136; Anderson v. Stump, 42 Cal. App.2d 761, 109 P.2d 1027; Mastro v. Kennedy, 57 Cal.App.2d 499, 504, 134 P.2d 865; Dean v. Dyer, 64 Cal.App.2d 646, 149 P.2d 288; Clemens v. Smith, 170 Or. 400, 134 P.2d 424; Drakes v. Tulloch, 220 Mass. 256, 107 N.E. 916; Hafemann v. Seymer, 195 Wis. 625, 219 N.W. 375; Swanson v. Hood, 99 Wash. 506, 170 P. 135, 137.

[6] In the Barham case a psysician testified as an expert, not that the conduct of the dentist was negligent or in conflict with the degree of care and skill ordinarily exercised by dentists in that vicinity, but simply to establish that the infection in the plaintiff's jaw was caused by an unsterile hypodermic needle or by an unsterile solution. In the case at bar, appellant's expert testified merely for the purpose of establishing that the infection in appellant's urinary tract was caused by an unsterile instrument or that the parts of appellant's body into and through which the instruments were inserted had not been completely sterilized. The purpose of the expert testimony was precisely the same in each case.

There is no difference between the facts of the Barham case and the facts of the case at bar. In the Barham case a needle was inserted into the gum and a solution injected. Five or six days later an infection appeared. The point of infection was the place where the needle was inserted. It was held that, without expert testimony, the jury could infer negligence. Here, instruments were inserted into the male organ and the urinary tract and a solution injected. Twenty-four hours later an infection appeared. The point of infection was the urinary tract. The jury, without expert testimony, could infer negligence. The evidence in the present case makes for a stronger inference of negligence than that in the Barham case. In that case there was no evidence that the gum was not infected at the time the needle was inserted and the solution injected. Here the evidence—with the exception of the opinions of two defense experts which were contrary to the testimony of Dr. Belt that appellant's genito-urinary system was negative—is without conflict that the urinary tract was in a healthy and normal condition and free from infection at the time the instruments were inserted and the solution injected. In the Barham case the infection did not appear until five or six days after the operation. Here the infection appeared about 24 hours after the examination.

[7-9] With the evidence stated before the jury, the court at the request of respondent gave the following instructions: (1) "Negligence upon the part of a physician is never to be presumed, and in the absence of expert testimony to the contrary, it is to be presumed that a physician possesses and has exercised the requisite degree of skill and care in examining a patient." (2) "In determining the question of whether the defendant was guilty of negligence as alleged in the complaint you cannot and must not set up a standard of your own but must be governed in that regard solely by the testimony of expert witnesses who have appeared and testified in this case." Under these instructions the jury was not permitted to determine for themselves that failure to properly sterilize the instruments inserted into the appellant's body or failure to properly sterilize the parts of the body through which the instruments were inserted, or both, was negligence. Failure on the part of a physician in either of these respects is negligence as a matter of common knowledge. There is no law, as applied to the facts of this case, which requires that the jury in determining those questions be governed solely by the testimony of expert witnesses. The practical effect of these instructions was to direct the jury to return a verdict for the

respondent. An instruction is prejudicially erroneous which excludes an issue that is supported by evidence. Pierce v. Paterson, 50 Cal.App.2d 486, 490, 123 P.2d 544.

[10-13] The court refused to give the following instructions requested by appellant:

(1) "In determining whether defendant's learning, skill and conduct fulfilled the duties imposed on him by law, as they have been stated to you, you are not permitted to set up arbitrarily a standard of your own. The standard, I remind you, was set up by the learning, skill and care ordinarily possessed and practiced by others of the same profession in good standing, in the same locality at the same time. It follows, therefore, that except as hereinafter explained the only way you may properly learn that standard, is through evidence presented in this trial by physicians and suggeons called as expert witnesses.

"However, there is this exception to the rule just stated; when it is a matter of common knowledge that danger is involved in certain conditions or in a failure to maintain certain conditions or to take certain precautionary measures, as, for instance, failure to perform the commonly known duties of cleanliness or sterilization, expert testimony is not required to establish such a fact, but it may be judicially noticed as a part of that fund of common knowledge shared by us with our fellow citizens generally.

"This exception may be otherwise stated as follows: When it is common knowledge that an event or a circumstance that has happened to or developed in a patient is of the kind that ordinarily does not occur in the absence of negligence on the part of the physician attending him, the question whether or not the condition was caused by negligence may be decided from the general circumstances as shown by the evidence and in the light of common experience and reason." (This is California Jury Civil Instruction, 3d Ed. § 214-B. See, 1948 Pocket Parts.)

(2) "If you believe from the preponderance of the evidence that defendant, Elmer Belt, or any of his agents or employees, negligently used or employed either unsterilized instruments or solutions in the examination of the plaintiff or in the injecting into him of such solutions and that as the proximate result thereof infection was introduced into plaintiff thereby injuring him, plaintiff is entitled to recover from defendant, Elmer Belt, his damages herein in such sum as in your judgment, considering all of the evidence, will justly compensate him for any damage you believe him to have sustained as the proximate result thereof." In Pierce v. Paterson, 50 Cal.App.2d 486, 489, 123 P.2d 544, 546, the court quoted with approval from Sim v. Weeks, 7 Cal.App.2d 28, 45 P.2d 350, as follows: "'It is well settled that a physician and surgeon cannot be held to guarantee the results of his professional services. "However, it is equally well settled that in undertaking a treatment of a patient the practitioner impliedly contracts and represents, *not only* that he possesses the reasonable degree of skill and learning possessed by others of his profession in the locality, *but that he will use reasonable and ordinary care and skill in the application of such knowledge to accomplish the purpose for which he is employed;* and that if injury is caused by a want of such skill or care on his part, he is liable for the consequences which follow. Houghton v. Dickson, 29 Cal.App. 321, 155 P. 128; Nelson v. Painless Parker, 104 Cal.App. 770, 286 P. 1078; Perkins v. Trueblood, 180 Cal. 437, 181 P. 642; Hesler v. California Hospital Co., 178 Cal. 764, 174 P. 654; Ley v. Bishopp, 88 Cal.App. 313, 263 P. 369; Patterson v. Marcus, 203 Cal. 550, 265 P. 222."'" (Italics added.) Appellant does not contend that respondent did not have the requisite knowledge and skill. His contention is that respondent was negligent in preparing for and making the examination; that there was no proper sterilization. Where the evidence conflicts, each party is entitled to have the law given to the jury which is applicable to his theory of the case and the testimony of his witnesses. Kelley v. City and County of San Francisco, 58 Cal.App.2d 872, 876, 137 P.2d 719; Buckley v. Shell Chemical Co., Ltd., 32 Cal.App.2d 209, 216, 89 P.2d 453; Dowdall v.

Gilmore Oil Co., Ltd., 18 Cal.App.2d 1, 5, 62 P.2d 1051; Renton, Holmes & Co. v. Monnier, 77 Cal. 449, 455, 19 P. 820. This injunction is not met when the instructions remove that theory from consideration of the jury. Morrow v. Mendleson, 15 Cal. App.2d 15, 21, 58 P.2d 1302. It is the duty of the court to give instructions expounding the law on every reasonable theory of the case finding support in the evidence. Megee v. Fasulis, 65 Cal.App.2d 94, 101, 150 P.2d 281.

The evidence, without the testimony of experts, was sufficient to warrant the jury in finding that the infection was caused by the negligence of respondent. It was, therefore, prejudicial error to give the two instructions requested by respondent and to refuse to give the two instructions requested by appellant.

[14-17] We are of the opinion that appellant's second assignment of error is well taken and that he was unduly restricted in the examination of the expert whom he called. It would serve no purpose to enumerate the numerous instances in which objections were sustained to questions asked for the purpose of qualifying the witness as an expert. It will suffice to state the applicable rule of law. "There can be no doubt that a party producing an expert witness has the right to question him as to his experience in the particular matters concerning which he is to be examined, not only for the purpose of establishing the competency of the witness to the satisfaction of the court, but also for the purpose of making plain the strength of the witness' grounds of knowledge and the reason for trusting his belief." Salmon v. Rathjens, 152 Cal. 290, 299, 92 P. 733, 737; see, also, Eble v. Peluso, 80 Cal.App.2d 154, 181 P.2d 680. The weight to be given the testimony of the expert by the jury depends in great measure upon the knowledge and experience he shows in answers to questions relating to his qualifications. De Freitas v. Town of Suisun, 170 Cal. 263, 267, 149 P. 553. After determining that the witness was qualified as an expert, the court limited appellant to one hypothetical question. Objections were sustained to other hypothetical questions relevant to the inquiry. Code of Civil Procedure, section 2044, provides that "the parties may put such pertinent and legal questions as they see fit." This rule is subject to the provision that: "The court must exercise a reasonable control over the mode of interrogation, so as to make it as rapid, as distinct, as little annoying to the witness, and as effective for the extraction of the truth, as may be; * * *" and "The court, however, may stop the production of further evidence upon any particular point when the evidence upon it is already so full as to preclude reasonable doubt." The questions to which objections were sustained were pertinent and legal and appellant had not produced any evidence on the points. The questions should have been permitted. On cross-examination appellant's expert was compelled to answer "Yes or No" to a question asked by the cross-examiner. He answered "Yes." On redirect examination appellant asked the witness to explain the "Yes" answer. An objection was sustained. The explanation should have been allowed. When a question calls for an answer of either "Yes" or "No", the witness is ordinarily permitted to explain the answer. 58 Am.Jur. 321, sec. 574; Webber v. Park Auto Transp. Co., 138 Wash. 325, 244 P. 718, 47 A.L.R. 590.

[18-21] Appellant, in rebuttal, called his expert to the stand and asked him a hypothetical question which assumed facts developed by the defense. An objection to the question was sustained, apparently on the ground that it did not assume as true the very facts in issue—i. e., that the instruments, the solution, and the parts of appellant's body had been sterilized,—facts which had been assumed in the hypothetical questions propounded by respondent to his experts. The court should have permitted the witness to answer. Appellant had a right to rebut any one or more of the facts or opinions developed by the defense. The circumstance that a hypothetical question does not include all of the evidence in the case does not make the question objectionable. The question may be framed upon any theory of the questioning party which can be deduced from the evidence, and the statement may assume any facts within

the limits of the evidence, upon which the opinion of the expert is desired, and may omit any facts not deemed by the questioner material to the inquiry. In re Guardianship of Jacobson, 30 Cal.2d 312, 323, 324, 182 P.2d 537; Alward v. Paola, 79 Cal. App.2d 1, 9, 179 P.2d 5; Mirich v. Balsinger, 53 Cal.App.2d 103, 116, 117, 127 P.2d 639. Considerable latitude must be allowed in the choice of facts as the basis of hypothetical questions. Dameron v. Ansbro, 39 Cal.App. 289, 296, 178 P. 874.

Judgment reversed.

WOOD, J., concurs.

SHINN, Presiding Justice.

I dissent. The theory of the majority opinion, as I understand it, is the following: Dr. Belt testified that the cystoscopic examination did not disclose an infection in the urinary tract; plaintiff developed an infection a short time after the examination and it was conclusively proved that the infection was in the urinary tract; these facts were sufficient to establish as a matter of common knowledge that the infection was a new one that had been introduced during the examination; and that the jury could have determined as a matter within common knowledge that the methods and technique of defendant, including the precautions that were taken to prevent infection, were not such as were usually employed by competent urologists practicing in the vicinity. The majority opinion then concludes that it was error to instruct that the jury was to be governed by the expert testimony in deciding the ultimate question whether defendant failed to exercise the required degree of judgment, skill, and care, and that it was also error to refuse to instruct that expert testimony is not required to prove matters that are of common knowledge.

I do not agree that we may assume as an established fact that the infection was in the urinary tract. That was a question for medical experts and the evidence was conflicting. I do not agree that if the infection was in the urinary tract it would follow as a matter of common knowledge that it was a new infection. That, too, was a question for medical experts and the evidence on the point was conflicting. I do not agree that if a new infection manifested itself in the urinary tract after the examination the jury could have inferred from that fact, and as a matter of common knowledge, that its occurrence was due to negligence on the part of defendant. In other words, it is my opinion, contrary to that of my associates, that even if a new infection was introduced during the examination it was a question for medical experts whether the methods and technique of defendant in the examination were those commonly employed by competent urologists practicing in the vicinity, which was the test to be applied to defendant's conduct. Consequently I am of the opinion that the jury was properly instructed.

I would agree with the views of the majority opinion if a sponge had been found in plaintiff's body, instead of an infection. An understanding of the phenomenon of the appearance of a sponge in a patient's body after an operation is of course within the recognized scope of the lay intelligence. The reverse is true with respect to the occurrence of infection. There is a correspondingly wide difference between my own views and those of my associates.

My associates rest their opinion, in part, upon what appears to me to be a clearly unwarranted assumption that the point of the infection was the urinary tract. This was one of the chief subsidiary issues in controversy, upon the determination of which the ultimate issue of defendant's liability might turn. The majority opinion appears to rely heavily as the basis for the assumption, upon statements attributed by plaintiff to defendant's employees, Dr. Ebert and Dr. Guth, that the infection was in the urinary tract. No doubt the admissions would have supported a finding that the infection was in the urinary tract but they were not, of course, conclusive upon that point. They were in fact only unsworn expressions of medical opinions. They were to be weighed against the testimony of the experts who expressed contrary opinions, and they were to be considered and weighed in the same manner as if they had been stated from the witness stand. In other words, the question whether the infection was in the urinary tract remained one to be determined from the opinions which the experts expressed, including those of Dr. Ebert and Dr. Guth. In reality, if the jury had believed that the infection was in the urinary tract that belief would have been based upon the medical testimony of Dr. Webb, the professional opinions of Drs. Ebert and Guth, and those of the experts who thought it was an old infection. If they had believed the contrary it would have been because they relied upon the opinions of defendant and his experts to be referred to later that the infection was not in the urinary tract. In either case they would have been governed by the expert opinions expressed, although those of Drs. Ebert and Guth were not given under oath. It is thus apparent that the admissions of the two doctors did not remove the question as to the location of the infection from the sphere of expert knowledge.

The admissions as to the location of the infection were not admissions of negligence, nor were they admissions that the infection had been introduced during the examination. In Markart v. Zeimer, 67 Cal.App. 363, 227 P. 683, one of the defendant physicians had stated that they had performed a wrong operation on the plaintiff; that they had injured a cord as a result of which plaintiff lost one of his testicles; that it was a "mis-operation." Of these admissions the court said, 67 Cal. App. at page 371, 227 P. at page 685: "An admission to be sufficient must be and admission of negligence or lack of skill ordinarily required for the performance of the work undertaken. This 'wrong operation' may have been deemed right at the time it was performed. * * * These admissions, therefore, are not admissions that the operation complained of was not performed with reasonable care, or that the defendants did not possess and use that reasonable degree of learning and skill which was ordinarily possessed by members of their profession in good standing practicing in their vicinity." In Donahoo v. Lovas, 105 Cal.App. 705, 288 P. 698, plaintiff had been injured by the injection of alcohol into a sciatic nerve and his physician had admitted that he should not have injected the alcohol into the nerve; that he had thereby injured the nerve and blocked the circulation. In holding this admission to be insufficient to send the case to the jury the court quoted with approval from Markart v. Zeimer stating, 105 Cal.App. at page 710, 288 P. at page 701: "The admission in question went no further than an expression based on the results and is of no value in showing whether or not ordinary skill was used in the first place." The statements of Dr. Ebert and Dr. Guth were only admissions of the existence of an infection in the urinary tract. They were not admissions as to how the infection came to be there; far less were they admissions that it was introduced during the examination or that defendant had been negligent in any respect.

Inasmuch as the statements of the doctors Ebert and Guth were not sufficient to support a finding of negligence, plaintiff was obliged to rely upon his expert testimony to prove negligence. Proof of the existence of an infection in the urinary tract, while an essential factor in establishing defendant's negligence, was by no means the determinative fact. If it was sufficiently established by the admissions, the critical and strictly medical question would remain whether or not it was a new infection. As will be disclosed, there was substantial evidence tending to prove that it was a flare-up of an old infection, and there was no evidence upon which the jury could have determined that it was a new one, except the expert testimony given by Dr. Webb. There is no tenable theory of negligence, nor is any urged, which does not proceed from the premise that a new infection was introduced during the examination. Plaintiff's expert, Dr. Webb, answering a hypothetical question, expressed the opinion that the infection was in the urinary tract and was a new infection introduced during the examination. He was not questioned as to whether, in his opinion, the methods and technique employed by defendant conformed to the practice of competent urologists and he expressed no opinion on that point. Plaintiff relied upon Dr. Webb's opinion that it was a new infection and contended that from this premise an inference could be drawn that defendant did not employ the proper degree of judgment, skill, and care. He was given the full benefit of this contention by an instruction which will be presently discussed. Although there was a conflict of professional opinion whether the infection was in the urinary tract, I shall not press the point further. I shall, however, stress the testimony that it was not a new infection. Dr. Donald A. Charnok, testifying for defendant, in answer to a hypothetical question stated his opinion that plaintiff was suffering from an existing low grade infection in the lower urinary tract. Dr. Charles Allen Graves, a witness for defendant, testified that in his opinion plaintiff suffered from periodic infections of the urinary tract prior to the date of the examination, "as the history shows pus cells in existence in the tract as far back as the history goes." Dr. J. J. Crane, another of defendant's experts, testified that in his opinion plaintiff was not suffering from a low grade infection of the urinary tract, but that if an infection was present it would have been in the genital tract, involving the prostate. Dr. Crane was of the opinion that the infection was most likely caused by influenza or an upper respiratory inflammation, or by a sinus infection. Dr. Andrews, a pathologist, testified that he made a laboratory examination of a culture taken June 12th, five days after the cystoscopic examination; and that on June 14th, and again on June 19th the results of the laboratory tests showed there was no infection of the urinary tract. Dr. Belt, testifying in his own behalf, was of the opinion that plaintiff had a fever of unknown origin, possibly coming from an infection of the upper respiratory tract, involving the lungs, sinus or throat. As stated in their opinions, all the experts took into consideration the medical history of plaintiff, both before and after the examination, and defendant's experts considered the methods of sterilization and other technique employed by defendant. They stated fully the reasons for their opinions. In the hypothetical questions plaintiff's medical history, both before and after the examination, was stated. The following are a few of the facts in the medical history: Plaintiff had suffered pains in the lower abdomen over the bladder above the pubic arch, and it radiated upward to the right and left; it had first appeared some eight years previously, at which time he suffered aurethral discharge which under treatment was identified as a mixed non-venereal infection; he had suffered from the same pains off and on ever since; he had had his appendix removed some two years before the cystoscopic examination; because of the continuing pain he had had an examination of the prostate which developed nothing wrong, although the secretion contained dead sperm only; he was required to get up at least once, sometimes twice at night, and had had three spells of pain within the last three months; he had had prostatic treatments by massage and had taken vercolate which increased the pain; intercourse if psychologically prolonged or often repeated brought on the pain; he had had lots of sinus trouble since 1920; his left testis was small and under-developed and tender to the touch; he was sent by his physician to Dr. Belt in the hope that the source of his trouble would be discovered but it was not discovered; after the operation he developed chills and fever, was taken to the hospital the fourth or fifth day, had a temperature of 102.8, having taken sulfathiazol for two days; urinalysis and blood count were normal, and the urinalysis showed no infection present; a blood culture was taken June 12th and after seven days showed no growth of bacteria; there was no complaint of burning or bladder pain and the hospital chart showed the urine clear at all times; a prostate massage on June 21st showed 15 per cent pus content which by July 28th was reduced to 5 per cent, with the urine still negative; on June 14th a smear of the urethra revealed no gram-negative intro or extra cellular diplococci. There was no burning or urination or bladder pain, and no hematuria.

The opinions of the experts and the reasons for them clearly showed that they were based upon facts contained in the statement of the medical history. Each expert called attention to facts which he relied upon as support for the opinions he expressed. I am certain that I have no knowledge whether the ailments from which plaintiff had suffered, the symptoms he had manifested, his reaction to the treatment he had received, the history of his illness after the examination, his reaction to the treatment then received, and the results obtained by pathological examinations and analyses furnished a sound and reasonable basis for the opinions of the physicians that the infection which developed after the examination was not a new infection. I must say that they all sound intelligent and logical to me. I do not know how any trier of fact could determine which opinion or set of opinions was entitled to the greatest weight except by an appraisal of the competence, judgment, and reliability of the several experts when they appeared as witnesses before him. If the questions answered by the experts were within the field of scientific knowledge the jurors who heard the testimony would have to be governed in their determinations by the expert testimony which appeared to them to be the most convincing.

The majority opinion necessarily rests upon one of two theories. Either the jurors competent to answer the hypothetical questions which were propounded to the experts or were competent to determine the question of defendant's negligence without taking into consideration any of the facts of plaintiff's medical history.

If the jury had taken into consideration the medical history, would their conclusions have been within the field of medical science, or based upon facts which are of common knowledge? Were the jurors competent to answer the hypothetical questions? It is clear that their conclusions as to whether the infection was a new one would necessarily have consisted of opinions that could be reached intelligently only by competent and informed physicians. Since it must be conceded that the jurors were not competent to answer questions requiring special skill and knowledge in the field of medicine, it would follow that it would have been improper for them to base their conclusions upon facts which would be of no significance except to the medical expert. Should they then have disregarded altogether the history of plaintiff's previous ailments and treatment, the recurrent pains he had suffered in the abdominal region, and all the other factors that were stated in the several hypothetical questions propounded to the experts? In other words, should they have ignored the particular individual involved and assumed that all cases are alike? Should they have proceeded on the simple theory that since no infection was known to exist in plaintiff's urinary tract prior to the examination, and plaintiff developed a high fever after the examination, which indicated an infection somewhere in his system, it was a matter of common knowledge that it must have been introduced into the urinary tract in the course of the examination, and therefore must have been a new infection and not a flare-up of an existing infection? The majority opinion necessarily gives an affirmative answer to the last of these questions in holding there was sufficient evidence of negligence without plaintiff's expert testimony and that it was error to instruct that the jury should be governed by the expert testimony. I cannot agree that the condition of the patient, before and after the examination, was all the jury had to consider nor that the cause of the infection could be determined upon the basis of supposed common knowledge. I fail to see how an intelligent conclusion upon the subject could be reached by a lay jury when no reputable or responsible physician would undertake to make a diagnosis as to whether it was a new or an old infection without first obtaining and weighing in the light of his knowledge and experience all relevant information as to the medical history and other facts indicative of the condition of the patient. We are considering obscure or hidden infections of the human body, not those that are on the surface, where their nature and causes may be demonstrable as facts. If anything relating to infections is of common knowledge it is that they often baffle the most skilled and experienced physicians. Anyone who has grown to maturity, paying some attention to his physical ailments and those of his acquaintances, has learned that a great deal of experimentation is indulged in, necessarily, in order to locate, identify and treat numerous types of infections in the human body. He may even know that it is not unusual to have teeth extracted upon the advice of competent physicians and dentists, purely by way of experiment, but as an intelligent effort to cure a stubborn infection, the cause of which is unknown.

The majority opinion essentially holds that the appearance of an infection after surgery warrants an inference that the surgeon was negligent. I cannot agree. I doubt that my associates realize to what strange ends the doctrine they announce would lead. It is trite to say that examination and treatment by the insertion of instruments into or through the natural openings of the body, or through wounds, is a necessary part of the practice of medicine and surgery. It is also elementary that infection is an insidious and dreaded enemy, and that great precautions are taken to prevent it. If it appears where a laceration has been repaired or a fracture reduced, or a tonsil removed or a throat or sinus examined or treated, is this a good reason for inferring negligence? If a patient develops a sore throat after having his temperature taken is it to be inferred that the thermometer was unsterile? If so, the practice of medicine and surgery would be a mixed profession and insurance business. A malpractice action would be little more than an order to the defendant to show cause why he should not pay damages. But I find no precedent for the theory upon which the majority opinion proceeds. Laymen have never been allowed to say in a malpractice action that there was negligence because, in their opinion, a better result would probably have been reached if there had been no negligence

The line between the field of common knowledge and the field of special learning, knowledge and skill, from which expert testimony must be drawn, has been sharply defined and consistently maintained. Without discussion, I refer to the following decisions of our own courts. Engelking v. Carlson, 13 Cal.2d 216, 88 P.2d 695, severance of a nerve during operation; Patterson v. Marcus, 203 Cal. 550, 265 P. 222, mistake in diagnosis as to pregnancy; Hall v. Steele, 193 Cal. 602, 226 P. 854, unsuccessful facial operation; Nicholas v. Jacobson, 113 Cal. App. 382, 298 P. 505; incorrect diagnosis and unsuccessful treatment; Donahoo v. Lovas, 105 Cal.App. 705, 288 P. 698, injury to sciatic nerve; Johnson v. Clarke, 98 Cal. App. 358, 276 P. 1052, removal of part but not all of kidney; Markart v. Zeimer, 67 Cal.App. 363, 227 P. 683, severance of artery and cord during operation; Pearson v. Crabtree, 70 Cal.App. 52, 232 P. 715; Houghton v. Dickson, 29 Cal.App. 321, 155 P. 128, cases of bone fractures. See, also, Loudon v. Scott, 58 Mont. 645, 194 P. 488, 12 A.L.R. 1487 and note, cases of death under anaesthetic.

It was not only proper, but necessary that the jury be instructed that expert testimony was required to establish negligence on the part of the defendant. The instruction on expert testimony was a correct statement of the rule. Engelking v. Carlson, supra, 13 Cal.2d at page 221, 88 P.2d 695.

The majority opinion quotes at length from the opinion in Barham v. Widing, 210 Cal. 206, 291 P. 173, and says the present case is squarely within the holding in that case. I cannot agree.

A careful reading of the opinion in the Barham case will disclose that it held only this: That where it had been conclusively shown by expert testimony that Barham suffered an infection in his jaw at the exact place where the hypodermic needle had been inserted, and there was expert opinion evidence that the cause was an infected needle or solution, it was proper to instruct the jury that if they believed that the needle or the solution was unsterile, and as a proximate result thereof an infection was introduced into Barham's mouth, they could infer negligence or malpractice on the part of the defendant Widing. Certainly negligence may properly be inferred from the use of an unsterile instrument in a surgeon's or dentist's operating room. There was no contention made in the Barham case, much less a holding, that the jury could disregard the expert testimony in determining whether the infection had been proximately caused by the use of an unsterile needle or solution. Barham was relying upon the opinion of his expert that either one or the other was unsterile. The case is not authority for the holding of the majority opinion that the evidence of negligence of Dr. Belt was sufficient without the expert testimony.

The court did not err in refusing the instructions to the effect that expert testimony is not required to prove facts that are of common knowledge. Without amplification they would have left it to the jury to decide what facts are of common knowledge, which was a question for the court. The court gave the following insruction:

"If, and only in the event, you should find that plaintiff, H. T. Moore, sustained injury as the result of the introduction by defendant, Elmer Belt, or any of his agents or employees, of a new infection you are instructed as follows: An inference arises that the proximate cause of such injury was some negligence or malpractice on the part of the defendant, Elmer Belt, or his agents or employees. That inference is a form of evidence, and if there is none other tending to overthrow it, or if the inference preponderates over contrary evidence, it warrants a verdict in favor of plaintiff. Therefore, you should weigh any evidence tending to overcome that inference, bearing in mind that it is incumbent upon the defendant to rebut the inference by showing that the injury in question occurred without being proximately caused by any failure of duty on his part or on the part of any of his agents or employees.

"You are instructed that where an inference is permitted by law, that such inference is only a species of evidence, and where such inference is rebutted by clear, positive and uncontradicted evidence, then such inference is disspelled and disappears from the case."

I think the instruction was erroneous in in several particulars but that question is not presented for our decision. Certainly it was more favorable to plaintiff than the ones that were refused, or the one that was given in Barham v. Widing. It not only authorized but directed the jury to infer negligence if a new infection was introduced during the examination. There was no requirement, as there was in the Barham case, that the jury must first determine that the infection was introduced by the use of an unsterile instrument or fluid. Under the instruction the jury could have found defendant guilty of negligence if it was believed that the infection was introduced during the examination, even though it was also believed that defendant had exercised the highest degree of judgment, care and skill. Neither the Barham case nor any other that I know of, is authority for the rule stated in the instruction. Appellant contends, and the majority opinion in effect holds, that if the jury had been instructed that expert testimony was not necessary to prove negligence, the verdict would probably have gone against the defendant. I think plaintiff very likely would have prevailed, and that the same might happen in any other case where it was proved that an infection occurred after surgery and the same issue was tried without expert testimony. That is my reason for dissenting. Decisions by laymen of scientific or technical matters in the field of the learned professions must have support in competent expert testimony.

The experts testifying for defendant expressed the opinion that his conduct met the requirements of due care, skill and judgment—the ultimate question. It was therefore proper to instruct as follows: "In determining the question of whether the defendant was guilty of negligence as alleged in the complaint you cannot and must not set up a standard of your own but must be governed in that regard solely by the testimony of expert witnesses who have appeared and testified in this case." The evidence narrowed the issue to the question whether proper precautions had been taken to prevent infection. The methods of sterilization used by Dr. Belt were described in defendant's hypothetical questions and Dr. Webb assumed in giving his answers that the instruments had been sterilized. The jury, if it had accepted Dr. Webb's conclusions, could have found that either the instruments or the patient's body had not been properly sterilized. It could not have set up its own standard of sterilization or technique and concluded that the process followed by defendant, which was shown to be in accordance with approved practice, was inadequate, nor could it properly have concluded, from the mere occurrence of a hidden infection, and without supporting expert testimony, that there had been negligence in failing to procure proper sterilization.

There is an additional reason for rejecting the claim that it was error to give the instructions on expert testimony. Plaintiff offered the testimony of Dr. Webb for the purpose of proving that a new infection was introduced by defendant or his employees. Defendant was obliged to meet that expert testimony with the testimony of his own experts. The court was required to instruct on the issue to which the expert testimony was addressed. Plaintiff introduced and relied upon the theory to which the instructions related. I do not question that he had a right at the trial to contend that he had made out a case of negligence without the expert testimony, but upon principle and authority I do deny that he has a right to complain of the giving of instructions which were made necessary by the theory upon which his case was tried and the evidence upon which he relied. Shapiro v. Equitable Assur. Soc., 76 Cal.App.2d 75, 94, 172 P.2d 725; Sommer v. Martin, 55 Cal. App. 603, 610, 204 P. 33; 5 C.J.S., Appeal and Error, § 1507, p. 210. See, also, Carpenter v. Ewing, 76 Cal. 487, 488, 18 P. 432; Abbott v. Cavalli, 114 Cal.App. 379, 384, 300 P. 67.

I am of the opinion that the court could very properly have allowed more latitude of examination in the qualification of Dr. Webb, and also that he should have been permitted to answer the hypothetical question put to him in rebuttal. But he had already given a comprehensive resumé of his entire professional career of some forty years, and had stated his expert opinions fully in answer to plaintiff's hypothetical question. After reviewing the entire record I am satisfied that the limitation of the examination of Dr. Webb was not an abuse of the court's discretion, and that there is no merit in the other assignments of error.

I think the judgment should be affirmed.

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90 Cal.App.2d 348

WHEELER et al. v. GREGG et al.

Civ. 16444.

District Court of Appeal, Second District, Division 1, California.

Feb. 28, 1949.

Rehearing Denied March 21, 1949.

Hearing Denied April 28, 1949.

1. Municipal corporations 🔑621.54

Fact that city council, in granting conditional use permit to excavate for commercial production of rock, sand, and gravel, made a finding that permitted uses of the realty were essential or desirable to the public convenience or welfare, and were in harmony with the various elements or objectives of the master plan of the zoning ordinance, raised presumption that existence of necessary facts had been ascertained and found.

2. Municipal corporations 🔑621.47

Judgment of city council that owner of realty in city was entitled to a conditional use permit to excavate for commercial production of rock, sand, and gravel, should be final unless it clearly appears to be arbitrary or contrary to the law.

3. Municipal corporations 🔑621.53

Where a zoning ordinance authorizes the planning commission or city council to grant a conditional use permit on finding of the existence of certain facts, their action will not be disturbed by the courts in absence of a clear and convincing showing of the abuse of the power of discretion vested in them.

4. Municipal corporations 🔑63(1)

Whether granting by city council of conditional use permit for excavation of commercial production of rock, sand, and gravel in city was wise as a matter of policy, was beyond courts to determine unless ordinance under which such action was taken was unconstitutional.

5. Municipal corporations 🔑63(1)

All questions of policy and wisdom concerning matters of municipal affairs are for determination of the legislative governing body of the municipality and not for the courts.

6. Municipal corporations 🔑589

In exercise of the policy power, a large discretion is vested in the legislative branch of the government of a municipality.

7. Municipal corporations 🔑63(1)

The function of the courts is to determine whether municipal bodies acted within limits of their power and discretion, and courts are not authorized to entertain a hearing de novo and then make such order as in their opinion the municipal authorities should have made.

8. Municipal corporations 🔑621.55

In action by property owners against city and one to whom city had granted a conditional use permit to excavate for commercial production of rock, sand, and gravel in city, to have the permit declared void, burden was on property owners to prove that city council acted without substantial evidence and in excess of jurisdiction in granting the permit, and such requirement was not satisfied by a mere showing that there was a conflict in the evidence, or that city council, on basis of record before it, might have been justified in deciding differently, or that record before city council might have supported a conclusion contrary to that which was arrived at.

9. Constitutional law 🔑278(1)

Provision of city zoning ordinance authorizing the granting of conditional use permits by planning commission of city or city council to permit certain uses, of public concern in zones from which such uses would otherwise be excluded, when it be found that such uses were deemed essential or desirable to the public convenience or welfare, was not unconstitutional, as a denial of due process.

10. Administrative law and procedure 🔑206
Municipal corporations 🔑591

Provision of city zoning ordinance authorizing the granting of conditional use permits by planning commission of city or city council to permit certain uses, of public concern in zones from which such uses would otherwise be excluded, when it be found that such uses were deemed essential or desirable to the public convenience or welfare, was not unconstitutional as an unlawful delegation of "legislative power", but was merely the grant of "quasi-judicial power" or perhaps "administrative power".

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Administrative Power", "Legislative Power" and "Quasi-Judicial Power".

11. Administrative law and procedure 🔑302
Constitutional law 🔑318

The essential requirement of due process is met when administrative body of city is required to determine the existence or nonexistence of necessary facts before any decision is made.

12. Administrative law and procedure 🔑206
Municipal corporations 🔑591

Generally, the power to authorize a variance from terms of a city's zoning ordinance may be granted to an administrative board without violating the principle against the delegation of legislative powers.

13. Municipal corporations 🔑205, 591

Though the legislative body of a city cannot delegate its power to make a law, it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend.

14. Municipal corporations 🔑621.55

In action by property owners against city and one to whom city had granted a conditional use permit to excavate for commercial production of rock, sand, and gravel in city, evidence sustained finding that the conditional use permit was not repugnant to master plan for development of city. Gen.Laws, Act 5211b.

15. Municipal corporations 🔑600

Zoning regulations of a city are not contracts by the city, and may therefore be modified by the city.

16. Municipal corporations 🔑600

Realty in a city is always held subject to the valid exercise of police power by the city.

17. Constitutional law 🔑92

The theory of vested rights relates only to such rights as an owner of realty in a city may possess not to have his realty rezoned after he has started construction thereon or was making a use thereof permitted by law, when such construction or use does not constitute a nuisance.

18. Constitutional law 🔑92

Adoption by city of zoning ordinance gave owners of realty no vested rights which would prevent city from subsequently amending the ordinance or granting a conditional use permit thereunder.

19. Municipal corporations 🔑600, 621.2

Provisions of city zoning restricting uses to which certain realty could be put did not result in a contract with owners of realty divesting the city of right to change ordinance subsequently or to grant a conditional use permit adversely affecting the realty of the owners of realty.

20. Municipal corporations 🔑625

Where there was evidence that realty was located in area in city which had long been a rock and gravel producing section, that within a radius of a mile and a quarter from the realty there were located 15 gravel pits, some active and others idle, that there was a public need for rock and sand located on the realty, and that highest and best use of the realty was for excavation of rock, sand, and gravel, and that realty was of little value for any other use, granting by city council of a conditional use permit to owner of realty to excavate for commercial production of rock, sand, and gravel, was not void on ground that it was unreasonable.

21. Trial 🔑375

When a trial judge by stipulation of the parties views territory involved in an action, his observations on such a tour become evidence in the case, and what is then seen may be used alone or with other evidence to support findings.

22. Trial 🔑375

In action by owners of realty against city and one to whom city had granted a conditional use permit to excavate for commercial production of rock, sand, and gravel in city, trial judge's two-day observations of the realty and the surrounding area was independent evidence which could be used to support trial judge's finding that grant of conditional use permit was reasonable.

23. Constitutional law 🔑92
Municipal corporations 🔑589

One has no vested right in exercise of police power by city, and such exercise may not be limited by private contract or restrictive covenants.

24. Municipal corporations 🔑600

Private agreements are not to be considered when determining the validity of a city's zoning ordinance.

25. Estoppel 🔑62(4)

Fact that city passed a zoning ordinance forbidding excavation for commercial production of rock, sand, and gravel in certain area in city, did not estop city thereafter from granting owner of realty in that area a conditional use permit to excavate for commercial production of rock, sand, and gravel.

26. Nuisance 🔑33

Evidence justified trial court's conclusion that anticipated use of realty in city for commercial production of rock, sand, and gravel under conditional use permit would not result in a nuisance.

27. Nuisance 🔑23(1)

Where operation of realty for commercial production of rock, sand, and gravel in city could not be characterized as a nuisance per se, court was justified in following rule that under such circumstances decree should not enjoin more than the specific thing which might constitute a nuisance, as appears from the requirements of the particular case. Code Civ.Proc. § 731a.

28. Nuisance 🔑23(1)

The business of excavating rock and gravel by the owner from lands belonging to him is a lawful and useful occupation, and regulation thereof should go no further than to control those particular features of the operations which might result in substantial injury to adjoining property or to persons residing or owning property in the near vicinity of the land on which the operations are being conducted.

29. Nuisance ⚷23(1)

Where there was no evidence that owner of realty employed, or under restrictions of conditional use permit granted him by city and judgment of court, would employ unnecessary and injurious methods of operation of his realty to excavate for commercial production of rock, sand, and gravel, trial court was not authorized to grant property owners in the area injunctive relief. Code Civ.Proc. § 731a; Civ.Code, § 3482.

30. Nuisance ⚷6

Duly enacted zoning ordinance, within scope of authority conferred on the city, had the same force within city's corporate limits as a statute passed by the Legislature has throughout the state, and therefore something done under the zoning ordinance cannot be a nuisance in view of the statute providing that nothing which is done or maintained under the express authority of a statute can be deemed a nuisance. Civ.Code, § 3482.

31. Evidence ⚷98

Where no evidence is introduced in support of an issue, findings should be made thereon against the party who has the burden of proof.

32. Appeal and error ⚷989

Where an attack is made on the findings or judgment on ground that they are not supported by the evidence, the power of reviewing courts begins and ends with a determination of whether there is any substantial evidence, contradicted or uncontradicted, that will sustain the findings made or the judgment rendered.

◆

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Action by Jackson Earl Wheeler and others against J. D. Gregg and the City of Los Angeles, a municipal corporation, to have declared unconstitutional and void the action of the city council of Los Angeles granting to J. D. Gregg a conditional use permit to excavate for commercial production of rock, sand, and gravel, to enjoin the city from granting any permit, to enjoin J. D. Gregg from exercising any right under the permit, from conducting any operations for commercial production of rock, sand, and gravel, and for recovery of damages from J. D. Gregg. From a judgment in favor of the defendants, the plaintiffs appeal.

Judgment affirmed.

Oliver O. Clark and Robert A. Smith, both of Los Angeles, for appellants.

Donald J. Dunne and Guy Richards Crump, both of Los Angeles, for respondent J. D. Gregg.

Ray L. Chesebro, City Atty., Roger Arnebergh, Asst. City Atty., and Thomas H. Hearn, Deputy City Atty., all of Los Angeles, for respondent City of Los Angeles.

WHITE, Justice.

Plaintiffs herein, numbering twenty-five individual and one corporate property owners whose properties lie within 3,000 feet of 115 acres of land owned or leased by defendant Gregg, instituted this action to have declared unconstitutional and void the action of the Council of the City of Los Angeles whereby, on October 2, 1946, said council granted to defendant Gregg a variance permit (in reality a Conditional Use Permit under section 12.24 of Ordinance No. 90,500) to excavate for the commercial production of rock, sand and gravel in an area of land containing some 105 acres. Plaintiffs alleged that the action was also brought in behalf of the Planning Commission, Park Department, Playground and Recreational Department and Board of Education of defendant city. They also alleged that their action was prosecuted for the benefit of more than one thousand persons living within what plaintiffs described as "the community area," alleging that "the situation of said agencies is similar to the situation of these named plaintiffs in respect to their own properties," and that with reference to the aforesaid more than one thousand persons, the enjoyment of their homes within said "community area" and their health and safety "would be substantially, materially, and injuriously affected in kind substantially as would be these named plaintiffs" from defendant Gregg's operations in the area in question.

By their complaint, plaintiffs sought a decree:

(1) Declaring void a variance permit (really, as stated above, a Conditional Use Permit) granted defendant Gregg by defendant city by which Gregg was authorized to excavate and remove rock, sand and gravel from the permit area;

(2) Enjoining the city from granting any permit for the commercial production of rock, sand and gravel from any lands included within the so-called community area;

(3) Enjoining defendant Gregg from (a) exercising any right, benefit or privilege under the permit granted him by the city, and (b) from conducting any operation for the commercial production of rock, sand and gravel within the so-called community area;

(4) As against defendant Gregg the recovery of actual damages "accrued" to the date of judgment, together with $250,000.00 punitive damages;

(5) General relief.

Defendants filed separate answers each denying the material allegations of the complaint. Following trial the court rendered judgment for defendants, but in so doing required defendant Gregg to comply with certain operational conditions imposed by its decree, in addition to the conditions imposed by the city in its permit.

The conditions imposed by defendant city were:

"1. That the applicant (Gregg) construct a 6-foot cyclone type mesh wire fence around the said property, including barbed wire on the top of said fence, providing the Fire Department grants permission for same.

"2. That no permanent plant, building or structure be installed or maintained on said property and that all material excavated be mined by an electrically powered shovel and primary crusher and transported by a conveyor belt system running through a tunnel or tunnels under Glenoaks Boulevard to the plant now operated by applicant, lying southwesterly of said boulevard and processed at said plant.

"3. That a set-back line of 50 feet from all property lines and existing streets be maintained and that slopes of excavations be maintained at one foot to one foot.

"4. That the area between all property lines or street lines and 50 foot set-back be screen planted progressively as excavations proceed."

To the foregoing conditions the court added the following:

"1. That defendant John D. Gregg shall not conduct any operation for the excavation of rock, sand or gravel from the so-called 'Critical' area, as described in the complaint herein, lying northeasterly of Glenoaks Boulevard at any time before 6:00 o'clock A.M. of any day, or after 8:00 o'clock P.M. of any day, excepting that the said defendant John D. Gregg shall not be prohibited from making any reasonable or necessary repairs to equipment in said area during other hours.

"2. That said defendant John D. Gregg house in any primary crusher which is operated in that portion of the so-called 'Critical' area lying northeasterly of Glenoaks Boulevard so as to minimize any noise emanating therefrom.

"3. That in connection with any and all drag-line operations on the banks or slopes of any pit excavated by defendant John D. Gregg in that part of the so-called 'Critical' area lying northeasterly of Glenoaks Boulevard, that the said defendant John D. Gregg shall cause the banks or slopes of said excavation to be sprinkled with water prior to any such drag-line operations, so as to minimize the possibility of dust from any such operation being carried by the winds beyond the boundaries of said so called 'Critical' area.

"4. That said defendant John D. Gregg, as soon as reasonably practicable and as soon as material and equipment is available, shall complete the construction of the dust collection system in his rock crusher plant located southwesterly of Glenoaks Boulevard, the construction of which system was commenced prior to the commencement of this action."

With reference to the physical characteristics of the area involved, there was testimony that the soil in what we shall designate as the "permit area" consists of quite a range in sizes of soil particles from large rocks down to some fine silt. It is not uniform either in the vertical horizon or laterally. It has been laid down by rather fast-moving water, and as the streams have changed directions and changed velocities they have deposited in a rather heterogeneous manner various particles in rather close areas, so that there is no one property that has a uniform type of soil. It is what is termed gravelly soil. In some places there are soils having a sufficiently fine deposit to be termed a sandy loam. There are some small parcels or portions that could be called gravelly loam, but, for the most part it is a gravelly soil; that "The permit area is cut up by stream beds. It is badly eroded by what we term flood erosion due to the surface flows following flash floods, so that there are many small depressions due to that. The difference in elevation will vary two or three feet in very short distances in many places, in some places the depth of these washes and depressions is as much as five or six feet; there are one or two pronounced ridges, and the topography is so uneven that at the present time no agricultural work could be carried on without levelling. If it were to be laid out for an irrigation system in which pipelines are used and the furrow method is employed, it would be necessary to do very extensive, a very extensive amount of grading. If a sprinkling system was used a less amount of grading would be required, however there would be a considerable amount necessary even in the event a sprinkling system was used." That from the standpoint of farming, "no part" of the permit area "has any agricultural value whatever."

Although residences could be and have been constructed in the permit area, there was substantial evidence that, "As regards the permit area, I believe the most profitable use to which that property can be put is for the extraction of rock, sand, and gravel. The highest and best use means the highest, best and most profitable. The word 'profitable' is commonly connected with the highest and best, and means that use which will produce the highest rental value or leasehold value or market value of the fee"; that the highest and best use of the entire area including the permit area, is "to develop the natural resources that exist upon it," namely, rock and sand. There was also evidence showing the proximity of the permit area to numerous gravel pits, both operating and abandoned, rubbish dumps, a winery and other industrial uses.

There was also testimony given by qualified experts that none of plaintiffs' properties were adversely affected "value-wise," by reason of the action of the city council in granting the conditional use permit to defendant Gregg. That the depreciation in value of the properties since October 1, 1946, was due to the general decline in the values of real estate in the Los Angeles area in general and in the area district here in question in particular. That the decline in values in the San Fernando Valley is comparable to the decline in such values throughout Los Angeles County and the United States since October 1, 1946, the date of the permit here challenged.

Plaintiffs presented evidence that in 1914 the lands here in question were subdivided for residential-agricultural use and were by deed restrictions limited to such use for the ensuing twenty years. That thereupon these lands were offered for sale and a considerable amount thereof was sold and developed for residential uses. That in 1914 the area here in question, then known as a part of Hansen Heights, was annexed to the City of Los Angeles; that in 1919, the residents of that area, in conjunction with those of a larger area, organized Municipal Improvement District No. 9 and bonded their properties for $150,000 to obtain, and assure, an adequate water supply for this area; that in July, 1925, nearly nine years before the expiration of the aforesaid deed restrictions, the defendant city enacted its Zoning Ordinance No. 52,421, by which this community area was declared to be a residential area, and from which the mining of rock aggregates was excluded; that in June, 1926; May, 1927; August 15, 1927; and August 27, 1927, by its enactment of ordinances numbered respectively 55,129, 57,958, 58,624 and 58,375, defendant city reaffirmed its zoning classification of this community area as a residential area, and its exclusion therefrom of the business of mining rock aggregates; that in June, 1926, and in June, 1928, upon petition of the people, defendant city consummated proceedings for the concrete paving of about seven and one-half miles of the public streets within said area, and assessed the costs of said improvement upon the lands within said area; that in 1928, upon petition of the people, the defendant city consummated proceedings for the organization of Municipal Improvement District No. 57, and the acquisition and improvement of a fifteen acre-public park and recreation center, on the westerly side of Wicks Avenue, immediately southerly of Dronfield Avenue, in said community area, and bonded the property within said community area for the payment of its cost; that in June, 1930; February, 1933; September, 1934 and November, 1936, defendant city by its enactment of ordinances numbered, respectively, 66,750; 72,327; 74,140, and 77,000 reaffirmed its zoning classification of this community area as a residential area, and its exclusion therefrom of the business of mining rock aggregates; that in August, 1934; July 7th, 1936; July 21st, 1936; July 7th, 1939, and January, 1940, the City Planning Commission reaffirmed its zoning classification of this community, by denying five separate applications for permission to mine rock aggregates within this community area. Two of these applications were denied, upon appeal, by the City Council. Three of these applications involved land covered by the permit challenged here. That in 1942, upon petition of the people, the Remsen Avenue school, located about one-half mile westerly of this community area, and about 900 feet from a potential rock excavation operation, was abandoned, and as a replacement therefor, the Stonehurst School was established within this community area about 600 feet from the area covered by the permit under challenge herein; that in 1944 the city began, and continued through 1945, and until March 7, 1946, a comprehensive survey and study of zoning conditions, and on that date, March 7, 1946, it enacted its comprehensive zoning ordinance, No. 90,500, which became effective June 1, 1946. That by this ordinance, the city reaffirmed its classification of this community area as a residential area, and its exclusion therefrom of the business of mining rock aggregates, upon the following stated grounds: (1) The continuance of such restriction was "necessary in order to encourage the most appropriate use of land; to conserve and stabilize the value of property; to provide adequate open spaces for light and air; * * * to facilitate adequate provisions for community utilities and facilities such as, transportation, water, sewerage, schools, parks and other public requirements, and to promote health, safety and the general welfare, all in accordance with a comprehensive plan"; that during the thirty-two year period from 1914 (the year of the deed restrictions), to October 2, 1946 (the date of the permit challenged here), this community area, of less than one and one-half square miles, was improved with (1) more than 360 homes occupied by more than 1,750 persons of whom more than 350 were children under the age of sixteen years; (2) two churches, attended by more than 300 persons each Sunday; (3) a kindergarten and elementary grade school attended by 418 pupils; (4) a public park and recreation center attended by more than 200 persons each day, and 2,000 persons each week, many of whom are children under the age of six years, who unattended, patronize the facilities of said recreation center, and for which the city expends about $6,000 annually for its supervised recreational facilities at this park; (5) a City Fire Department which in efficiency is about four times greater than that required by the National Fire Underwriters Board; an American Legion Hall adequate for the needs of a membership of 118, and a Medical Clinic; that during the two and one-half years immediately preceding October 2, 1946, fourteen of the named plaintiffs, at a cost to them of more than $150,000, purchased and improved their home properties which lie either immediately adjoining the critical area involved here, or immediately across a forty-foot street from said critical area. In their purchase of these homes many of these purchasers first inquired of the city as to the zoning restrictions, and were told by the city that this area was zoned for residential use, and that several applications for permission to excavate rock aggregates in this community area had been denied by the city. These persons testified that they would not have purchased or improved these properties had they known there was any probability of permission being granted to excavate within this area for the production of rock aggregates; that in 1946, the assessed value of the land and improvements in private ownership within this community area of one and one-half square miles, was about $500,000—an increase of about $150,000 over the preceding year. That the lands which comprise the critical area involved here have a reasonable market value of $2,500 per acre, if permission to produce rock aggregates therefrom is denied; that the defendant Gregg paid for the 105 acres of land covered by this permit during the five years immediately preceding October 2, 1946, an aggregate sum of about $75,000. That there is, and was during the year 1946, preceding October 2nd, a substantial demand for the land which comprises said critical area, for development and use for residential purposes, and that said land is reasonably adapted to that use; that during this thirty-two year period of residential classification, development, use, and protection against the invasion by the rock industry, no disturbing change in conditions has occurred within this community area.

What is termed the "permit" area is bounded on the west by Wicks Street, a dusty unimproved road, on the northeast by Dronfield and by Art Street (unpaved), Lot 23 of Block 17 and Lot 9 of Block 19, on the southeast by Peoria Street (which is paved), Lots 8, 11, 12, 15, 16, 17 and 18 in Block 19, and by Pendleton Street, which is not paved. What is referred to as the "community" area surrounds the "permit" area. Maps of these areas were introduced into evidence at the trial and are before us on this appeal. We will not attempt to delineate their boundaries in detail. With reference to the "community" area, suffice it to say that it encompasses a general area surrounding the "permit" area, including distances of from some 250 feet to 3,000 feet from the boundaries of the "permit" area. It is noteworthy that the varying distances at which the boundaries of the "community" area are drawn from the boundaries of the "permit" area serves to exclude existing gravel pits and other industrial uses inconsistent with the theory of a strictly residential district.

From a perusal of the voluminous record herein consisting of a reporter's transcript containing 5,082 pages of testimony, a clerk's transcript of 174 pages, 288 exhibits and 67 numbered paragraphs of findings, we deem it a fair statement to say that prior to June 1, 1946, the City of Los Angeles had no comprehensive zoning ordinance, rather, there existed a series of heterogeneous zoning ordinances applicable to various parts of the municipality and which, as testimony in this case indicates, were considered as stop-gap ordinances to be eventually absorbed by a single comprehensive zoning ordinance. Contained in all of these ordinances were provisions for exceptions, and many were granted.

The first comprehensive zoning ordinance and the one with which we are here concerned, was adopted and became effective June 1, 1946, being Ordinance No. 90,500 of defendant City. The record reflects that during the period of more than a year prior to its adoption while surveys were being made and the ordinance was in process of preparation, defendant Gregg's property, which is the subject of this appeal, was shown on the tentative zoning map as M–3, which would permit the excavation of rock thereon. However, when the ordinance was finally adopted by the City Council it absolutely classified defendant Gregg's property in an R–A zone, which permitted residential and agricultural uses and excluded the excavation of rock, sand or gravel.

However, the ordinance as adopted, provided for the granting of variances from its existing provisions. Also, section 12.24 of said ordinance provided for the granting of conditional use permits by the Planning Commission or the City Council to permit certain uses, of public concern, in zones from which such uses would otherwise be excluded, when it be found that such uses are deemed essential or desirable to the public convenience or welfare. We find included in such permitted uses, of public concern, the "development of natural resources."

Shortly after the effective date of the foregoing ordinance, defendant Gregg, pursuant to the provisions of section 12.24 thereof, applied to the Planning Commission of defendant City for a permit to excavate about 105 acres of the property owned by him, for the development of the natural resources on his property, namely rock, sand and gravel. On July 26, 1947, said Planning Commission denied defendant Gregg's application upon the grounds (1) that an excavation for the commercial production of rock, sand, and gravel, was not the highest and best use of said land; (2) that said property is adapted to residential development and use; (3) that the "RA" zoning then upon said property, was appropriate for said property, and for that general area, as evidenced by the residential development in that immediate neighborhood; (4) that the pit which would be left after the excavation was completed, would create an unsightly and dangerous condition, detrimental to the public welfare and safety, and would leave the land in a condition unsuited for use in keeping with others in that community; (5) that the creation of such a condition would adversely affect individual property rights, and would interfere with the normal growth of that community, and (6) would conflict with the objectives of the city's Master Plan of Zoning.

Thereupon, defendant Gregg, in accordance with further provisions of the ordinance, appealed to the City Council from the adverse ruling by the City Planning Commission. The exhibits on file demonstrate that the claimed merits and demerits of defendant Gregg's application were presented both to the City Planning Commission and to the City Council in detail, and afforded both of these bodies ample evidence upon which to arrive at an informed opinion and conclusion.

A public hearing on defendant Gregg's application was first conducted before the Planning Committee of the City Council and later before the Council itself. Both the proponent and the protestants were allowed approximately the same time, "between an hour and an hour and a half" before the Planning Committee of the City Council, at which many witnesses were heard. When the report of that committee was submitted to the Council as a whole, another public hearing was held, at which the protestants requested one hour in which to present their claims. However, the president of the Council ruled that each side should have thirty minutes. Following this hearing, the City Council voted to grant the application of defendant Gregg. The instant action ensued, and from the judgment therein entered as aforesaid in favor of defendants, plaintiffs prosecute this appeal.

Appellants' first ground of appeal is that the grant of the foregoing permit to defendant Gregg is unconstitutional and void because such action is in excess of the authority delegated to the Council by Ordinance No. 90,500. This contention is predicated upon the claim that the authority delegated by the ordinance to the council is expressly limited to permit only such uses of property as are "essential or desirable to the public convenience or welfare, and are in harmony with the various elements or objectives of the Master Plan." That the stated "objectives" of the Master Plan as contained in section 12.02 of the ordinance preclude the granting of a permit such as the one here under consideration, which according to appellants, would injuriously affect the enjoyment by them of their properties, would jeopardize the safety of children in the community, and would militate against the promotion of the "health, safety and general welfare, all in accordance with a comprehensive plan" Ordinance 90,500, sec. 12.02.

[1] Sections 12.24 and 12.32–E of the ordinance authorize the Council to grant a Conditional Use Permit upon a finding that the permitted uses of the property are essential or desirable to the public convenience or welfare, and are in harmony with the various elements or objectives of the Master Plan. In the proceedings now before us the Council in granting the challenged permit affirmatively found those conditions to exist and further found wherein the Planning Commission in theretofore denying the permit, was in error. The

fact that the Council made such findings raises the presumption that the existence of the necessary facts had been ascertained and found. Northside Property Owners Ass'n. v. County of Los Angeles, 70 Cal. App.2d 598, 608, 161 P.2d 613; Lindell Co. v. Board of Permit Appeals, 23 Cal.2d 303, 323, 144 P.2d 4; Bartholomae Oil Corp. v. Seager, 35 Cal.App.2d 77, 80, 94 P.2d 614.

[2-7] The necessity for a Conditional Use Permit is to be determined under section 12.24 of the ordinance by the Planning Commission or the City Council, and their judgment should be final unless it clearly appears to be arbitrary or contrary to the law. Where a zoning ordinance authorizes the Planning Commission or City Council to grant a Conditional Use Permit upon finding the existence of certain facts, their action will not be disturbed by the courts in the absence of a clear and convincing showing of the abuse of the power of discretion vested in them. Otis v. City of Los Angeles, 52 Cal.App.2d 605, 613, 126 P.2d 954. Whether or not the granting of the permit herein was wise as a matter of policy is something which is beyond the courts to determine unless the ordinance under which such action is taken is unconstitutional or void. The rule is indelibly written into our law that all questions of policy and wisdom concerning matters of municipal affairs are for the determination of the legislative governing body of the municipality and not for the courts. In the exercise of the policy power a large discretion is vested in the legislative branch of the government. The function of the courts is to determine whether or not the municipal bodies acted within the limits of their power and discretion. Courts are not authorized to entertain a hearing de novo and then make such order as in their opinion the municipal authorities should have made. Were the rule otherwise, courts would be usurping the functions of the municipal governing body. Lockard v. City of Los Angeles, 33 Cal.2d 453, 202 P.2d 38.

[8, 9] The determination of what harmonizes with the elements and objectives of the Master Zoning Plan having been committed to the discretion of the local governing bodies, the burden of proving that the City Council acted without substantial evidence and in excess of jurisdiction, rested upon appellants. And this requirement is not satisfied by a mere showing that there was a conflict in the evidence, or that the City Council on the basis of the record before it, might have been justified in deciding differently, or that the record before the Council might have supported a conclusion contrary to that which was arrived at. Hogan v. Retirement Board, 13 Cal.App.2d 676, 677, 57 P.2d 520. It therefore follows that the ordinance here in question and the procedure therein authorized is neither unconstitutional or void.

[10, 11] It is next contended that the power vested in the Planning Commission in the first instance, and in the City Council on appeal, to grant a Conditional Use Permit under section 12.24 of Ordinance No. 90,500, constitutes an unlawful delegation of legislative power. This claim is without merit. We are persuaded that a finding by the Planning Commission in the first instance, or, as in the case at bar, by the City Council on appeal, of the necessary facts to justify the granting of a Conditional Use Permit under section 12.24 of the ordinance is an exercise of quasi-judicial, or perhaps administrative power, and does not amount to an exercise of legislative power. Nider v. Homan, 32 Cal.App.2d 11, 15, 89 P.2d 136; Swars v. City of Vallejo, 64 Cal.App.2d 858, 864, 149 P.2d 397; Wallace v. Board of Education, 63 Cal.App. 2d 611, 616, 147 P.2d 8; Irvine v. Citrus Pest District, 62 Cal.App.2d 378, 385, 144 P.2d 857. The essential requirement of due process is met when the administrative body is required to determine the existence or non-existence of the necessary facts before any decision is made. Such a discretion is not arbitrary or so unguided as to invalidate the statute or ordinance. People v. Walton, 70 Cal.App.2d Supp. 862, 870, 161 P.2d 498.

As was said by the Supreme Court in Gaylord v. City of Pasadena, 175 Cal. 433, 436, 166 P. 348, 349:

"Even a casual observer of governmental growth and development must have observed the ever-increasing multiplicity and complexity of administrative affairs—national, state, and municipal—and even the occasional reader of the law must have perceived that from necessity, if for no better grounded reason, it has become increasingly imperative that many quasi legislative and quasi judicial functions, which in smaller communities and under more primitive conditions were performed by the legislative or judicial branches of the government, are intrusted to departments, boards, commissions, and agents. No sound objection can longer be successfully advanced to this growing method of transacting public business. These things must be done in this way or they cannot be done at all, and their doing, in a very real sense, makes for the safety of the republic and is thus sanctioned by the highest law. For, as the Supreme Court of the United States declares: 'Indeed, it is not too much to say that a denial to Congress of the right, under the Constitution, to delegate the power to determine some fact or the state of things upon which the enforcement of its enactment depends, would be "to stop the wheels of government" and bring about confusion, if not paralysis, in the conduct of the public business.' Union Bridge Co. v. United States, 204 U.S. 364, 27 S.Ct. 367, 51 L.Ed. 523."

See also Dierssen v. Civil Service Commission, 43 Cal.App.2d 53, 59, 110 P.2d 513, and Carter v. Stevens, 211 Cal. 281, 289, 295 P. 28.

[12, 13] In the case of Johnston v. Board of Supervisors, 31 Cal.2d 66, 73, 187 P.2d 686, 691, it was held that "The general rule, however, is that even the broader power to authorize a variance from the terms of a zoning ordinance may be granted to an administrative board without violating the principle against the delegation of legislative powers." While the legislative body can not delegate its power to make a law, it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend.

It must therefore be held that the power granted by section 12.24 of the ordinance to the Planning Commission in the first instance, and to the City Council on appeal, to grant Conditional Use Permits in the particular instances specified, was not intended to, nor does it confer any power to amend or alter the zoning ordinance itself, nor does it delegate any legislative power. Neither is it a grant of power to create variances for non-conforming uses. That power is contained in section 12.26 of the ordinance. It will be noted that Conditional Use Permits are confined to uses of public concern, such as airports, cemeteries, development of natural resources, public utilities, educational institutions, libraries, and governmental enterprises. By the specific terms of the Ordinance such uses are permitted in any zoning district subject only to a finding by the Planning Commission, in the first instance, or the City Council on appeal, that the use is essential or desirable to the public convenience or welfare. The decision to grant a Conditional Use Permit does not create a new zone. It merely affirms as a fact the existence of the circumstances under which the ordinance by its terms prescribes that such permit shall issue.

[14-20] Appellants next assail the granting of the Conditional Use Permit herein as unconstitutional and void because, as they contend, the act is an unreasonable, and therefore, an unconstitutional exercise of the police power. As we view appellants' argument in this regard, they do not attack the constitutionality of the ordinance, indeed, they rely upon it and attack as unconstitutional the action of the City Council in granting the Conditional Use Permit in this particular instance because such action was unreasonable. Appellants urge that the action of the council was unreasonable and in excess of the authority delegated to it by Ordinance No. 90,500 for the reason that the Conditional Use Permit does not harmonize with the elements or objectives of the Master Plan. It would appear that the "Master Plan" is something distinct from the Zoning Ordinance. It is authorized by "The Planning Act of 1929," Deering's General Laws, Act 5211b. A reading of the Planning Act of 1929 reveals the "Master Plan" to be "a comprehensive, long-term, general plan for the physical development of the city * * * which in the commission's judgment bears relation to the planning thereof." The Zoning Ordinance may have been adopted to imple-

ment the "Master Plan," but it is not the plan itself. In any event, the "Master Plan" with its accompanying maps, diagrams, charts and reports (as provided for in the foregoing Planning Act of 1929) was not introduced into evidence. There was, however, the testimony of a former Director of City Planning of defendant City to the effect that the Conditional Use Permit was in harmony with the Master Plan. And the City Council specifically found that the Conditional Use Permit was "essential to the public convenience and welfare and is in harmony with the various elements or objectives of the Master Plan." Accordingly, there arose a presumption of the existence of the necessary facts to support such finding. Northside Property Owners Association v. County of Los Angeles, supra, 70 Cal.App.2d at page 608, 161 P.2d 613; Lindell Co. v. Board of Public Appeals, supra, 23 Cal.2d at page 323, 144 P.2d 4; Bartholomae Oil Corp. v. Seager, supra, 35 Cal.App.2d at page 80, 94 P.2d 614. This presumption was not overcome, but in fact, was strengthened by the evidence. The finding of the trial court that the Conditional Use Permit was not repugnant to the Master Plan was justified and proper. We perceive nothing unreasonable in the action of the City Council granting the Conditional Use Permit to defendant Gregg. The latter was possessed of an inherent right to remove rock and gravel from his own land unless and until prohibited by an exercise of the police power of the City of Los Angeles. By the adoption of Ordinance 90,500 that right was suspended. The granting of the permit did not give defendant Gregg any right not theretofore vested in him. It merely removed the impediment imposed by the exercise of the police power. And the reasonableness of the zoning as applied to certain lines of commercial zoning must be distinguished from the reasonableness of zoning regulations prohibiting the development of natural resources. The exclusion of ordinary business enterprises does not destroy any inherent property right, and, if not discriminatory, will be held reasonable and valid. Most such businesses can be conducted at any other designated place. But rock and gravel, like any other natural resource, can be obtained only in those particular areas where the deposit has been lodged by nature. Therefore, it follows that to absolutely prohibit the removal of rock, sand and gravel from one's own land in an instance where such land is primarily valuable only by reason of the existence of rock, sand and gravel, might be regarded as an unreasonable exercise of the police power. Trans-Oceanic Oil Corp. v. City of Santa Barbara, 85 Cal.App.2d 776, 789, 194 P.2d 148. The permit granted respondent Gregg does not restrict appellants in the use of their own property. And they have no vested right in the maintenance of restrictions on respondent Gregg's property. It may be true that to continue the zoning restrictions upon respondent Gregg's property might have conferred benefit on neighboring owners and enhanced the value of their property, but the existence of benefits does not generate interests protected by the constitution against diminution by governmental authorities in the proper exercise of the police power. Zoning regulations are not contracts by the city and may therefore be modified by the latter. Property is always held subject to the valid exercise of police power. The theory of vested rights relates only to such rights as an owner of property may possess not to have his property rezoned after he has started construction thereon or was making a use thereof permitted by law, when such construction or use does not constitute a nuisance. Dobbins v. City of Los Angeles, 195 U.S. 223, 25 S.Ct. 18, 49 L.Ed. 169, 176; Trans-Oceanic Oil Corp. v. City of Santa Barbara, supra, 85 Cal.App.2d at page 787, 194 P.2d 148. The adoption of Zoning Ordinance No. 90,500 gave appellants no vested rights which would prevent defendant city from subsequently amending the ordinance or granting a Conditional Use Permit thereunder. The provisions of the ordinance restricting the uses to which respondent Gregg's property could be put did not result in a contract with appellants divesting the city of the right to subsequently change the ordinance or to grant a Conditional Use Permit adversely affecting the property of appellants. Acker v. Baldwin, 18 Cal.2d 341, 345, 115 P.2d 455; Otis v. City of Los Angeles, supra, 52 Cal.App.2d at page 613, 126 P.2d at page 954. As affecting the challenged reasonableness of the action of the City Council in granting respondent Gregg a Conditional Use Permit, there was testimony that his property is located in an area which has long been a rock and gravel producing section. That within a radius of a mile and a quarter from the subject property are located fifteen gravel pits, some active and others idle. That there is a public need for the rock and sand located on this particular property, and that it would be compatible with the greatest public service and the least private injury to expand the M-3 or unrestricted use zone to include all of the land in an area in which the Gregg property is located. There is also evidence in the record that the highest and best use of the subject property is for the excavation of rock, sand and gravel, and that said land has little value for any other use; that if the Gregg plant were forced to shut down for lack of materials, it would be impossible to furnish the City of Los Angeles with its requirements of rock and sand; that the Gregg plant supplies approximately 30% of all of the rock and gravel mined from the San Fernando area, and that if this plant were shut down, there are no other plant facilities at this time available to supply the resulting deficit; that the Gregg plant is the most modern plant in the San Fernando Valley; that nowhere in the United States have conditions been attached to the operation of rock and gravel properties as stringent as those attached by the City Council to the operations in the subject area, and that the operation of the subject property under the permit will constitute a reasonable and necessary method of operation usually and ordinarily conducted by rock plants.

The transcript contains volume after volume of additional testimony and evidence showing the public necessity and the reasonableness of the City Council's action in granting the permit.

[21, 22] In addition, there is the fact that by stipulation the trial judge spent two whole days personally viewing the entire area, including all of the rock plants, and also including all of the properties owned by plaintiffs herein. It is well settled that when a trial judge by stipulation of the parties, as here, views the territory involved in an action, his observations on such a tour become evidence in the case, Safeway Stores, Inc., v. City Council, 86 Cal.App.2d 277, 94 P.2d 720, and that what is then seen may be used alone or with other evidence to support the findings, Neel v. Mannings, Inc., 19 Cal.2d 647, 122 P.2d 576; 24 Cal.Jur., p. 921; Gularte v. Martins, 65 Cal.App.2d 817, 151 P.2d 570; see also collection of authorities cited in McBaine Calif. Evidence Manual 1948 Supplement, p. 32. It therefore, follows that independent evidence consisting of the view by the court must be considered as having supported the reasonableness of the City Council's act in granting the Conditional Use Permit, especially when considered in connection with the vast volume of testimony in support thereof as disclosed by the transcript.

As a further ground for reversal, appellants assert that the permit granted respondent Gregg is void, "because the City is estopped in the circumstances of this case, to thus impair the personal and property rights" of appellants.

[23-25] As we have heretofore pointed out, no person has a vested right in the exercise of the police power and exercise of the same may not be limited by private contract or restrictive covenants. Acker v. Baldwin, supra, 18 Cal.2d at page 345, 115 P.2d at page 455. Private agreements are not to be considered when determining the validity of a zoning ordinance. O'Rourke v. Teeters, 63 Cal.App.2d 349, 352, 146 P.2d 983. Appellants' contention that an estoppel arises because, prior to the year 1946, the Gregg and surrounding lands had been zoned for residential purposes is equally unavailing. The existence of such zoning ordinance gave appellants no vested right which woud operate to prevent defendant city from subsequently amending the ordinance. And, as a matter of fact, the Conditional Use Permit granted respondent Gregg was not the result of an amendment to the ordinance, but was in conformity with the existing provisions thereof. Appellants place great reliance upon the case of Times-Mirror Co. v. Superior Court of City of Los Angeles, 3 Cal.2d 309, 44 P.2d 547, but the facts of that case are clearly

distinguishable from those in the case at bar. It is only in exceptional cases that estoppels against public authority may be invoked. And the cases wherein the doctrine was applied all involved most unusual sets of facts. As was said by this court in Donovan v. [Municipal Court of] City of Santa Monica, 88 Cal.App.2d 386, 199 P.2d 51, 56: "There is no doubt that the general rule is that estoppel will not be invoked against the government or its agencies except in rare and unusual circumstances. See cases collected in 19 Am.Jur., p. 818, sec. 166." We find no analogy between the facts in the case now engaging our attention and those cases wherein the doctrine of estoppel has been invoked against the municipality.

Appellants' next contention is that in a suit in equity such as the one now before us the reasonableness of the act done presents a judicial, not a legislative question, and that it becomes the duty of the court to hear and determine that question upon its own record of individual investigation and upon its own responsibility. We deem it unnecessary to discuss this claim because that is exactly what the court did in the instant case. It did not limit its investigation to the record before the City Council. True, the court found that the action of the City Council in granting the Conditional Use Permit was neither arbitrary, capricious nor unreasonable, but in arriving at that conclusion the court did not accept the record before the City Council as final and conclusive. In determining the legality and reasonableness of the Council's action, as well as the question of whether needless oppression was wrought by such action and whether constitutional rights were thereby invaded, the court not only heard over 5,000 pages of testimony and considered 288 separate exhibits, but in addition, made its own individual investigation by viewing the subject property and surrounding territory for two days, which, as hereinbefore indicated, in itself constitutes a species of evidence. Manifestly, the determination of the issues in this case was made on the court's "investigation upon its own responsibility," and was not confined to a consideration solely of the record before the City Council.

[26] Appellants next contend that in this action in equity they are entited to an injunction to prevent a threatened interference with their constitutional right to own and enjoy their property. Although not specifically stated in appellants' briefs, an examination of the pleadings coupled with the arguments advanced in their briefs leads us to the conclusion that appellants seek to enjoin respondent Gregg's operations as an anticipated nuisance. When viewed in the light of the conditions imposed by the City Council in granting the Conditional Use Permit and the additional conditions imposed by the trial court in its judgment, we are persuaded that the conduct of respondent Gregg's operations, subject to the foregoing conditions imposed thereon, justified the conclusion of the trial court that the same would not result in any substantial injury to appellants nor to the ownership or enjoyment of their property.

[27, 28] Where, as here, the operations in question could not be characterized as a nuisance per se, the court was justified in following a well established rule of law which provides that under such circumstances the decree should not enjoin more than the specific thing which might constitute a nuisance, as appears from the requirements of the particular case. Pomeroy's Equity Juris., 2d Ed., secs. 1945, 1948. It is now established law in this state that the business of excavating rock and gravel by the owner from lands belonging to him is a lawful and useful occupation, and the regulation thereof should go no further than to control those particular features of the operations which might result in substantial injury to adjoining property or to persons residing or owning property in the near vicinity of the land upon which the operations are being conducted. People v. Hawley, 207 Cal. 395, 412, 279 P. 136; In re Smith, 143 Cal. 368, 371, 77 P. 180; In re Kelso, 147 Cal. 609, 613, 82 P. 241, 2 L.R.A.,N.S., 796, 109 Am.St.Rep. 178; Byers v. Colonial Irrigation Co., 134 Cal. 553, 555, 66 P. 732; Vowinckel v. N. Clark & Sons, 216 Cal. 156, 162, 13 P.2d 733.

There is substantial evidence in the record herein that respondent Gregg's plant is the most modern in the San Fernando Valley and that the operation of the plant under the restrictive terms of the Conditional Use Permit and the judgment will constitute a reasonable method of operation in the manner usually and ordinarily governing the operation of rock plants. The court was therefore justified in giving heed to the aforesaid rule, that in proper cases it will not enjoin the conduct of a defendant's entire business where such business is not a nuisance per se if less measure of restriction will afford plaintiffs the relief to which they may be entitled.

Appellants' contention that the court in the present action in equity was clothed with jurisdiction to absolutely prohibit respondent Gregg's operations is further answered by the provisions of section 731a of the Code of Civil Procedure reading as follows:

"731a. (Manufacturing or commercial operations in established zones not enjoinable nor deemed nuisance: Operation producing offensive odors.) Whenever any city, city and county, or county shall have established zones or districts under authority of law wherein certain manufacturing or commercial uses are expressly permitted, no person or persons, firm or corporation shall be enjoined or restrained by the injunctive process from the reasonable and necessary operation in any such industrial or commercial zone of any use expressly permitted therein, nor shall such use be deemed a nuisance without evidence of the employment of unnecessary and injurious methods of operation. * * *"

[29] While respondent Gregg was not operating in a zone wherein "manufacturing or commercial uses are expressly permitted," he was operating in a zone in which the ordinance authorized the issuance of conditional use permits, and the evidence adduced at the trial brings this case within the provisions of section 731a of the Code of Civil Procedure above quoted. There being no evidence that respondent Gregg employed, or under the restrictions of the permit and judgment, would employ unnecessary and injurious methods of operation, the trial court was not authorized to grant appellants injunctive relief. McNeill v. Redington, 67 Cal.App.2d 315, 318, 154 P.2d 428; Northside Property Owners Ass'n v. Hillside Memorial Park, 70 Cal.App.2d 609, 617, 618, 161 P.2d 618.

[30] Furthermore, section 3482 of the Civil Code reads as follows:

"Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance."

Ordinance No. 95,500, having been duly enacted by the City of Los Angeles within the scope of the authority conferred upon it, has the same force within its corporate limits as a statute passed by the legislature has throughout the state. Monterey Club v. Superior Court of Los Angeles County, 48 Cal.App.2d 131, 147, 119 P.2d 349; Ex Parte Roach, 104 Cal. 272, 274, 37 P. 1044. As heretofore pointed out, respondent Gregg was operating pursuant to a permit authorized by the city ordinance.

Appellants challenge forty-six of the sixty-seven numbered paragraphs of Findings of Fact, declaring in that regard that "There is no evidence in this record which supports any of the Findings of Fact here challenged. Wherein a so-called Finding of Fact, is a conclusion of law, such conclusion is without any support in legal authority."

[31, 32] It would unduly prolong this already lengthy opinion to discuss seriatim the challenged findings and the objections made thereto. Suffice it to say that the affirmative findings are responsive to the issues framed and supported by substantial evidence, while the negative findings are justified by the rule that where no evidence is introduced in support of an issue findings should be made thereon against the party who has the burden of proof. Haney v. Kinevan, 73 Cal.App.2d 343, 344, 166 P.2d 361. The rule is elementary that when an attack is made upon findings or a judgment upon the ground that they or it are or is not supported by the evidence the power of reviewing courts begins and ends with a determination of whether there is any substantial evidence contradicted or uncontradicted, which will sustain the findings made or the judgment rendered. An examination of the findings herein precludes a reversal of the judgment because we cannot say from a review of the record that, accepting the full force of the evi-

dence adduced, together with every inference favorable to respondents which may be drawn therefrom, and excluding all evidence in conflict therewith, it still appears that the law precludes the challenged finding or findings made.

We have noted the other contentions made on this appeal, one by appellants that actual and punitive damages may be recovered in this form of action, and the other by respondents that appellants case is moot by reason of the adoption of an ordinance by respondent City on January 5, 1948, amending sections 12.20 and 12.24 of the Los Angeles Municipal Code, of which Municipal Code ordinance No. 90,500 (here under consideration) is a part. In view of the foregoing conclusions at which we have arrived, we deem it unnecessary to discuss them.

For the foregoing reasons the judgment is affirmed.

YORK, P. J., and DORAN, J., concur.

* * *

90 Cal.App.2d 436

In re PEARSON'S ESTATE.

Civ. 7516.

Sac. 5928.

District Court of Appeal
Third District, California.
March 2, 1949.

1. Executors and administrators 🔑289
Taxation 🔑902, 903

The state inheritance tax becomes due and payable at the date of transferor's death and is a lien upon the interest transferred and executor is required to collect such tax from transferee and not to deliver property until he deducts or collects such tax. Revenue and Taxation Code, §§ 13401 et seq., 14102, 14121, 14301.

2. Internal revenue 🔑1741

The federal estate tax is due and payable 15 months after decedent's death and is a lien upon the gross estate of decedent from the date of decedent's death. 26 U.S.C.A. §§ 822, 827.

3. Internal revenue 🔑1732
Wills 🔑736

The executor is required by Probate Code to prorate the federal estate tax among the various distributees who have received property contributing to liability for such tax, unless otherwise directed by will. Probate Code, § 970; 26 U.S.C.A. § 822.

4. Appeal and error 🔑1008(3)

Where trial court has interpreted a will and such interpretation appears to be reasonable and consistent with intent of testator, reviewing court will not substitute a different conclusion, even though it may be as clearly tenable as the one attacked, but since interpretation of a will presents a question of law, reviewing court is not bound by conclusion of trial court.

5. Appeal and error 🔑1008(3)

Where trial court's interpretation of will does not appear reasonable and consistent with intent of testator, appellate court must interpret the document independently of the interpretation placed upon it by trial court.

6. Wills 🔑469

Provision in sub-paragraph of will devising realty that such realty should be free and clear of all liens applied only to such realty and not to personal property and money bequeathed to the same beneficiary in succeeding sub-paragraphs and codicils to will.

7. Wills 🔑455

That a phrase used in will is not as clear or precise as it could be should not be permitted to defeat the clear intent of testator.

8. Constitutional law 🔑229(1)
Wills 🔑736

State statute directing executor to prorate federal estate tax among the distributees who have received property contributing to liability for such tax unless otherwise directed by will does not violate constitutional requirement of geographic uniformity of taxation or deny equal protection of the laws in violation of 14th

Amendment. Probate Code, § 970; 26 U.S.C.A. § 822; U.S.C.A.Const. Amend. 14.

9. Internal revenue ⟹1746
Wills ⟹736

Under will devising real and personal property to same beneficiary and providing that such realty should be free and clear of all liens and that any liens existing at time of testator's death should be paid and discharged before payment or distribution of any other bequest or devises, beneficiary was entitled to receive realty free and clear of all liens at time of testator's death, including liens of both federal estate and state inheritance taxes, and value of such realty could not be considered in determining amount of state inheritance and federal estate taxes deductible from share of estate distributable to such beneficiary. Revenue and Taxation Code, §§ 13401 et seq., 14102, 14121, 14301; Probate Code, § 970; 26 U.S.C.A. §§ 822, 827.

◆

Appeal from Superior Court, Yuba County; Warren Steel, Judge.

Accounting proceeding in the matter of the estate of Joseph Upham Pearson, also known as J. U. Pearson, deceased, by Pearson Henderson, executor of the last will and testament of Joseph Upham Pearson, against Helen Hansen Sutter Yuba Investment Company, a corporation and others, beneficiaries. From a decree settling the first account of the executor and from an order for partial distribution, Helen Hansen appeals.

Order annulled and cause remanded for entry of an order in accordance with opinion.

Manwell & Manwell, of Marysville, for appellant.

Rich, Weis, Carlin & Fuidge, of Marysville, for respondent.

PEEK, Justice.

This is an appeal from the decree settling the first account of the executor of the last will and testament of Joseph Upham Pearson, deceased, and from the order for partial distribution. Particularly the appellant attacks that portion authorizing the executor to deduct the amount of the inheritance tax due the State of California, as well as the pro rata share of the federal estate tax from the property which the executor proposed to distribute to said appellant Helen Hansen, under the terms of the will.

The decedent by sub-paragraph (a) of Paragraph Third of his will dated December 10, 1941, devised to appellant certain real property comprising his home and residence with the following provision, to wit: "Said real property and premises herewith devised shall be free and clear of all liens of any kind and character and description, and if there are any such liens at the time of my death, the same shall be first paid and discharged by my executor before the payment or distribution of any other bequests and devises hereinafter provided."

In sub-paragraph (b) of Paragraph Third the testator also devised and bequeathed to appellant all of his jewelry wherever situated and all of the furniture and furnishings and personal property located in his said home, and in sub-paragraph (c) of Paragraph Third he gave to her an interest in certain sums due him under a lease and contract of sale of certain lands. In a subsequent codicil dated January 23, 1946, he modified this latter bequest, and by a second codicil dated approximately eight months thereafter the testator bequeathed appellant the sum of $15,000 in cash in lieu of the sum provided in the previous codicil. Nowhere in said sub-paragraphs (b) or (c) or in either of said codicils is there any provision similar to that contained in sub-paragraph (a) of Paragraph Third.

Appellant contends that the language appearing in the will that "said real property and premises herewith devised shall be free and clear of all liens of any kind and character and description" evidences an intent of the testator that she should receive all of the property devised to her without deduction of the state inheritance tax or its pro rata share of the federal estate tax. In answer thereto respondent in effect argues that at most the provision in question could only be applicable to liens against the real property in existence at the time of the testator's death, such as mortgage liens or other evidence of indebtedness but not the liens, if any, attaching by virtue of federal estate or state inheritance taxes.

[1-3] The inheritance tax provided for in Section 13401 et seq. of the Revenue and Taxation Code becomes due and payable at "the date" of the transferor's death (Section 14102) and is declared to be a lien upon the interest transferred (Section 14301). Under Section 14121 the executor is directed to collect the tax from the transferee and said section further provides that he shall not deliver the property until he deducts or collects the tax. The applicable federal statute (26 U.S.C.A. § 822) provides that the federal estate tax is due and payable fifteen months after the decedent's death and is a lien upon the gross estate of the decedent (26 U.S.C.A. § 827) which lien, by judicial interpretation, Detroit Bank v. United States, 317 U.S. 329, 63 S.Ct. 297, 87 L.Ed. 304, likewise attaches at "the date" of the decedent's death. Section 970 of the Probate Code which was added in 1943 directs the executor to pro rate the federal estate tax among the various distributees who have received property contributing to liability for that tax unless otherwise directed by the will of the testator.

[4, 5] It may be said that where a trial court has interpreted a will and such an interpretation appears to be a reasonable and consistent with the intent of the testator, a reviewing court will not substitute a different conclusion even though it may be as clearly tenable as the one attacked, In re Estate of Sullivan, 86 Cal.App.2d 890, 195 P.2d 894, but as the interpretation of a will presents a question of law a reviewing court is not bound by the conclusion of the trial court. In re Estate of Welch, 83 Cal.App.2d 391, 188 P.2d 797. Thus, where the converse of such a situation obtains it becomes the duty of an appellate court to interpret the document independently of the construction placed upon it by the trial court. In re Estate of Norris, 78 Cal.App.2d 152, 177 P.2d 299.

[6] Turning to the said provision of the will it seems clear that the testator's intent was that appellant should receive the real property free and clear of all liens, since the provision by its terms is applicable only to the devise of the real property and by its context is not applicable to the bequests of personal property. To this extent we agree with respondent's contention but we cannot agree with his further argument that the liens created by the applicable taxing statutes are not such liens as were contemplated by the testator.

[7] Neither the phrase "at the time of my death" as stated in the will, nor "at the date of death" as provided in the federal and state taxing statutes, appear to be wholly irreconcilable to one another. Possibly the phrase as used in the will is neither as clear nor as precise as it could be. However, that should not be allowed to defeat what appears to this court to have been the clear intent of the testator—that the petitioner herein should receive his home free and clear of all liens at the time of his death which, in accordance with such interpretation, would include the liens of both federal estate and state inheritance taxes as well as other evidences of incumbrance.

[8] Appellant lastly attacks section 970 of the Probate Code as an attempt by the legislature to place the burden of the federal estate tax upon the beneficiaries and thus make it an inheritance tax which appellant contends violates the Fourteenth Amendment to the Constitution, stating that for the State of California to thrust a federal tax upon the beneficiaries of an estate where other states do not, is neither uniform nor fair to the citizens of California. With this contention we cannot agree. As was said in Security-First National Bank v. Wellslager, 88 Cal.App.2d 210, 198 P.2d 700, 702: "Similar statutes have been enacted in other states. Their purpose is to apportion equitably the burden of the tax so that it is borne commensurately by those whose gifts contribute to the tax burden and there is eliminated from such burden all whose legacies do not in any way create or add to the tax. In re Harvey's Estate, 350 Pa. 53, 38 A.2d 262. The right of the states to enact legislation

apportioning the estate tax burden has been upheld. Riggs v. Del Drago, 317 U.S. 95, 97, 98, 63 S.Ct. 109, 87 L.Ed. 106, 111, 142 A.L.R. 1131."

In referring to practically identical apportionment legislation in the state of New York the U. S. Supreme Court in the Riggs case, supra, which was relied upon in the Security-First National Bank case, supra, stated that [317 U.S. 95, 63 S.Ct. 112] "Nor does the fact that the ultimate incidence of the federal estate tax is governed by state law violate the requirement of geographical uniformity. Cf. Phillips v. Commissioner [of Internal Revenue], 283 U.S. 589, 602, 51 S.Ct. 608, 613, 75 L.Ed. 1289, [1300]."

[9] From our interpretation of the will as stated above it necessarily follows that in determining the amount of state inheritance and federal estate taxes which the executor was authorized to deduct from the share of the estate distributed to appellant, the value of the real property so devised cannot be considered.

The order herein attacked is annulled and the cause is remanded to the trial court to enter a new and different order in accordance with the views herein expressed.

ADAMS, P. J., and THOMPSON, J., concur.

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90 Cal.App.2d 386

HAPPOLDT v. GUARDIAN LIFE INS. CO. OF AMERICA.

Civ. 16380.

District Court of Appeal, Second District,
Division 3, California.
Feb. 28, 1949.

1. Insurance 🔑665(5)

In action on policy providing benefits for death resulting directly from bodily injury through accidental means, evidence was sufficient to support finding that broken hip rather than natural diseases was proximate cause of death.

2. Trial 🔑253(5)

In action on policy providing benefits for death resulting directly from bodily injury through accidental means, instructions that pre-existing disease would not relieve insurer from liability if accident was proximate cause of death and that recovery could be had even though diseased condition appeared to actually contribute to cause of death if accident set in progress chain of events leading directly to death were not objectionable as taking from jury fact issue as to whether death resulted directly from accidental means.

3. Insurance 🔑466

Under policy providing benefits for death resulting directly from bodily injury resulting through accidental means, pre-existing disease would not relieve insurer from liability if accident were proximate cause of death; and beneficiary could recover even though diseased condition appeared actually to contribute to cause of death if accident set in progress a chain of events leading directly to death.

4. Appeal and error 🔑1033(5)

Where jury found for beneficiary in action on policy providing benefits for death from accident, instructions correctly directing that pre-existing disease would not relieve insurer from liability if accident was proximate cause of death and that recovery could be had even though diseased condition appeared to actually contribute to cause of death if accident set in progress chain of events leading directly to death, and instructions incorrectly directing that there could be no recovery if death was caused partly by disease and partly by accidental injury were not prejudicially conflicting, since second group was more favorable than insurer could demand.

5. Trial 🔑260(3)

Refusal to give insurer's requested instruction that beneficiary in action on life policy providing benefits for death resulting directly from accident had burden of proving by preponderance of evidence that death did not result directly or indirectly from illness or disease of any kind was not ground for complaint in view that instructions given by court adequately instructed jury on burden of proof and preponderance of evidence.

6. Constitutional law 🔑154(3)

Instruction in action on policy written in 1925 and 1926 providing benefits for death resulting directly from accident and expressly excluding death caused directly or indirectly by disease, based on 1945 decision permitting beneficiary to recover on proving that accident was proximate cause of death was not objectionable as impairing obligation of insurance contract in view of case law of state at time contract was made. U.S.C.A.Const. Amend. 14.

7. Constitutional law 🔑278(1)

Where widow brought action on policy written in 1925 and 1926 providing benefits for death resulting directly from accident and expressly excluding death caused directly or indirectly by disease, instruction based on 1945 decision, charging that plaintiff was required to prove that accident was proximate cause of death was not objectionable as depriving insurer of property without due process of law in view of case law of state existing at time contract was made. U.S.C.A.Const. Amend. 14.

8. Appeal and error 🔑925(3)

Conclusion of trial judge in determining whether alleged misconduct of counsel had any prejudicial effect upon jury should not be disturbed on appeal unless under all circumstances appearing it is plainly wrong.

9. Trial 🔑305

Exchange of bantering remarks between juror and attorney in corridor adjoining court room during progress of trial when juror stated that attorney resembled a certain motion picture actor was not basis for mistrial on ground of "misconduct".

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Misconduct".

10. Judgment 🔑223

If as a matter of law plaintiff is entitled to recover interest from a particular date prior to a verdict, trial judge is empowered to include in judgment entered upon the verdict the provision for such interest. Civ.Code, § 3287.

11. Interest 🔑39(1)

If right to recover a certain amount of money is vested in a person upon a particular day, he is entitled to recover interest thereon from that day. Civ.Code, § 3287.

12. Insurance 🔑668(14)
Interest 🔑68

In action on policy providing benefits for death from accident, and stating that benefit would become payable if policy became a claim by death of insured, and due proof was furnished to insurer at its home office that death resulted from accidental means, whether due proof was furnished by widow shortly after husband's death, and whether interest from that date should be included in verdict was for the jury. Civ.Code, § 3287.

◆

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Gertrude E. Happoldt against the Guardian Life Insurance Company of America, a corporation, on an additional agreement contained in a life policy, for indemnity benefits for death from accident. From the judgment, and from the judgment as amended, and from an order granting a motion to amend the judgment, defendant appeals.

Judgment as originally entered affirmed; amendment of judgment stricken; and minute order granting motion to amend vacated with directions.

Adams, Duque & Hazeltine and A. Andrew Hauk, all of Los Angeles, for appellant.

Henry C. Rohr, Ben C. Cohen and Henry A. Plattner, all of Los Angeles, for respondent.

WOOD, Justice.

On October 31, 1925, the defendant issued its policy of life insurance in the sum of $50,000 on the life of John H. Happoldt. On January 20, 1926, the defendant issued its additional agreement for indemnity benefit of $25,000 for death from accident, which agreement was attached, as a rider, to said policy of life insurance. The plaintiff, who is the widow of the insured, is the beneficiary named in the policy and in the additional agreement. The insured died on December 12, 1945. All premiums had been paid. The defendant paid the $50,000. The agreement, or rider, for additional indemnity benefit for death from accident provided in part that if "death resulted directly, independently and exclusively of all other causes from bodily injuries effected solely through external, violent and accidental means, of which * * * there is as evidence a visible contusion or wound on the exterior of the body, and that such death occurred within 90 days from the date of such bodily injuries, then the sum of Twenty-five Thousand Dollars will become payable under this agreement in addition to and together with the face amount of said policy. * * *" It was also provided therein that said additional indemnity should not be payable if the insured's death resulted "directly or indirectly from bodily or mental infirmity * * * or illness or disease of any kind."

This is an action to recover the additional $25,000. In a jury trial, a verdict for $25,000 was returned on June 30, 1947, and a judgment for that amount was entered on July 1, 1947. On July 31, 1947, plaintiff filed a notice of motion to amend said judgment to include interest on the $25,000 at the rate of 7 per cent per annum from February 8, 1946. The motion was granted on August 13, 1947, and the judgment which had been entered was then amended accordingly. Defendant appeals from the judgment entered on July 1st, from the judgment as amended on August 13th, and from the order granting plaintiff's motion to so amend the judgment.

Appellant contends that the evidence was insufficient to support the judgment. Its argument is that the insured's death did not "result directly, independently and exclusively of all other causes from bodily injuries effected solely through external, violent and accidental means"; and that his death resulted from bodily infirmity, illness and disease.

At the time of the issuance of the policy and rider, and thereafter until July, 1928, the insured was employed by a clothing company in New York. At said last mentioned time, the insured, having developed asthma, discontinued his work and thereafter did not engage in any occupation. The insured and plaintiff became residents of Los Angeles in 1930. Soon thereafter, in 1930, the insured's claim for total and permanent disability benefits under the insurance policy was approved, and from that date until the death of the insured the defendant paid him disability benefits in the sum of approximately $65,000. He continued to be afflicted with asthma from 1930 until his death. Every morning it was necessary for him to cough until he dislodged "an oyster of tough phlegm." He went alone to various places in the city, and he often went, over a period of 16 years, on a bus to Gardena where he played poker, and he often attended motion picture shows. From 1937 until about three weeks before his death he was under the medical care of Dr. Ruth, who saw him at irregular intervals—at times there were intervals of six months when he did not see him. On October 26, 1945, the plaintiff sent the insured to a sanitarium for rest because he was exhausted nervously. She visited him at the sanitarium every other day, and at all such visits, until November 15th, he was fully clothed and he walked without assistance. On November 15th, when she visited him, she found him sitting on the edge of his bed, and she noticed that he could not stand up. The next morning she had him removed from the sanitarium to their home. Dr. Ruth then examined him and found that he had a fractured right femur, with swelling and discoloration over his right hip. Then the insured was taken to the general hospital, and Dr. Ruth did not see him again. On November 19th an operation was performed upon insured's right hip, and the fracture was reduced by inserting a "Z nail" across the fracture. He died 23 days later, on December 12, 1945, at the age of 67 years.

The general hospital records relative to the insured, which were received in evidence, show as follows: that he was admitted to the hospital on November 16, 1945; five days prior thereto he had fallen and injured his right hip; he had had asthma for 16 years; at the time of entering the hospital his blood pressure was 170 over 100, his heart was moderately enlarged, his liver was "palpable two fingers down to the right"; on November 19th an open reduction of the fracture of the right hip was performed, and the "patient left the table in fair condition"; on December 3, 1945, he became comatose; on December 7th, "Cond is same. prognosis poor."; on December 10th, "prognosis poor 2 days ago, Seen by two medics resident who said patient was terminal as far as two days ago," and "patient appears to be terminal Dr. Tompkins called relative to transfer to medical ward; This case is no longer an ortho. problem. Advise: (1) transfer to a medical ward."; a report of December 10th stated "T 103.4 * * * improvement of lung path. Widespread bronchopneumonia on left. No evidence of pulmonary edema. Liver percusses down 3 F. but is a chronic alcoholic. No venous distension or peripheral edema. Hip is now healed. Problem is no longer ortho."; and a report of December 12, 1945, at 11:00 (a. m.) states "end near," and at 4:45 (p. m.) states, "patient died." Those hospital records also show that following the operation the insured was given three grains of digitalis three times daily; that, four days after the operation, insured's blood pressure was 200 over 120, and that the giving of digitalis was then discontinued. Those records also show that the medical summary, made after death, was as follows: heart failure due to broncho-pneumonia and congestive failure due to arteriosclerotic heart disease; coronary sclerosis; chronic myocardial degeneration; and the complications were: fracture of the right hip; emphysema.

An autopsy was performed on December 13, 1945, by Dr. Myers, an autopsy surgeon in the office of the coroner of Los Angeles County. His autopsy report states that the immediate cause of death was broncho-pneumonia and emphysema; and that other conditions were coronary sclerosis, chronic myocardial degeneration and recent fracture of the right hip. His report also states that the heart was slightly enlarged, and the liver was enlarged "about 3 fingerbreadths below the costal margin and contains much fat." The death certificate signed by the coroner stated that the immediate cause of death was broncho-pneumonia and emphysema.

An autopsy was performed on December 15, 1945, by Dr. Butt, who is the chief pathologist of the general hospital, but the autopsy was not made in his official capacity—it was made under private employment by the defendant. That report states that his anatomical diagnosis, based on the autopsy performed by him, was as follows: "1. Emphysema with moderate right cardiac hypertrophy and decompensation. 2. Bronchitis, chronic. 3. Bronchitis, acute. 4. Arteriosclerosis, local, coronary arteries with scars in the heart muscle. 5. Arteriosclerosis, local, aorta. 6. Pleurisy, chronic, adhesive. 7. Operation, open reduction of fracture of the right hip, healed. 8. Lipoma, subcutaneous tissue, neck." Dr. Butt testified that the cause of death was heart failure; that he doubted that there was any connection between the insured's death and the fracture of his leg; and that, basing his opinion upon the evidences of cardiac failure, he was of the opinion in this particular case that cardiac failure "would have produced death regardless of * * * what happened to the man in the interim." He also testified that the insured had a nutmeg liver, and that he did not think the condition of the liver could cause death but the condition was an indication of failing heart; and the heart, liver, and spleen were about normal size.

Plaintiff contended at the trial that the accidental fall, and the resulting broken hip suffered by the insured, set in motion a chain of events, namely, the surgery, the pneumonia, and the cardiac failure, which eventually caused death. Appellant contended at the trial that death was not the result of the injury, but was the result of diseases known as bronchial asthma and heart disease.

Four doctors of medicine, called as witnesses by plaintiff, gave testimony in support of plaintiff's contentions, and four doctors of medicine, called as witnesses by defendant, testified in support of defendant's contentions.

Dr. Ruth, above referred to as the personal physician of the insured from 1937 until the insured entered the general hospital, was called as a witness by plaintiff. He testified that in 1937 the insured was suffering from a moderately enlarged heart, rapid and irregular heart beat, and bronchial asthma of cardiac origin. In answer to a hypothetical question, based upon the autopsy report of the coroner, the hospital records, and upon assumed facts within the evidence above mentioned, regarding the insured's activities and general health prior to his fall, Dr. Ruth testified that he would say definitely there was a connection between the insured's hip injury and his death. He also testified that he had observed the insured for a period of seven years, and he had always recovered from the asthmatic attacks; the insured had had a fractured pelvis about two years previously and he recovered from that without difficulty; and in his opinion the insured might have continued to live if the hip injury here involved had not occurred.

Dr. LaJoie, called as a witness by plaintiff, testified that in September, 1945, when Dr. Ruth was not available, he was called to the insured's home where he found the insured in a semi-comatose condition which apparently resulted from an overdose of sleeping tablets. In answer to a hypothetical question, based upon the autopsy report of the coroner, the hospital records, and assumed facts within the evidence above mentioned, Dr. LaJoie testified that in his opinion "the precipitating cause of death was the fracture of the hip, which in itself started events * * * like the fracture of the hip, the surgery, and the pneumonia which set in after the surgery and then the cardiac failure which ensued." He testified, on cross-examination, that the fracture alone did not cause the death, but it was the complications that arose after the fracture that caused the death—a combination of the events of pneumonia, putting him to bed, lowering and enfeebling his circulation, and finally cardiac failure; that in his opinion the pre-existing cardiac condition could contribute to the death.

Dr. Brem, called as a witness by plaintiff, testified, in answer to a hypothetical question, based upon the autopsy report of the coroner, the hospital records, and assumed facts within the evidence above mentioned, as follows: "Well, I would say that—I have no doubt that the primary cause of death was certainly the injury [the fractured hip] sustained by this man. The immediate cause of death was complications arising from this, to be sure; surgery, bronchial pneumonia, and eventually death. None of these influencing things would have happened had it not—had not this person been injured in the first place, and it is my conviction; I feel sure that there was nothing in this man's body, according to the autopsy description, given by the coroner's surgeon, to indicate that he had anything at all that predisposed him toward —to a sudden and unexpected death." On cross-examination he testified that the condition of chronic asthma would contribute to the death; that the coroner's autopsy report was not a very exhaustive report but was sketchy, and he had to assume that everything which was not mentioned in it was normal; and if an exhaustive autopsy found to the contrary he very likely would be guided by it. On redirect examination, after having studied the autopsy report made by Dr. Butt, he testified that it was a complete report but it did not alter his conclusions as to the cause of the insured's death; that after reading Dr. Butt's report he was still of the opinion the fracture of the hip had a direct connection with the death of the insured; and "I still believe even more firmly than ever, if possible, that the fracture was the incident that started all of these things that eventually terminated in this man's death."

Dr. Lasky, called as a witness by plaintiff, testified, in answer to a hypothetical question, based upon the coroner's autopsy report, the hospital records, and assumed facts within the evidence above mentioned, that the insured died as a result of the fracture of his hip; that "There is no doubt in my mind but what this man suffered an injury which introduced a series of events * * * which ended in death." On cross-examination he testified that the cause of death was bronchiolitis and bronchial pneumonia, which were secondary to the trauma, the accident.

Dr. Butt, called as a witness on behalf of defendant, testified that the "main operating cause of death in this case was heart failure"; that in his opinion, right side hypertrophy of his heart and chronic bronchitis were the main operating causes of the death of the insured; that (contrary to the finding of the coroner's autopsy surgeon) he found no evidence of bronchial pneumonia; and that the insured's major condition was coronary disease.

Dr. Ruddock, called as a witness by defendant, testified, in answer to a hypothetical question, that the proximate cause of death was "chronic arteriosclerotic heart disease with failure."

Dr. Newbarr, called as a witness by defendant, testified, in answer to a hypothetical question, that the proximate cause of death was arteriosclerotic heart disease; there is nothing in the coroner's autopsy report which would substantiate a conclusion that bronchial pneumonia was the cause of death; and the accident could not have been a primary cause of the death but it could have contributed to it.

Dr. Cefalu, called as a witness by defendant, testified, in answer to a hypothetical question, that the insured's death was caused by a myocardial degeneration due to arteriosclerotic changes; and that in his opinion bronchial pneumonia did not cause the death.

[1] The testimony of the four doctors called as witnesses by the plaintiff, if believed, was sufficient to support a finding that the accident was the proximate cause of death.

Appellant further contends that the court erred in giving certain instructions requested by plaintiff. It argues that those instructions took from the consideration of the jury the two material issues in the case, namely, whether death resulted directly from accidental means, and whether death resulted directly from disease. It also argues that those instructions made issues of law of those issues of fact; and that by said instructions the trial court directed the jury to return a verdict for plaintiff if it found that disease was not a proximate cause of death, regardless of whether it found that injury by accidental means was the proximate cause of death. The instructions so referred to are as follows:

Instruction 26 stated, in part: "* * * that Mr. Happoldt's death did not result directly or indirectly from bodily or mental infirmity * * * or disease of any kind, so as to bar recovery under this policy, if his death was the proximate result of a fractured hip sustained through accidental means * * * which aggravated or awakened a previously existing bodily infirmity or dormant ailment * * * from which death resulted."

Instruction 29 was as follows: "If you find that the accident, if any, operating upon an unhealthy body causes injury putting in motion a chain of events which can be traced to the accidental injury, the accident may be the proximate cause of death. In other words, a recovery may be had even though a diseased or infirm condition appears to actually contribute to the cause of death, if the accident sets in progress the chain of events leading directly to death, or if it is the prime or moving cause."

Instruction 31 stated in part: "You have been elsewhere instructed that if the death of Mr. Happoldt was proximately caused by a diseased condition of the heart or lungs which pre-existed and continued after the fracture of his hip, your verdict must be for the defendant. However, in this connection, you are further instructed that notwithstanding the fact that Mr. Happoldt, before he suffered a fracture of his hip, may have had a diseased condition of the heart, if you so find, or chronic asthma, and that such condition was a remote and not a proximate cause of his death, or that the accident in which he sustained such fractured hip acted upon such diseased condition so as to set in motion a chain of events which led to and proximately caused Mr. Happoldt's death, then in either of those cases, your verdict must be in favor of the plaintiff, providing, of course, you also find that the fractured hip was caused by accidental means."

Instruction 32 stated in part: "If an injury to a person effected through accidental means proximately causes to be set in progress disease, infection or other conditions which in natural and continuous sequence operate directly to cause death, the death is considered to have resulted from bodily injury effected through accidental means. This is true, although at the time of the injury the person is so weakened and debilitated by some pre-existing infirmity or disease that he is less able to withstand the effect of the injury and the other conditions which are the proximate result of the injury. Under such circumstances if the pre-existing infirmity does not operate directly to cause the death, but merely renders the person less able to combat the disease or conditions which are the natural and proximate result of the injury itself, the pre-existing infirmity is merely a condition, and the accidental injury is the proximate cause of death."

Instruction 33 stated in part "* * * under the language of the policy in this case, a recovery may be had by the plaintiff if you are satisfied from a preponderance of the evidence that even though the decedent was afflicted with a pre-existing disease prior to the accident but that the accident set in motion the events that resulted in his death, such accident would be the proximate cause of his death resulting directly and independently and exclusively from all other causes from bodily injuries effected solely through * * * accidental means, but excluding death resulting directly or indirectly from bodily or mental infirmities or illness or disease of any kind."

[2] Those instructions did not take from the consideration of the jury any issue of fact. In each of the instructions the jury was directed, in substance, to find as a fact whether the accident was the proximate cause of death. It is to be noted that each of those instructions included words to the effect that if the jury found certain facts then the verdict should be for plaintiff. For example: instruction 26 stated in part, "If his death was the proximate result of a fractured hip"; instruction 29 stated, "If you find that the accident" put in motion a chain of events; instruction 31 stated, "If you so find" and "provided, of course, you also find"; instruction 32 stated, "If injury * * * effected through accidental means proximately causes to be set in progress disease"; instruction 33 stated, "If you are satisfied from a preponderance of the evidence." Under those instructions the jury was required to determine, among other things, whether the hip injury was caused by accident, and whether such accident, if any, was the proximate cause of death. The court did not err in giving those instructions. In the case of Brooks v. Metropolitan Life Ins. Co., 27 Cal.2d 305, 163 P.2d 689, which was an action on an accident insurance policy, the policy insured against bodily injuries caused directly by accidental means, and it provided for double indemnity if the injuries be received "in consequence of the burning of any building in which the insured shall be at the commencement of the fire"; and it provided that the insurance should not cover suicide, nor death caused by disease or mental infirmity. The insured in that case, who was confined to his bedroom by reason of an incurable disease, died in a fire which started in his bedroom. Defendant therein contended that the insured had committed suicide, and that there was no liability under the policy because it did not appear that disease and mental infirmity did not in some measure contribute to the cause of death. After verdict and judgment for the defendant therein, the trial court granted a new trial on the ground of insufficiency of evidence; and on appeal the order granting a new trial was affirmed. In that case the Supreme Court said, 27 Cal.2d at page 309, 163 P.2d at page 691: "* * * that the presence of preexisting disease or infirmity will not relieve the insurer from liability if the accident is the proximate cause of death; and that recovery may be had even though a diseased or infirm condition appears to actually contribute to cause the death if the accident sets in progress the chain of events leading directly to death, or if it is the prime or moving cause."

[3, 4] Appellant also contends that the instructions above referred to (Nos. 26, 29, 31, 32 and 33) were in conflict with in-

structions Nos. 25, 27, and 30, which were given at his request. Instruction 25 stated in substance that plaintiff was entitled to recover "only if the death" resulted from bodily injuries "effected solely" through accidental means. Instruction 27 stated: "* * * that if the plaintiff in this case has established by a preponderance of the evidence not only the fact of the accidental injury but the sufficiency thereof to cause death, independently and exclusively of all other causes, and if the testimony in reference to pre-existing disease fails to establish such disease as an indirect or contributory cause of death, then plaintiff can recover. However, there can be no recovery under the policy sued upon in this action for death caused partly by disease and partly by accidental injury. If, therefore, you find that the death of Mr. Happoldt was caused partly by disease, your verdict must be in favor of the defendant." Instruction 30 stated in substance that in order for plaintiff to recover she must prove that the fracture of the hip was the cause which, in natural and continuous sequence, produced death, but that if the jury found that death would have occurred, in any event, at or about the same time it did occur, as the result of diseases from which he was suffering before and after the accident, the verdict must be for defendant. It appears that the first group of instructions directed the jury to the effect that pre-existing disease will not relieve the insurer from liability if the accident was the proximate cause of death, and that a recovery may be had by plaintiff even though a diseased condition appears to actually contribute to the cause of death if the accident sets in progress a chain of events leading directly to death; and it appears that the second group of instructions above mentioned directed the jury to the effect that there could be no recovery if the death was caused partly by disease and partly by accidental injury. The instructions in the first group correctly stated the law. Brooks v. Metropolitan Life Ins. Co., supra, 27 Cal. 305, 163 P.2d 689. The instructions in the second group, which were requested by appellant, were not correct instructions and were more favorable to the appellant than it was entitled to. It is true, as appellant argues, that it cannot be determined which group of instructions the jury followed. It appears, however, since the verdict was for plaintiff, that irrespective of which group of instructions the jury followed, its finding was either that the hip injury was the sole proximate cause of death; or that, even though a pre-existing disease appeared to contribute to the cause of death, the hip injury set in progress a chain of events leading directly to death. If the jury followed the instructions in the first group, it followed correct and full instructions with reference to pre-existing disease. If the jury followed the instructions in the second group, it followed instructions which were not a correct and full statement of the law regarding pre-existing disease, in that, those instructions did give plaintiff the benefit of the law regarding pre-existing disease as stated in the case of Brooks v. Metropolitan Life Ins. Co., supra. The two groups of instructions were not prejudicially conflicting. If the verdict was based on the first group of instructions, the appellant was not thereby prejudiced for the reason the instructions were correct statements of the applicable law. If the verdict was based on the second group, appellant was not thereby prejudiced for the reason the instructions were more favorable to appellant than it was entitled to. A statement in the case of Fassett v. Nascimiento, 108 Cal.App. 14, 291 P. 269, relative to alleged conflicting instructions, is applicable herein. In that case the court gave two correct instructions to the effect that if plaintiffs, husband and wife, were entitled to recover, they were entitled to consequential damages; and it gave a third instruction, which was erroneous, to the effect that if the wife was entitled to recover damages, she was not entitled to consequential damages. The consequential damages therein amounted to $892.60, and the verdicts therein were $9,000 for the wife, and $1,800 for the husband; and it was contended that by reason of the conflict in the instructions it could not be determined whether consequential damages were included in the award to the wife. The court therein said, 108 Cal.App. at page 20, 291 P. at page 272: "[T]he third instruction [the erroneous one to the effect that the wife could not recover consequential damages] was far more favorable to appellant than he was entitled to, and he cannot be heard to complain of it or of any conflict, apparent or real, created by it, especially since it was given at his request."

[5] Appellant's further contention that the court erred in refusing to give instructions F, G, and H, which appellant requested, is not sustained. Those proposed instructions stated in substance that plaintiff had the burden of proving by a preponderance of the evidence that death did not result directly or indirectly from illness or disease of any kind. The court correctly instructed the jury as to the meaning of the expressions "burden of proof" and "preponderance of the evidence." It also gave an instruction to the effect that one who asserts the affirmative of an issue has the burden of proving his allegation by a preponderance of the evidence. It also gave the following instruction: "In order to recover accidental death benefits under this policy plaintiff must prove by a preponderance of the evidence that the death of Mr. Happoldt was the result, directly independently, and exclusively of all other causes, from injuries effected solely through external, violent, and accidental means." It also gave the following instruction: "[T]he burden is upon plaintiff to prove affirmatively that the accident, if any, is the proximate cause of death, and, therefore, unless you find that the fractured hip which occurred approximately one month before Mr. Happoldt's death was and is in fact the proximate, prime, or moving cause of his death or that it set in progress the chain of events leading directly to his death, your verdict must be in favor of the defendant." It therefore appears from the instructions just referred to, and from the instructions hereinabove referred to, that the jury was adequately instructed on the subject of burden of proof and preponderance of the evidence.

[6, 7] Appellant also contends that the trial court impaired the obligation of the insurance contract, and deprived defendant of its property without due process of law, in violation of the federal Constitution. Const. U. S. Amend. 14. Its argument is that the trial court, in giving an instruction based upon the case of Brooks v. Metropolitan Life Ins. Co., supra, did in effect rewrite appellant's insurance contract. He asserts that if the Brooks case (decided in 1945) overruled previous decisions in this state "with respect to insurance policy exclusion clauses covering contribution of disease or bodily infirmity," then it was error to apply the Brooks case herein to the insurance contract and the indemnity rider which were made in 1925 and 1926. Appellant asserts that the case law, at the time the insurance contract and rider were made, was that where a contract of insurance limits the liability for accidental death benefits, by expressly excluding death which is caused directly or indirectly by disease, there can be no recovery if the plaintiff fails to sustain the burden of proving that disease did not contribute to death. In support of that assertion appellant cites the following cases: Rock v. Travelers' Insurance Co. of Hartford, Connecticut, 172 Cal. 462, 156 P. 1029, L.R.A. 1916E, 1196; Clarke v. New Amsterdam Casualty Co., 180 Cal. 76, 179 P. 195; Kellner v. Travelers Ins. Co., 180 Cal. 326, 181 P. 61; and Ogilvie v. Aetna Life Insurance Co., 189 Cal. 406, 209 P. 26, 26 A.L.R. 116. The Brooks case holds, as above shown, that the presence of pre-existing disease will not relieve the insurer from liability if the accident is the proximate cause of death, and that recovery may be had even though a diseased condition appears to actually contribute to cause the death if the accident sets in progress the chain of events leading directly to death. Under the Brooks case, and the cases cited by appellant, the plaintiff is required to prove that the accident is the proximate cause of death. It therefore appears that, under the case law of California at the time of trial and at the time the contract was made, a plaintiff was required to prove that the accident was the proximate cause of death. Furthermore, the contract and the rider were made in New York where the defendant's home office was located and where the insured and plaintiff resided. Under such circum-

stances, it would seem that the defendant did not contemplate the case law of California, regarding procedure, in determining the provisions of its proposed contract with the insured. Appellant's contention, relative to impairment of the obligation of the contract and due process of law, is not sustained.

[8, 9] Appellant contends further that one of the attorneys for plaintiff, who tried the case, was guilty of prejudicial misconduct. During a recess on the first morning after the jury had been selected, several jurors were standing in a group in the corridor adjoining the courtroom, and the trial attorney for plaintiff, and others, were also in the corridor. The jurors were near the only window in the corridor. The attorney went to a place near the window, and one of the jurors spoke to him and said that the attorney resembled a certain motion picture actor, and then the attorney and the jurors laughed, and "a few bantering remarks were exchanged." Defendant's attorney, who had gone into the corridor and observed that incident, then walked toward the courtroom and requested plaintiff's attorney to go with him. The attorneys went into the chambers of the trial judge, and reported the incident to the judge. The attorney for defendant did not at that time make a motion for a mistrial, but stated that he desired to call the matter to the attention of the court. The trial judge commented upon the inadequacy of facilities for the jurors, the fact that it was impossible to pass through the corridor without coming into contact with the jurors, and that some pleasantries in no way related to the case might be countenanced to avoid discourtesy; and he stated that he was of the opinion that no harm had been done, but that he would admonish the jury to disregard the incident. The attorney for defendant then stated that he did not think such admonition was necessary. At the opening of the afternoon session of the trial, defendant's attorney made a motion for a mistrial. The trial judge denied the motion, stating that he was still of the opinion that the incident did not constitute misconduct which would be the basis for a mistrial, and that no prejudice resulted. The trial judge was in the best position to determine whether the alleged misconduct of counsel had any prejudicial effect upon the jury. The conclusion of the trial judge in such a matter should not be disturbed on appeal "unless, under all the circumstances appearing, it is plainly wrong." Lafargue v. United Railroads of San Francisco, 183 Cal. 720, 724, 192 P. 538, 540, and Walling v. Kimball, 17 Cal.2d 364, 369, 110 P.2d 58. The incident was inconsequential and did not amount to misconduct.

[10-12] Appellant also contends that the court erred in amending the judgment "so as to include legal interest from February 8, 1946." As above shown, the jury returned a verdict in favor of plaintiff for $25,000 on June 30, 1947. Judgment upon the verdict was entered on July 1, 1947, for $25,000 "with interest thereon at the rate of seven per cent per annum from the date of the verdict until paid." On July 31, 1947, plaintiff filed a notice of motion to amend said judgment to include interest on said amount at the rate of seven per cent per annum from February 8, 1946. The motion was granted on August 13, 1947, and the judgment was amended by inserting in the judgment, after the amount "$25,000.00" the following words: "to include legal interest from February 8, 1946;". The amended judgment, in the part material here, read as follows: "* * that said Plaintiff * * * recover * * * the sum of $25,000.00 to include legal interest from February 8, 1946; with interest thereon at the rate of seven per cent per annum from the date of the verdict until paid * * *." The policy provided that the face amount of said policy, $50,000, should be payable "upon receipt at said Home Office of due proof of death." The agreement for the additional $25,000 for death from accident, attached to the policy, provided: "If said policy shall become a claim by the death of the insured * * * and due proof shall be furnished to the Company at its Home Office in the City of New York that such death resulted directly, independently and exclusively of all other causes from bodily injuries effected solely through external, violent and accidental means, * * *" the $25,000 "will become payable under this agreement in addition to and together with the face

amount of said policy * * *." If the right to recover a certain amount of money is vested in a person upon a particular day, he is entitled to recover interest thereon from that day. Civ.Code, sec. 3287; Canavan v. College of Osteopathic P. & S., 73 Cal.App.2d 511, 521, 166 P.2d 878. In the present case, if there was liability on the part of defendant under the additional agreement, plaintiff was entitled to recover the principal sum of $25,000 and interest thereon from the day due proof was furnished to the defendant at its home office that death resulted from accidental means. If, as a matter of law, the plaintiff herein was entitled to recover interest on the $25,000 from a particular date prior to the verdict, the trial judge was empowered to include in the judgment, entered upon the verdict, a provision for such interest. Engelberg v. Sebastiani, 207 Cal. 727, 729, 730, 279 P. 795. In the present case, as above shown, the verdict did not include a provision for interest, but the judge, on August 13, 1947, amended the judgment which had been entered upon the verdict of June 30, 1947, to include a provision for interest from February 8, 1946. The question arises as to whether, as a matter of law, plaintiff was entitled to interest from said February 8th, or whether the matter of interest was an issue of fact for the jury. Respondent (plaintiff) asserts in effect that as a matter of law she was entitled to interest from that date. She states as follows: "Notice in writing, on defendant's proof of loss form, of the death of the insured was *mailed* by plaintiff to defendant on February 8, 1946, and *that condition of the insurance contract* having been met on said date, thereupon the sum of $25,000.00 additional indemnity became due and payable." (Italics added.) It does not appear, however, as shown above, that *mailing* of notice of death was compliance with any condition of the additional agreement that was required to be fulfilled in order to fix the date when the additional amount for death "from accidental means" should become payable. The provision of the additional agreement which fixed such date was as follows: "If * * * due proof shall be furnished to the Company at its Home Office * * * that such death resulted * * * from bodily injuries effected solely through * * * accidental means * * *." The plaintiff alleged in paragraph VII of her complaint that after the death of the insured she gave written notice to the defendant, upon forms duly furnished by defendant, of the death of the insured, of her relationship to the insured, of her interest in the policy, of all facts and circumstances surrounding the death of the insured, and of the occupation, habits, health, and all particulars pertaining to the insured at the time of his death; and that said written notice and forms required by the defendant were *mailed* to the defendant on February 8, 1946. The complaint did not allege when due proof was furnished to defendant at its home office that death resulted from accidental means, but it did allege, as above shown, that written notice of the death was *mailed* to the defendant on February 8, 1946. The defendant expressly admitted, in answering paragraph VII of the complaint, that during the month of February, 1946, it received from plaintiff certain written notices of the death of the insured; but it denied generally and specifically the other allegations of said paragraph VII. That admission in the answer, that it received from plaintiff during the month of February, 1946, certain written notices of the death of the insured, was not an admission that due proof that death resulted from accidental means was furnished to the defendant at its home office on February 8th, or at all during February, 1946, or at any time. The answer, as above shown, denied all the allegations in paragraph VII regarding the information alleged to have been in the notice of death, and it denied the allegation that the notice of death was mailed on February 8th. The record does not show that it was undisputed that due proof that death resulted from accidental means was furnished defendant at its home office on February 8, 1946, or on any other date. It does not appear that, as a matter of law, plaintiff was entitled to interest from any particular date prior to the verdict. It was a question of fact for the jury as to whether interest should be included in the verdict. It was error to amend the judgment of July 1, 1947, to include interest from February 8, 1946.

It is ordered that the amendment of the judgment, which amendment was made on August 13, 1947, in words and figures as follows: "to include legal interest from February 8, 1946;" be and the same is stricken from the judgment. The judgment as originally entered on July 1, 1947, is affirmed. The minute order herein dated August 13, 1947, and entered on August 20, 1947, which is as follows: "Plaintiff's motion to amend judgment heretofore submitted is now granted so as to include legal interest from February 8, 1946", is vacated and set aside. The superior court is directed to make and enter an order denying plaintiff's motion to amend the judgment, which motion was filed on July 31, 1947. Each party to pay his own costs on appeal.

SHINN, P. J., and VALLÉE, J., concur.

WILKE v. CROFTON.

Civ. 16489.

District Court of Appeal, Second District, Division 1, California.

March 4, 1949.

Rehearing Denied March 23, 1949.

Hearing Granted April 28, 1949.*

1. Appeal and error 🔑1011(1)

Where there is substantial evidence to sustain a finding, conflicting evidence will not be considered on appeal.

2. Contracts 🔑322(3)

Evidence sustained finding that defendant was liable for breach of contract to grant an interest in and to share future profits of a corporation organized to operate a ranch and race track, unexcused by any theory of impossibility, non-existence of subject matter, or frustration.

3. Appeal and error 🔑1146

Power of appellate court to modify judgment without ordering new trial should be exercised only, when, upon a full consideration of the record, party against whom judgment is for the first time entered in the trial court, could not successfully meet contentions of his adversary upon a retrial. Code Civ.Proc. § 956a; Const. art. 6, § 4¾.

4. Appeal and error 🔑1178(6)

Where trial court awarded nearly $10,000 damages for breach of contract to grant an interest in and to share profits of corporation organized to operate ranch and race track, but otherwise found that judgment in favor of plaintiff should logically be for sum not less than ⅓ of $500,000, award was inconsistent and inadequate and judgment would be reversed in reference to amount of liability, and new trial granted, solely for ascertainment of amount of damages. Code Civ.Proc. § 956a; Const. art. 6, § 4¾.

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Appeals from Superior Court, Los Angeles County; Louis W. Kaufman, Judge.

Action by Fred J. Wilke against James N. Crofton for breach of a contract to grant an interest in and to share in future profits of a corporation organized to operate certain ranch property, for an accounting and for other relief, wherein defendant filed a counterclaim. From the judgment, defendant appeals and plaintiff cross appeals.

Affirmed in part, and reversed in part.

Wood, Crump, Rogers, Arndt & Evans and Guy Richards Crump, all of Los Angeles, for defendant and appellant.

David L. Sefman and Clifford Thoms, both of Los Angeles, and Robert P. Dockeray, of Burbank, for plaintiff and cross-appellant.

DORAN, Acting Presiding Justice.

The action herein was for breach of contract, an accounting, and "A declaration that plaintiff is entitled to receive his agreed proportionate interest in the future profits of said Tijuana Hippodrome Company". The second amended complaint alleged that in 1940 plaintiff Wilke was requested "to devise ways and means of securing for said (Arguello) heirs physical possession" of the Mexican property known as "Gijuana

* Subsequent opinion 209 P.2d 790.

Ranch" on which were located a horse race track, bull fighting ring and other concessions; that plaintiff conferred with defendant Crofton in reference to securing and operating said property at a profit.

On August 22, 1942, a "Preliminary Option and Lease Contract" was executed by plaintiff and the Arguello heirs, which contract was then assigned to defendant Crofton, named as "Financier". By letter Crofton then agreed "to cause to be issued and delivered to you (Wilke) fifteen per cent (15%) of all the authorized, issued and outstanding capital stock of any corporation or company that is organized for the purpose of operating the property". This agreement also provided that should Crofton "operate said properties prior to the time of the incorporation of the operating company that I (Crofton) will pay you (Wilke) monthly a sum equal to fifteen per cent (15%) of the net operating profit after the deduction of the rentals of twenty-five per cent (25%) specified in said lease contract". Wilke was also to be elected an officer of the corporation or company. A written "Ratification of and Supplement to Lease Contract" was signed by Wilke, Crofton and the Arguello heirs on October 9, 1942.

The complaint alleges that Crofton "did contact certain persons of influence" in Mexico, ultimately secured delivery of possession of the race track property to the Arguello heirs, and made plans to operate the same. It is then charged that Crofton fraudulently set about to deprive Wilke of any interest in the profits, and to this end secured a new lease from the heirs eliminating the plaintiff therefrom; that Crofton caused a trusted employee named Silveyra to organize a Mexican corporation known as "Tijuana Hippodrome Company", from which company plaintiff was likewise eliminated, and that Silveyra then proceeded to operate the race track as a dummy in Crofton's behalf. The name of Crofton does not appear as a stockholder nor was any stock issued to plaintiff Wilke. Silveyra, however, is alleged to have held a large block of capital stock for Crofton's sole benefit. For the purpose of defeating Wilke's 15% contract interest, according to the complaint, it was made to appear that "the said Crofton, had lost all rights and interests in and to the properties". The Hippodrome Company is alleged to have earned net profits of $1,500,000.00 per year, and would earn such an amount per annum for the balance of the ten-year lease term. Plaintiff received nothing, and the present action resulted.

The answer denied all material allegations except the execution of the various documents; alleged that Crofton had acquired no stock in the corporation, owned no interest therein and had been completely eliminated from participation in the profits; that defendant had expended "time, effort, and the sum of $70,557.09 in cash in an endeavor to obtain for the Arguello heirs a decision from the Supreme Court of Mexico" etc., which decision had finally been obtained. A counterclaim by Crofton charged fraud on the part of the plaintiff Wilke in inducing execution of the various contracts.

A trial of the issues resulted in findings of fact in favor of the plaintiff on all material issues, and judgment was rendered against the defendant James N. Crofton in the sum of $9,750.00. The defendant has appealed from the judgment, and there is a cross-appeal by the plaintiff from the alleged inadequate award of damages.

The defendant's brief is largely devoted to a resume of the evidence which it is contended does not support the findings; defendant argues that "There is, in fact, nothing but surmise and suspicion" to support the judgment in plaintiff's favor. Crofton's brief also avers that performance of the contract with Wilke was excused on the theory of impossibility of performance, non-existence of the subject matter, and "frustration"; that "Fortuitous destruction of the value of performance wholly outside the contemplation of the parties may excuse a promisor", and should so operate in this case.

As noted in plaintiff Wilke's brief, "At no point in appellant's (Crofton's) brief has he raised any question of the improper introduction of evidence, or any question of law other than that of sufficiency of the evidence to support the findings". This being so, plaintiff argues that since the record discloses competent evidence to support the findings, the appellate court is bound to uphold the judgment. However, as cross-appellant, plaintiff insists that the damages awarded by the trial court are grossly inadequate, and that the appellate court should increase the amount without ordering a new trial.

[1] Appellant Crofton's briefs do not question the established rule that "where there is substantial evidence to sustain a finding, conflicting evidence will not be considered". Indeed, this appellant states: "We do not quote extensively from the testimony of other witnesses, * * * because to the extent that their testimony corroborates the testimony of the plaintiff, the testimony of the plaintiff is sufficient, in and of itself, to support a finding of fact; and where witnesses for the defendant have contradicted plaintiff, we must likewise, for the purposes of this appeal, assume that the (trial) Court believed the testimony, if any, which tends to support the findings". It is contended, however, that in twenty-two instances "there is NO evidence to support a given finding".

As a matter of fact, as respondent states, "Crofton in his opening brief has set forth sufficient evidence to support these Findings". There is, for example, testimony to the effect that between October, 1942 and May, 1943, Crofton had some ten or twelve conferences with Wilke, reporting progress in the Mexican transactions and contacts with various important personages such as General Quebado, Rafael Comacho, a brother of the President of Mexico, and Secretary Alaman who at the time of the trial had become the Mexican President.

In May of 1943, plaintiff Wilke went to Florida, remaining there for one year. On July 5, 1943, Crofton wrote Wilke stating that "the contract we received was illegal", that Crofton "had nothing. Therefore I had my lawyer write a new contract". This letter further states: "I have had to go another route to protect myself", and that "I have talked to my pardners about you * * * They are willing that you be recognized but it will be a little different from what we first started". Crofton therein claims that "They are taking 50% of the deal so if you take 15% and man in Mexico 5% more I will end with 30% for myself which is not fair to me, * * * They are so strong we must do as they say or else." and reiterates that Wilke must accept less than the 15% interest specified in the contract.

During 1944 it appears that Crofton continued to press Wilke to reduce the latter's contract interest. According to Wilke's testimony as summarized in appellant's brief, during a conversation in July, 1944, "Defendant (Crofton) further said he had waited long enough for plaintiff to take a reduction and that 'they' didn't propose letting him have the 15% * * * plaintiff had to take the reduction whether he liked it or not". Plaintiff testified that Crofton telephoned "he had obtained a lease from the Arguello heirs made directly to him and that plaintiff was eliminated; that unless plaintiff agreed to the reduction he was out, going to be out". There were other similar conversations.

When Wilke suggested being present at the time possession of the race track was delivered, Crofton said: "No, we don't want anybody there * * * but Silveyra, who has been named as custodian and trustee for these heirs, and Mr. Maldonado who has the order for the physical delivery." In regard to Silveyra, Crofton said: "He is my boy"; and "he represents me when I am not there as my employee". Somewhat later Crofton "revealed to us why he would like Mr. Silveyra to take over possession for him because he didn't want his (Crofton's) name to appear".

Plaintiff testified that in December, 1944, Crofton offered "me my last chance and opportunity to agree to a reduction * * *. He said, 'I now have possession of the race track. * * * It is all in our hands, and unless you agree to it right now * * * Why, you are out, you are through' ". Complaining that "This is pretty rough treatment" but that "I don't think I have any alternative", plaintiff then signed an agreement to reduce the percentage from 15% to 5%.

The race track and concessions opened on January 1, 1945, and according to plaintiff's testimony, Crofton informed Wilke that the temporary racing permit had been issued in Silveyra's name, and that Ernie Crofton, defendant's brother, was keeping defendant posted on the operation of the track and was looking out for defendant's interest. In Wilke's presence, defendant said to Silveyra and Ernie Crofton: "I have got an expense account here and I want to turn it in to you for you to get me a check and don't make me wait too long for it". Defendant and Silveyra had adjoining boxes at the race track, and according to defendant's brief, "Silveyra (was) going from place to place, supervising", and "brother Ernie (was) doing what he could to help".

At other conversations, defendant Crofton informed Wilke that there had been some "difficulty" with Silveyra about the issuance of stock, that the latter "was kind of running him around a little bit", but that Wilke need not worry as Crofton would "straighten that out". When Wilke told Silveyra that "he wanted his interests recognized", Silveyra replied: "Your dealings are with Mr. Crofton, not with me." The final conversation between plaintiff and defendant ended in a brawl; Wilke never received any stock or other interest, and Crofton disclaimed any liability. There is other evidence which corroborates plaintiff's contention.

[2] That there is substantial evidence in the record to support findings in favor of the plaintiff Wilke cannot well be doubted. This is true in respect to the matter of Silveyra's agency and representation of Crofton in the operation of the race track, and likewise in respect to Crofton's efforts to exclude Wilke from participation in the profits of the venture. The trial court did not accept appellant's version of the transaction, and in the state of the record, it would be manifestly improper for an appellate tribunal to interfere with the decision. Appellant's argument that performance of the contract is excused on the theory of impossibility, non-existence of the subject matter, "frustration", and the like, is not persuasive. Appellant's other contentions are likewise without merit.

Plaintiff's cross-appeal attacks, as wholly inadequate, the trial court's award of $9,750.00. In this connection it is pointed out that other findings were to the effect that "plaintiff was and is entitled to one-third (⅓) of defendant's twenty-one (21%) percent interest in said corporation Hippodromo de Tijuana and in the assets thereof and the profits therefrom". The trial court further found, in the language of Crofton's counterclaim, "that the reasonable value of the right, title and interest of defendant in and to said premises, as lessee under the terms of said lease-contract and said assignment, was and still is not less than the sum of Five Hundred Thousand ($500,000.00) Dollars, and in truth and in fact is greatly in excess of" such sum.

Cross-appellant's argument is that if, as found by the trial court, "plaintiff was and is entitled to one-third (⅓)" of the defendant's interest, which interest was found to be not less than $500,000.00, then a judgment in favor of plaintiff should logically be for a sum not less than one-third of $500,000.00, or $166,666.66. That such argument has merit, cannot be doubted. The record, indeed, furnishes no apparent basis for the trial court's award of $9,750.00 which is obviously inconsistent with the other findings mentioned.

As justifying a judgment in excess of the trial court's finding, cross-appellant's brief has suggested three separate formulae based upon a consideration of the evidence. The first of these, computed upon Wilke's evaluation of the race track leasehold for a period of ten years, would determine plaintiff's interest as amounting to $1,050,000.00. Cross-appellant's second theory, based upon statements by defendant's brother as to the net profit derived from the race track, would make Wilke's one-third interest amount to $2,420,600.00. A third suggested formula, predicated upon certain daily reports for ten racing days, would result in a sum of $925,727.43 as representing the value of plaintiff's interest.

[3, 4] That ordinarily a trial court is better equipped than an appellate court to determine the amount of damages, goes without saying. The power of an appellate court to modify a judgment without ordering a new trial, under the provisions of Article VI, Section 4-¾ of the California

Constitution, and Section 956a of the Code of Civil Procedure, "has been exercised sparingly", says the court in Tupman v. Haberkern, 208 Cal. 256, 269, 280 P. 970, 975, "and should be exercised only when, upon a full consideration of the record, the party against whom the judgment is for the first time entered in the trial court could not successfully meet the contentions of his adversary upon a retrial". Regardless of the existence of such power, it must here be said, in the language of Davis v. Chipman, 210 Cal. 609, 623, 293 P. 40, 46, that "the present action is not one in which we should exercise our power to make new findings" which would increase the amount of damages.

The judgment of the trial court is therefore affirmed in respect to the matter of defendant's liability, but reversed in reference only to the amount of such liability, and a new trial granted, with directions that such new trial be limited solely to the ascertainment of the amount of plaintiff's damages. Plaintiff and appellant Wilke to receive costs on the appeal and cross-appeal.

WHITE, Justice.

I concur.

The court found on substantial evidence that on January 2, 1945, the certain contracts mentioned in the majority opinion were in full force and effect. That "nevertheless said defendant James N. Crofton, in furtherance of his said scheme and plan, did cheat and defraud plaintiff". That "plaintiff was and is entitled to one-third (⅓) of defendant's twenty-one (21%) per cent interest in said corporation Hippodromo de Tijuana and in the assets thereof and the profits therefrom."

The court further found, "that it is true that the reasonable value of the right, title and interest of defendant in and to said premises, as lessee under the terms of said lease-contract and said assignment, was and still is not less than the sum of Five Hundred Thousand ($500,000.00) Dollars, and in truth and in fact is greatly in excess of the sum of Five Hundred Thousand ($500,000.00) Dollars, * * *."

The foregoing findings show on their face that the trial court's award of only $9,750.00 in damages was totally inadequate and erroneous.

There was evidence that during a period of ten racing days from April 1 to May 12, 1945 (the race track operated only on Sundays and holidays) the net profits for each of these racing days ranged from a low of $2,766.58 to a high of $50,113.83, totaling $271,727.14 or an average of $27,172.00 per racing day. On the basis of fifty-two racing days in a given year, the total amount of net profits would be $1,412,944.00. For the ten years period of the lease, the total amount of the net profits would amount to $14,129,444.00.

I cite this testimony to indicate the magnitude of the venture in which defendant Crofton had a twenty-one percent interest, and in which interest of Crofton the plaintiff was entitled to a one-third interest.

The law is well established that damages consisting of the loss of anticipated profits need not be established with absolute certainty. A showing of reasonable probability that the profits would have been earned except for the breach of the contract is sufficient, Hacker Pipe & Supply Co. v. Chapman Valve Mfg. Co., 17 Cal. App.2d 265, 61 P.2d 944.

With reference to plaintiff and cross-appellant's contention that the award of damages is totally inadequate, he suggests three separate formulas based upon a consideration of the evidence, from which the court with certainty could compute the correct amount of damages. In that regard cross-appellant in his opening brief says:

"First, we have the uncontradicted testimony of Wilke that in his opinion the value of the race track leasehold for the period of 10 years is between $15,000,000.00 and $18,000,000.00. Taking the lower figure, to-wit, $15,000,000.00, we find that 21 per cent, which would be Crofton's interest, would amount to $3,150,000.00. One-third of this which, under the findings of the Court, would be Wilke's interest, amounts to $1,050,000.00.

"Second, we have the four instances in which Ernie Crofton told the defendant Jim

Crofton that the net profit in February of 1945 for certain individual racing days had been $40,000.00, $55,000.00, $66,000.00 and $110,000.00, making a total of $266,000.00 for four days, or an average net profit per day of $66,500.00. On the basis of 52 racing days per year, this amounts to a total of $3,458,000.00 per year or $30,580,000.00 for the 10-year period of the lease.

"Again, using this figure as a basis for applying the findings of the Trial Court, we find that Crofton's interest of 21 per cent would amount to $7,261,800.00 and that Wilke's one-third of Crofton's interest would amount to $2,420,600.00.

"Third, we have the evidence in Plaintiff's Exhibit 6, consisting of the daily reports from the Tia Juana Race Track for 10 certain racing days in April and May, 1945. We have previously stated that Wilke's interest, computed on the basis of Exhibit 6, would amount to the sum of $925,727.43."

Even though we concede an element of speculation or uncertainty to the foregoing formulas as establishing a legal basis for measuring cross-appellant's damage, there remains another phase of the evidence and findings to which such a stricture may not be applied. I refer to the court's finding as set forth in the opinion, that defendant and appellant Crofton in his pleadings admitted that the reasonable value of his right, title and interest in and to the premises involved, as lessee under the terms of the lease contract and the assignment thereof, "was and still is not less than the sum of Five Hundred Thousand ($500,000.00) Dollars, and in truth and in fact is greatly in excess of the sum of Five Hundred Thousand ($500,000.00) Dollars". When this finding is considered in the light of the further finding that defendant and appellant in furtherance of a scheme and plan devised by him, "did cheat and defraud plaintiff", it becomes immediately manifest that under the testimony and findings the court could not legally or justly have computed plaintiff and cross-appellant's damage in an amount less than $166,666.66. Defendant and appellant owned a twenty-one per cent interest in the foregoing leasehold interest, in which plaintiff and cross-appellant was entitled to a one-third interest.

There is ample authority for plaintiff and cross-appellant's contention that "when defendant by breaching a contract makes it impossible for plaintiff to realize profits, the probable profits must of necessity be estimated," Hartman v. San Pedro Commercial Co., 66 Cal.App.2d 935, 937, 153 P.2d 212. Where as here, the promissor by his wilful breach of contract has given rise to the difficulty of proving the amount of loss of profits, the promisee is only required to show the amount of damages with reasonable certainty and any uncertainties will be resolved against the promissor, Steelduct Co. v. Henger-Seltzer Co., 26 Cal.2d 634, 651, 160 P.2d 804. The case just cited also furnishes authority for the statement that the promisee may introduce evidence of past profits made by the promissor in violation of the contract, in order to furnish a reasonable basis for estimating the amount of his profits under the contract for the remaining term thereof. In other words, the promisee is entitled to recover as damages such prospective profits the loss of which is the natural and direct consequence of the breach, Caspary, et al. v. Moore, et al., 21 Cal.App.2d 694, 699, 70 P.2d 224.

Because it is difficult to ascertain the amount of damage, a party who breached his contract as found by the court herein, by means of "a scheme to cheat and defraud" cannot escape liability. The law requires only that the best evidence be adduced of which the nature of the case is capable.

In the light of the foregoing rules of law, any award less than the foregoing sum of $166,666.66 was grossly inadequate and erroneous. By no stretch of the imagination and by no method of mathematical calculation based on the evidence herein, can it be said that the award of $9,750.00 constitutes one-third of the twenty-one per cent interest which the court found defendant and appellant Crofton held in the leasehold and profits of the Tiajuana race track.

90 Cal.App.2d 418

REINA v. ERASSARRET et al.

Civ. 3740.

District Court of Appeal, Fourth District,
California.

March 1, 1949.

Hearing Denied April 28, 1949.

1. Appeal and error 🔑919

Where certain defendants appeared by demurrer which was overruled and answer was filed denying generally plaintiff's claims and objection to introduction of any evidence at trial was sustained on ground that complaint did not state facts sufficient to cause of action and judgment was entered in favor of appearing defendants, effect of ruling was to give judgment on pleadings, and on appeal, truth of allegations of complaint would be assumed, and if they alleged ultimate facts disclosing existence of a cause of action in favor of plaintiff, judgment as rendered would be reversed, and trial would be required.

2. Cancellation of instruments 🔑27

Generally, party to contract or a privy thereto and he alone, is entitled to maintain a suit to cancel or rescind it; and one who is a stranger to or has no interest in subject matter of suit is not ordinarily entitled to such relief; and where sufficient grounds exist for rescission and cancellation of conveyance, it may be set aside at suit of those succeeding to rights of grantor, though relief by way of cancellation is not necessarily confined to party to instrument if his legal or equitable rights are affected thereby.

3. Cancellation of Instruments 🔑27

Where husband and wife owned realty in joint tenancy, and wife in lifetime conveyed her interest by deed of gift to children, husband as surviving joint tenant was entitled after wife's death to maintain suit to cancel or rescind deed on ground that deed was procured by fraud and undue influence.

4. Deeds 🔑196(2, 3)

In suit to rescind and cancel conveyance on ground of fraud and undue influence, ratification of conveyance by grantor is generally an affirmative defense, and grantee ordinarily bears burden of proof with regard thereto.

5. Appeal and error 🔑1008(1)

In action by husband as surviving joint tenant against children as grantees under deed of gift executed during wife's lifetime, whether wife was acting under undue influence or fraud and intended deed to grantees of all property she held as joint tenant with her husband was for the trial court.

6. Deeds 🔑203

In action by husband as surviving joint tenant against children as grantees of deed of gift of her interest by wife, will executed by wife on same day as deed giving all property to grantees under deed in equal shares was admissible as evidence contradicting husband's allegations of fraud.

7. Estoppel 🔑68(4)

Where wife owned property in joint tenancy with husband and during lifetime made deed of gift to their five children, three of whom quitclaimed their interest back when charged with fraud and two of whom retained their interest thereunder, and wife on day of deed executed will giving all property to the five children in equal shares, husband was not estopped after permitting entry of order admitting will to probate without taking appeal, from bringing suit to cancel gift deed on ground that will effected same intent as was effected by deed of gift.

8. Contracts 🔑273

Generally, in reference to rescission of instruments one may not affirm in part and rescind in part, though rule is otherwise where instrument sought to be cancelled is separable or divisible and where circumstances justify a rescission only as to particular matters or particular parties involved in the entire transaction. Civ.Code, § 3414.

9. Deeds 🔑64

The law does not force a man to take title to real property against his will, and hence assent of a grantee is necessary in order to make delivery of a deed effective and deed operative as such.

10. Deeds 🔑194(5)

Though under certain circumstances recordation of a deed may be prima facie evidence or a presumption of its delivery or acceptance, presumption is a disputable one.

11. Deeds 🔑54, 108

A deed takes effect from its delivery, and if delivery is wanting, it is void ab initio.

12. Appeal and error 🔑1008(1)

Where husband as surviving joint tenant of realty brought suit after wife's death to cancel her gift deed to five children who recorded deed alleging that deed was fraudulently presented by two children to their mother and her signature thus obtained, but that instrument had conveyed no present interest because it was not intended to be delivered at that time and that mother demanded reconveyance and accepted quitclaim of purported interest from three children and brought action to cancel purported deed as to remaining children, defense of estoppel or ratification of gift deed by wife was a factual question for the trial court.

◆

Appeal from Superior Court, Kern County; Norman F. Main, Judge.

Action by Frank Reina against Rose Erassarret, executrix of the will of Lizzie Reina, deceased and others, to set aside a conveyance of realty and to quiet title thereto, wherein defendants filed a cross-complaint. From the judgment, plaintiff appeals.

Judgment reversed.

West, Vizzard & Howden and Gordon Howden, all of Bakersfield, for appellant.

Harvey, Johnston, Baker & Palmer and Claude F. Baker, all of Bakersfield, for respondents.

GRIFFIN, Justice.

Action to set aside conveyance and quiet title. Plaintiff and appellant Frank Reina was the husband of Lizzie Reina, now deceased. They were the parents of defendants Samuel Reina, Josephine Reina, Rose Erassarret, Frances Argain, and John L. Reina. According to plaintiff's complaint, on August 27, 1946, he and his wife owned, in joint tenancy, certain real property located in Kern, Fresno, and San Luis Obispo counties. At that time Lizzie Reina was sick and feeble and confined to her bed and was weakened physically and mentally. It is alleged that she was of Italian descent, and unable to read or write in any language; that defendants Rose and Frances procured counsel and caused to be prepared on August 27, 1946, a grant deed of gift from the mother to her five children. It purportedly conveyed her undivided one-half interest in the property mentioned. It is alleged further that she was induced to execute the deed by undue influence and false and fraudulent representations on the part of defendants, i. e., representations that said deed would not take effect until her death and that she would retain full control and enjoy the profits of her joint tenancy until her death; that they recorded the deed immediately. It then alleges that as soon as the mother discovered that the deed had been recorded and that it purported to divest her of her present right, title and interest, she made demand upon all defendants for a reconveyance; that Josephine, Samuel and John did execute quitclaim deeds back to her and that they were duly recorded by plaintiff; that Rose and Frances refused to do so; that on October 17, 1946, Lizzie Reina filed an action against the latter two, praying that the deed executed by her be set aside as to the interest purported to be conveyed to them, and recorded a lis pendens; that on October 22, 1946, Rose and Frances executed a grant deed to their attorneys, Harvey, Johnston, Baker & Palmer, purporting to convey a 40 per cent interest in the described land, which deed was recorded on October 24, 1946. These attorneys and their respective wives are named parties defendant in this action.

Lizzie Reina died testate. Her will was admitted to probate and on November 22, Rose received letters testamentary. On February 24, 1947, upon application of the executrix, and order of the court was made dismissing the action brought by the mother against Rose and Frances.

Plaintiff prays that the deed of August 27, 1946, be declared void and that it be decreed that no defendant has any right, title or interest in said lands; that it be established that plaintiff and his wife were the owners of said land in joint tenancy at the time of her death and that upon her death her interest terminated and that plaintiff is now the owner thereof in fee simple.

Defendants Samuel, Josephine and John did not appear. Their defaults were taken. The other defendants appeared by demurrer, which was overruled. An answer was filed denying generally the claims of plaintiff. They set up special affirmative defenses which were later made and interposed on an objection to the introduction of any evidence at the trial. This objection was sustained on the grounds: (1) That the complaint did not state facts sufficient to constitute a cause of action; (2) That plaintiff was without the legal capacity to sue in that he was not a party to the instrument sought to be avoided and was without right or capacity to avoid the instrument or to impair the estate of the decedent by seeking to avoid an instrument to which he was a third party; (3) That there was a defect of parties plaintiff in that the complaint did not show that plaintiff was entitled to represent the decedent in any action to avoid an instrument; and (4) That there was a misjoinder of parties defendant in that the executrix was joined in a suit, the basic purpose of which was to compel the avoidance of transfers where the option so to avoid was not the right of the plaintiff but was the right of the executrix.

Following this ruling judgment was entered in favor of the appearing defendants. Plaintiff appealed.

[1] The effect of the ruling of the trial court was to give a judgment on the pleadings in favor of the defendants who appeared. Burnand v. Nowell, 84 Cal.App.2d 1, 189 P.2d 796. The truth of the allegations contained in the complaint must be assumed and if the pleadings allege ultimate facts which disclose the existence of a cause of action in favor of the plaintiff, then the judgment, as rendered, must be reversed and the cause proceed to trial. Genuser v. Ocean Accident & Guarantee Corporation, 42 Cal.App.2d 673, 109 P.2d 753.

The main argument presented by plaintiff for consideration is that since he and his wife were the possessors of the real property in question and title was held by them as joint tenants, in the absence of fraud of the defendants, the plaintiff would have owned, upon the death of his wife, all of the real property described; that by reason of their fraud and undue influence, as alleged, he was deprived of this one-half interest; that having a property interest in the whole of the estate, he may complain of the act which damaged his estate. He concedes that his joint tenant might have lawfully conveyed away this interest by her free and voluntary act.

Defendants justify the ruling of the trial court on this issue, upon the theory that Lizzie Reina had the right, during her lifetime, to break the joint tenancy, and name her five children as grantees; that under no circumstances has a joint tenant capacity to bring such an action merely by reason of such joint tenancy relationship; that since Lizzie Reina accepted a reconveyance of three-fifths of the property deeded out, she conclusively showed that she relied upon the original conveyance rather than the theory of repudiation of the entire instrument and thereby voluntarily destroyed the effect of the joint tenancy; that since her subsequent suit against the other two children was brought for the purpose of setting aside the former deed executed by her only as to the interest purportedly conveyed to them, it was not intended that she restore the joint tenancy relationship; that since the law does not permit a partial rescission, it must be held that there was an intended destruction of the joint tenancy, citing Buena Vista, Fruit & Vineyard Co. v. Tuohy, 107 Cal. 243, 246, 40 P. 386.

The works of ancient law writers and jurists, Coke on Littleton, Sec. 286; Blackstone's Commentaries, book 2, page 183;

and Washburn on Real Property, Vol. 1, page 646, paragraph 14, in speaking of the nature of a joint tenancy, recite that under the common law the interest which a joint tenant has as survivor is not a new one acquired by him from his cotenant upon the latter's death, for his own interest is not changed in amount, but only his cotenant's is extinguished; that title does not vest in the survivor upon the death of the cotenant nor does it descend to him from such cotenant because it has already vested in him by, and at the time of, the original grant; and that the interest of two joint tenants is not only equal or similar but also one and the same. See Hannon v. Southern Pacific Railroad Company, 12 Cal.App. 350, 107 P. 335; In re Peterson's Estate, 182 Wash. 29, 45 P.2d 45. However, in Delanoy v. Delanoy, 216 Cal. 23, 26, 13 P.2d 513, it was held that in this state a joint tenancy deed between husband and wife creates no estate in entirety. See, also, Hannon v. Southern Pacific Railroad Company, supra, 12 Cal.App. 350, at page 358, 107 P. 335.

It is argued that, applying this ancient doctrine to the facts of the instant case, Frank Reina was, at all times, the owner of the entire estate; that the right was given to Lizzie Reina to convey away, by her voluntary act, an undivided one-half interest in it and thus remove it from the control of the other joint tenant; that since the husband was seized of the whole estate from the beginning, he had the right to undo the effect of the fraud perpetrated upon him, which destroyed a portion of his estate.

In support of the contention that the right to set aside instruments is not given solely to parties to the instrument, plaintiff cites Page v. Garver, 146 Cal. 577, 579, 80 P. 860, where it was held that an heir, as distinguished from a personal representative, may sue to set aside a deed made by an ancestor during his lifetime. See, also, 12 C.J.S., Cancellation of Instruments, § 45, pages 1016, 1017; and Ingersoll v. Gourley, 72 Wash. 462, 130 P. 743, where such right is given to creditors and to trustees.

Plaintiff makes no contention that he is appearing for or representing the heirs or the estate of the deceased wife. His contention is that as such joint tenant he is not a stranger to, but has an interest in, the subject matter of the suit and is entitled to relief by reason of the fraud and undue influence pleaded.

[2, 3] It seems logical that the very nature of the instrument creating the joint tenancy constitutes an arrangement between the parties that the property will be thus held subject to the right of either to voluntarily deed out his interest therein and thereby destroy the joint tenancy holding; that unless this transfer by one joint tenant was voluntary, the other joint tenant had such an interest in the whole that he may maintain an action for cancellation or rescission of a conveyance which was obtained by fraud and undue influence of another and that he would be prejudiced by such an involuntary conveyance. This same principle was applied in Clay v. Hammond, 199 Ill. 370, 65 N.E. 352, 93 Am.St. Rep. 146, 149; 9 C.J. note 70, page 1224; 12 C.J.S., Cancellation of Instruments, § 45, note 27, where it was held that a deed executed by an insane person may be set aside by a vendee to whom such insane person conveyed the premises after his restoration to sanity. It has also been similarly held that where a deed is voidable on the ground of infancy of the grantor, one to whom the infant conveyed the property, after the infant reaches majority, may sue to set aside the prior conveyance. Breckenridge's Heirs v. Ormsby, 1 J. J. Marsh, Ky., 236, 19 Am.Dec. 71.

Neither party has presented authority directly deciding this question. Our research met with the same result. In Burton v. John Hancock Mutual Life Insurance Company, 171 Miss. 596, 157 So. 525, 158 So. 474, it was held that as to a tenancy in common there was no privity of estate but it was there said that this is not true as between joint tenants. Privies, as applied to the law, means "Any of those persons having mutual or successive relationship to the same right of property." Webster's Collegiate Dictionary, Fifth Ed.; Werner v. Graham, 181 Cal. 174, 183 P. 945; Richards v. Blaisdell, 12 Cal.App. 101, 105, 106 P. 732. As a general rule a party to the contract or a privy thereto, and he alone, is entitled to maintain a suit to cancel or rescind it, and one who is a stranger to, or has no interest in, the subject matter of the suit is not ordinarily entitled to such relief, and where sufficient grounds exist for the rescission and cancellation of a conveyance, it may be set aside at the suit of those succeeding to the rights of the grantor. However, it has been definitely held that relief by way of cancellation of an instrument is not necessarily confined to a party to the instrument if his legal or equitable rights are affected thereby. 9 Am.Jur. 356, sec. 9; Murray v. Murray, 115 Cal. 266, 47 P. 37, 37 L.R.A. 626, 56 Am.St. Rep. 97; International Realty Associates v. McAdoo, 87 Fla. 1, 99 So. 117; Bethany Hospital Co. v. Philippi, 82 Kan. 64, 107 P. 530, 30 L.R.A.,N.S., 194; Bell v. Pleasant, 145 Cal. 410, 78 P. 957, 104 Am.St.Rep. 61; Cox v. Schnerr, 172 Cal. 371, 156 P. 509. We conclude that plaintiff was not a stranger to, but had such an interest in, the subject matter of the suit as would entitle him to institute this action.

Since the complaint stated a cause of action by plaintiff, the remaining question is whether the allegations conclusively show, as a matter of law, that the deceased, during her lifetime, ratified the grant deed of August 27, 1946, particularly as to the claimed acceptance of the quitclaim deeds from her three children.

[4] Ratification is, generally, an affirmative defense. The defendant ordinarily bears the burden of proof with regard to affirmative defenses. It is true that plaintiff's complaint recites that after the discovery of the fraud Lizzie Reina demanded that the children reconvey the property to her and that quitclaim deeds were signed by three of them; that upon refusal of the other two she caused the action to be filed to "set aside" the deed of August 27, 1946, and clear her title.

[5] By the answer herein, and as an affirmative defense, defendants alleged that in making the deed of gift of August 27th, Lizzie Reina was not acting under undue influence or fraud and that she intended to deed to her children, at that time, all property she held as joint tenant with her husband. These, of course, were factual questions to be determined by the trial court after hearing all the evidence. By the answer they admit that the three children subsequently executed quitclaim deeds and claim that since that time the estate of Lizzie Reina owned that three-fifths interest so quitclaimed. The two daughters alleged the filing of the complaint against them by their mother, praying that the deed of gift be adjudged void "as to said defendants only". They also alleged that that action was compelled by reason of threats of plaintiff against his wife. Then follows a claimed affirmative defense that plaintiff was estopped to assert that the estate of decedent should be deprived of the property acquired through the quitclaim deeds from the three children; and that the mother was not, at the time of her decease, a joint tenant of plaintiff.

[6, 7] As bearing on the question of intent of the deceased, at the time she executed the gift deed, defendants allege the execution by her, on the same day, of a will giving all her property to the five children in equal shares. Of course this will may be admissible as evidence contradicting plaintiff's allegations of fraud, but would not operate as an estoppel, as a matter of law, against plaintiff's claim. It is argued, however, in this connection, that since no appeal was taken from the order admitting the will to probate, and since the devisees thereunder are the five children mentioned, plaintiff is without right and should be estopped from bringing suit to cancel the gift deed because the will effects, through testamentary disposition, the same intent as is effected by the deed of gift. This last claim is not altogether true. If the original deed is sustained, and the two daughters retained their interest thereunder, they may, under the terms of the will, also share in the proceeds of the property returned to the mother by the other three children.

The serious question is the one relating to the claimed estoppel by reason of the apparent reliance on the original gift deed occasioned by the acceptance of the quitclaim deeds from the three children to their mother without any indication that the title to the property was to be restored to its former status in joint tenancy. It might be interpreted, according to defendants' claim, that the action instituted against the two daughters alone, without naming the other three children as defendants, was an endeavor to effect a partial rescission of the original gift deed and only as to those named defendants. Defendants cite the general rule in reference to rescission of instruments, that one may not affirm in part and rescind in part. Buena Vista Fruit & Vineyard Co. v. Tuohy, 107 Cal. 243, 40 P. 386; Bettendorf v. Bettendorf, 190 Iowa 83, 179 N.W. 444, 945; 12 C.J.S., Cancellation of Instruments, § 78b, page 1080; 9 Am.Jur. 403, sec. 67; Shields v. Barrow, 17 How. 130, 15 L.Ed. 158.

[8] There are certain exceptions to this general rule, however, as where the instrument sought to be canceled is separable or divisible and where the circumstances justify a rescission only as to particular matters or particular parties involved in an entire transaction. Hoffman v. Kirby, 136 Cal. 26, 68 P. 321; Sec. 3414, Civ.Code; 12 C.J.S., Cancellation of Instruments, § 78b, page 1080; and Smith v. Smith, 289 Mo. 405, 233 S.W. 183.

It appears to us, however, in the present action, that the question of estoppel or ratification of the gift deed by Lizzie Reina is a factual question rather than one of law. Plaintiff's complaint in the instant action alleges that the gift deed was fraudulently presented by Rose and Frances to their mother and her signature thereto was thus obtained; that the instrument did not convey any present interest in the properties because it was not intended that it be delivered at that time; that notwithstanding this intention of the grantor, Rose and Frances immediately recorded it; that upon discovery, the mother demanded a reconveyance; that immediately three of them quitclaimed any purported interest and action was immediately instituted against the other two to cancel the purported deed as to them.

[9, 10] "Delivery" is a word of well-defined meaning in law. The elements are that the writing must be meant by the maker to take immediate effect and be presumably or in fact, accepted by the other party. The delivery and acceptance are of necessity simultaneous and correlative acts. The law does not force a man to take title to real property against his will. Hibberd v. Smith, 67 Cal. 547, 4 P. 473, 8 P. 46, 56 Am.Rep. 726. Hence, the assent of the grantee is necessary in order to make a delivery effective and the deed operative as such. Under certain circumstances the recordation of a deed may be prima facie evidence or a presumption of its delivery or acceptance but this presumption is a disputable one. Under the pleadings the question of the delivery of the gift deed to any or all of the children was raised, and became a factual question, and opened the door to proof as to whether or not the three children, the defendants in this action who defaulted ever had a part in obtaining the gift deed by fraudulent representations or otherwise; whether they ever knew of the existence of the deed or that the same was recorded at their instance or request or with their knowledge; and whether in fact or in law there was a delivery of the deed or acceptance of it by them.

[11, 12] In Bank of Healdsburg v. Bailhache, 65 Cal. 327, 4 P. 106, it was held that "A deed takes effect from its delivery, and if delivery is wanting, it is void ab initio." (Syllabus). The same result would obtain as to the other two children if, by the evidence, plaintiff is successful in establishing fraud and lack of intent on the part of the mother to deliver the deed. The fact that the three children, upon notice by the mother of the fraudulent action of the other two children, immediately relinquished any claimed right to the property, strongly indicates a repudiation by them of the grant or its claimed delivery and acceptance by them. However, the trial court might be impressed with the idea that the mother ratified the claimed fraudulent deed and that these three children knowingly accepted the deed and quitclaimed the property back to her with the intent that she should hold it other than by joint tenancy deed. These are factual questions for the trial court to determine from the evidence produced but not from the pleadings alone. The action instituted by the mother against the two other children may also be con-

sidered as evidentiary support of either position but is not conclusive as a matter of law.

Judgment reversed.

BARNARD, P. J., and MUSSELL, J., concur.

Hearing denied; TRAYNOR, J., dissenting.

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90 Cal.App.2d 482

LECKIE v. LOCKE et ux.

Civ. 16742.

District Court of Appeal, Second District, Division 1, California.
March 8, 1949.

1. Parent and child 🔑15

Evidence supported findings that no relation in loco parentis existed between minor girl and persons with whom she lived and that such persons became indebted to girl, under express contract, for difference between amount of her earnings, turned over to them, and amount paid by her for clothes and dentist and doctor bills, so as to authorize judgment against them in her favor for amount of such difference.

2. Appeal and error 🔑1010(1)

A reviewing court will not interfere with trial court's findings and judgment supported by substantial evidence.

◆

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by Eunice A. Leckie against Henry R. Locke and wife to recover money due plaintiff on the theory of a constructive trust and for money had and received. Judgment for plaintiff, and defendants appeal.

Affirmed.

Martin Forrest, of Los Angeles, for appellants.

Donald H. Blanchard, of North Hollywood, for respondent.

DORAN, Acting Presiding Justice.

The present action sought to recover from the defendants, husband and wife, a total sum of $2,401.24. The first cause of action was based upon the theory of a constructive trust; a second count was for money had and received. Defendants answered by way of a general denial. The trial court found in favor of the plaintiff in the amount of $1,000 and entered judgment accordingly.

It appears from the record that, at the age of sixteen years, plaintiff left the Children's Baptist Home located at Inglewood, California, and for a period of some sixteen months resided with a family by the name of Nix at Hermosa Beach. According to the testimony of Mrs. Nix, whose name had become Mrs. Bigger at the time of trial, plaintiff "was there as a child in the home"; attended school, "on occasions helped me with the housework," but was not working for pay or for a place to live. During this period plaintiff's sister Faye was living with the defendants' family and in October, 1943, plaintiff also took up residence at the Locke home. The defendants were not related to the plaintiff in any way. While with the defendants, plaintiff graduated from High School in 1944, and in the fall of that year secured outside employment, continuing to live at the defendants' home.

The definite arrangement as to plaintiff's residence with the defendants, and in reference to plaintiff's earnings, is a matter concerning which the evidence is in conflict. According to the defendants' testimony and the theory of appellants' brief, the plaintiff originally came to the Locke home "as one of the family"; defendants at all times stood in loco parentis to the plaintiff; any money earned by plaintiff and turned over to defendants merely went into a general family fund used for living expenses and the like, resulting in no liability to the plaintiff.

On the other hand, plaintiff testified that "when I started to begin to work I wanted definitely to go to school and that was a definite understanding that as far as I am concerned that the money was to be saved for my schooling." There was also evidence that some 18 of plaintiff's wage checks were indorsed over to the defendant Elizabeth Locke, totaling $468.18; that other wage checks in the amount of $1,062.24 were indorsed and cashed by the plaintiff. Plaintiff testified to paying doctor bills and other personal expenses and to purchasing groceries and other necessaries for the family with proceeds of these checks; that the balance remaining was turned over to and retained by Mrs. Locke.

By way of deposition, plaintiff's sister Faye, who had also resided at the Locke home, testified, as stated in respondent's brief, that plaintiff "was asked to leave defendants' home because she had refused to hand over her last pay check." Henry R. Locke admitted that "when Alice (plaintiff) left there was a little over $300.00 left in the bank," but that this was not paid to plaintiff. There was also testimony by Doris (Nix) Bigger to the effect that defendants had stated "they were helping her (plaintiff) save her money so that she might advance further in her art work." There was evidence, including Mrs. Bigger's testimony, that plaintiff performed various household duties in the defendants' home, and that "she was usually working in the house" when the witness visited there.

The trial court found that the relation of loco parentis did not exist "after plaintiff's graduation from high school," or at any time; that after graduation plaintiff "turned over to defendants approximately Fifteen Hundred ($1,500.00) Dollars with the agreement that plaintiff would pay for her clothes, dentist and doctor bills, and that plaintiff would continue to work nights, mornings and weekends in the home to pay for her room and board; that plaintiff spent for clothes, dentist and doctor bills approximately Five Hundred ($500.00) Dollars and that defendants are indebted to plaintiff in the sum of One Thousand ($1,000.00)."

It is appellants' contention that "All the evidence conclusively shows that plaintiff came into the home of defendants * * * to live as a member of defendants' family like a daughter; that "The evidence establishes the relationship of loco parentis between plaintiff and defendants. Hence the findings of the lower court are not supported by the evidence." It is further argued in appellants' brief that "The findings of the court on a material issue (the loco parentis relation) are in irreconciliable conflict constituting reversible error"; and that the findings in respect to the amount turned over to the defendants and the amount due plaintiff, are "not supported by any evidence nor allegations in plaintiff's first amended complaint." It is the theory of the appellants that since the defendants stood in the relation of loco parentis to plaintiff, defendants were entitled to Miss Leckie's earnings, and therefore that "the judgment for plaintiff is erroneous under the evidence and the law and should be reversed." The respondent's position is that the record discloses substantial evidence to support the judgment and findings, and that in view of defendants' express agreement in reference to the use and saving of plaintiff's wages, plaintiff is entitled to recover the balance found to be due.

[1, 2] There is no merit in appellants' contentions. As hereinbefore indicated, the record presents conflicting evidence, which conflict the trial court has resolved in respondent's favor. It cannot be doubted, however, that there is substantial evidence, a part of which has already been referred to, in support of the trial court's findings and judgment. Under such circumstances it is well established that a reviewing court will not interfere with the decision. The above rule here finds application both in respect to the finding that no relation in loco parentis existed between the parties, and to the trial court's further finding that there was an express contract under which the defendants became indebted to the plaintiff in the sum of $1,000. There is no rule of law which would or should prevent such recovery.

The judgment is affirmed.

WHITE, J., concurs.

90 Cal.App.2d 486

BERRY et al. v. KELLY.

Civ. 3749.

District Court of Appeal, Fourth District, California.

March 9, 1949.

1. Mines and minerals ⚷78(2)

Abandonment cannot be inferred from nonuser by oil and gas lessee unless nonuser is coupled with an intention to relinquish all rights in the premises.

2. Mines and minerals ⚷78(7)

Abandonment of oil and gas lease is a question of intention to be determined from all the facts, and mere delay in drilling a well is not conclusive evidence of intention to abandon or surrender the lease.

3. Mines and minerals ⚷78(5)

A forfeiture clause in oil lease is for the benefit of lessor who may invoke or waive it at his pleasure.

4. Mines and minerals ⚷78(7)

In action by purchasers of surface rights in land subject to oil and gas lease and any renewal, extension or modification thereof to enjoin sublessee from interfering with plaintiffs' use of land surrounding a producing oil well which sublessee, due to mechanical failures and other difficulties, had capped, evidence did not sustain finding that sublessee had abandoned well and well site, in absence of evidence that original lessors had given notice of default under lease provision that a producing well from which oil was not produced for nine consecutive months should be treated as abandoned.

5. Mines and minerals ⚷78(1)

While oil and gas lease was still in effect, sublessee was not bound to fill sump holes and other excavations around capped well and clean up the property, where lease provided that such work should be done after termination of lease.

◆

Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Action for injunction and damages by Marvin E. Berry and another against Edward A. Kelly. From a judgment awarding damages and enjoining defendant from interfering with plaintiffs' use and enjoyment of surface rights in land surrounding an oil well, defendant appeals.

Judgment reversed.

Mack & Bianco, of Bakersfield, for appellant.

West, Vizzard, Howden & Baker, of Bakersfield, for respondents.

MUSSELL, Justice.

Defendant appeals from a judgment in favor of plaintiffs in an action for injunction and damages.

Plaintiffs are the owners of real property in Kern County. The grant deed to them, dated April 5, and acknowledged May 8, 1944, contained the following reservations:

"Subject to existing oil and gas leases as of record and the Grantors herein reserve all things of value to be paid by said Lessees, their heirs or assigns, according to the terms of said lease or leases and any renewal, extention or modification thereof.

"Excepting and reserving unto the Grantors herein all oil, gas, petroleum or other hydrocarbon substances within or underlying or that may be produced and saved therefrom, together with the right to prospect for, mine and remove the same, provided that said Grantors agree that they will not hereafter execute any Oil and Gas Lease that does not provide to pay for any damage done to crops."

Defendant is the lessee named in an oil and gas lease executed by plaintiffs' grantors on May 20, 1942, covering the real property here involved. Prior to the time plaintiffs purchased the property, defendant, through a sublessee had drilled an oil well thereon cased with 8⅝ inch casing to a depth of approximately 3000 feet. When plaintiffs took possession a derrick was in place and an area surrounding it of approximately 3.13 acres was covered by sumps, a ramp and oil saturated dirt. "Mechanical failures and different troubles" caused defendant to have the machinery and derrick removed and the well capped. Drilling operations have not been resumed by defendant and the property has remained as it was when plaintiffs obtained title.

Plaintiffs allege that defendant has abandoned the well and the sumps adjacent thereto; that the location of the well and sumps occupy approximately two acres of the property and that plaintiffs have been deprived of the use of the two acres for farming purposes; that unless an injunction is issued to compel defendant to remove the oil well and to fill in the sumps plaintiffs will be deprived of the use of the land for a long time to come; that the reasonable rental value of the surface rights of the two acres during the years 1944 and 1945 and a part of 1946 is $125.00 per acre for said period.

The trial court found that defendant had abandoned the well and the adjacent sumps; that plaintiffs had been deprived of the use of five acres of property; that the reasonable rental value of the land is $45.00 per acre and that the oil and gas lease between the lessors and Edward A. Kelly as lessee, was still in force and effect between said parties. Judgment was for the plaintiffs in the sum of $800.00 and defendant was restrained and enjoined from interference with and prevention of plaintiffs' use and enjoyment of the surface rights in that portion of the property surrounding and adjacent to the well, "unless such interference with said surface rights shall arise by reason of future bona fide operations under that certain Oil and Gas Lease upon said premises."

Defendant's first contention is that there is no evidence to justify the finding that he, as lessee, had abandoned the said well and well site.

Defendant testified that he had been involved in litigation concerning the property, which litigation was only completed a few days before the trial of this action; that a sublessee had defaulted on a lease and that it was defendant's intention to get some one else to go on the premises and put the well on production or do it himself; that he was able to get several parties to do the work but he could not go ahead until title to the property was cleared up; that he had entered into an agreement with an oil company to redrill the well and place it on production as soon as work was completed on a nearby well which was being redrilled; that he anticipated that the well here involved would be finished and on production in from 45 to 70 days; that he had never received any notice from any of the lessors in his original lease of any default of his on the terms of the lease. It was conceded that the well in question, known as Cauley No. Six, was a producing well, which made 120 Barrels, 22 gravity.

[1] Abandonment cannot be inferred unless it can fairly be shown that nonuser by lessee is coupled with an intent to relinquish all rights in the premises. Swigert v. Stafford, 85 Cal.App.2d 469, 193 P.2d 106; Herbert v. Graham, 72 Cal.App. 314, 317, 237 P. 58; Utt v. Frey, 106 Cal. 392, 39 P. 807. As is said in Ten-Year Supp., Cal. Jur. Vol. 8, page 733, sec. 119:

> "But of course, nonuser alone does not constitute an abandonment. In order that there be an abandonment, there must be an intention to abandon; and while such an intention may be inferred from the facts and circumstances of the case, mere inactivity, without more, is a wholly insufficient basis for any such inference."

[2] Defendant's delay in drilling the well is not conclusive evidence of an intention to abandon or surrender the lease. Abandonment is a question of intention to be determined from all the facts. Alphonzo E. Bell Corporation v. Listle, 74 Cal. App.2d 638, 646, 169 P.2d 462.

There is no substantial evidence upon which the trial court could base a finding that defendant had abandoned the well and well site unless it can be said, as contended by plaintiffs, that the provisions of the oil and gas lease under the circumstances furnish such substantial evidence.

The lease provides in part as follows:

> "It is distinctly understood and agreed between the parties hereto that if any well which is producing oil shall be put down and oil shall not be produced therefrom at any one time for a period of nine consecutive months, (except where such production shall cease because of regulation or order of any Government Board, Bureau or Official requiring such suspension of produc-

tion or from other cause provided for herein), then and in that event such well shall be considered and treated as an abandoned well under the terms and conditions of this lease."

[3, 4] There is no evidence in the record before us that the original lessors were in any way dissatisfied with the conduct of defendant with respect to the Cauley Well. No notice of default was ever given to him. The lease was never terminated, and the court so found. Plaintiffs state in their brief that "The plaintiff has not taken the position at any time that defendant could be restrained from bona fide operations under his oil and gas lease", and that "it is not maintained that respondents, as owner of the surface rights, would be entitled to forfeit the oil and gas lease." Plaintiffs acquired the property subject to the terms of the lease, and any renewal, extension or modification thereof. We see nothing to prevent a waiver of abandonment or a renewal or modification of the lease by lessors. A forfeiture clause in an oil lease is for the benefit of the lessor and he may invoke it, or he may waive it as he pleases. Cal.Jur. Ten-Year Supp. Vol. 8, page 732. In this connection a further provision of the lease is as follows:

"The possession by the lessee of said land shall be sole and exclusive, excepting only that the lessor reserves the right to occupy said land or to lease the same for agricultural, horticultural, or grazing uses, which uses shall be carried on subject to, and with no interference with, the rights or operations of the lessee hereunder."

The lessee was also granted the sole and exclusive right to produce, extract, take and remove oil, gas, asphaltum and other hydrocarbons from and to store the same upon the premises during the term of the lease. We are of the opinion that the provisions of the lease relied upon by plaintiffs do not furnish sufficient grounds for a finding of abandonment under the circumstances here shown.

The evidence does not show that defendant occupied or used more land in connection with the well than was in use at the time plaintiffs acquired title thereto, and there was no testimony that the area occupied surrounding the well was more than necessary for drilling operations or in violation of any of the terms of the lease.

[5] Plaintiffs contend that it was incumbent on defendant to fill all sump holes and other excavations made and to clean up the property, but the lease provides that such work shall be done after the termination of the lease. Since the lease is admittedly still in effect we find no merit in this contention. Cal.Jur. Ten-Year Supp. Vol. 8, page 734.

We conclude that the court erred in finding that plaintiffs were entitled to have the well and well site declared abandoned, and erred in awarding damages to plaintiffs. It is unnecessary to decide the remaining points raised by appellant.

Judgment reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

In re DUMAS' ESTATE.

MEHL et al. v. DUMAS et al.

Civ. 16556.

District Court of Appeal, Second District,
Division 2, California.
March 11, 1949.

As Modified on Denial of Rehearing
March 29, 1949.

Hearing Granted May 9, 1949.*

1. Wills 🔑384

On appeal on judgment roll alone from order admitting to probate the purported last will of deceased, sole question presented was whether findings supported such order.

2. Wills 🔑477

An undated, unsigned second page in deceased's handwriting and signed, undated third page in deceased's handwriting, both of which were written at an unknown time many years after first page and neither of which referred to first page, which in itself was valid holographic will, were not admissible to probate as valid holographic instruments under rule of "integration" or doctrine of "incorporation by reference". Probate Code, § 53.

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* Subsequent opinion 210 P.2d 697.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Incorporation by Reference" and "Integration".

3. Wills ⚷477

Under the rule of "integration", will may be written on several sheets of paper provided all sheets are present at time of execution.

4. Trial ⚷398

A finding cannot run counter to facts established by other findings.

5. Wills ⚷130

Undated writings have no efficacy as holographic wills. Probate Code, § 53.

6. Wills ⚷277

The filing of "amended opposition" by persons contesting documents offered for probate as purported will of deceased created adversary proceeding which could be resolved only by order of court based either on statutory insufficiency of offered documents, or on proof or disproof of allegations of opposition. Probate Code, §§ 53, 74.

7. Appeal and error ⚷193(9)

The failure of complaint to state cause of action is not fatal to judgment unless appellant can show that defect in pleading resulted in miscarriage of justice.

8. Appeal and error ⚷193(1)

A party on appeal cannot for the first time challenge an adversary pleading as formally insufficient.

9. Wills ⚷130

Where first page of alleged will was written by deceased in her handwriting on or about January 20, 1935, and bore date and signature, and second page was written by deceased approximately 10 years later and bore no date or signature or reference to first page, and third page was written by deceased about time of second page and bore signature but no date or reference to first page, first page was valid holographic will even though not disposing of property, but second and third pages were not valid codicils, and were not valid holographic testamentary documents. Probate Code, §§ 53, 74, 229.

◆

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Proceeding in the matter of the estate of Nellie Dumas, deceased, wherein Mrs. J. H. Mehl and Mrs. Walter J. Niederer filed petition for probate of purported last will of deceased, opposed by Kenneth Dumas and others. From an order admitting to probate the purported last will of deceased, Kenneth Dumas and others appealed. The appeal was opposed by petitioners and by the Bank of America National Trust & Savings Association, special administrator.

Order reversed with instruction.

Dunlap, Holmes, Ross & Woodson, of Pasadena, for contestants and appellants.

E. L. Searle, of Los Angeles, for petitioners and respondents.

MOORE, Presiding Justice.

Contestants appeal on the judgment roll from an order admitting to probate the purported last will of Nellie Dumas.

The papers admitted as constituting such will are three unnumbered sheets of paper entirely in the handwriting of decedent. The sheet bearing a date and the signature of the testatrix is referred to as "page 1." It contains also the conventional exordium of the ordinary will. It made no attempt to specify bequests or legatees notwithstanding its declaration that the "following bequests are to be given to my friends herein named." Its only useful provision was the designation of executors. It closed with the following: "In testimony I set my name this 20th day of January, 1935. Signed Nellie Dumas." Neither page 2 nor page 3 contains a date. Each contains only a list of potential beneficiaries and legacies. The signature of decedent is at the bottom of page 3. The three sheets were found folded together in a manila envelope after decedent's death.

[1] Inasmuch as this is an appeal on the judgment roll alone, the sole question presented is whether the findings support the order admitting the three papers to probate. A consideration of all the findings is not essential to a correct decision. A review of a portion thereof amply demonstrates prejudicial error. To this end the following findings are pertinent:

"The first page of said offered will was written by said decedent on or about January 20, 1935. * * *"

"The second and third pages of said offered will were written by said decedent at least nine (9) years after January 20, 1935, and at an unknown time or times subsequent to April, 1944. * * *"

"The said second page is neither dated nor signed. That the said third page is signed by Nellie Dumas but is not dated."

"The testatrix adopted as the date of said will the date 'Jany 20th 1935' previously written in the will on page one thereof."

"No witness observed the writing of any part of said document."

After decedent's death "said offered will was found folded as a unit in said manila envelope, sealed * * * in the safe deposit box of said decedent * * * page one, page two and page three * * * were found folded as a unit * * * not fastened together by any mechanical means other than being folded as a unit."

It is apparent from inspection that page 1 dated and signed by the testatrix meets all the requisites of a holographic instrument even though it makes no disposition of property. In re Douglas' Estate, 303 Pa. 227, 154 A. 376. It is just as apparent that page 2 by itself wholly fails to meet these requirements since it is neither dated nor signed. Page 3 standing alone is deficient in that it is not dated, although signed. Neither do pages 2 and 3 considered together supply the essential requirements. Since pages 2 and 3 were written nine years after page 1 and their invalidity as holographic testamentary documents, when viewed independently of page 1, is evident, it follows that their vitality, if any, must be drawn from page 1. But this gap in time must be bridged by a legal principle more substantial than that implied by the conclusion of the trial court, to wit, "said will is one continuous instrument, and is a single, homogeneous, holographic document." Such a conclusion is not substantiated by a finding that decedent "adopted" a date used nine years previously in drafting page 1.

[2] Respondents dared not suggest that the doctrine of incorporation by reference is applicable for when page 1 was written pages 2 and 3 were not yet in existence. In re Estate of Bauer, 51 Cal.App.2d 636, 638, 124 P.2d 630; In re Estate of Wunderle, 30 Cal.2d 274, 281, 181 P.2d 874; In re Shillaber's Estate, 74 Cal. 144, 15 P. 453, 5 Am.St.Rep. 433. Neither could pages 2 and 3 be said to incorporate page 1 by reference since on neither is there a reference to page 1. Moreover, pages 2 and 3 viewed separately or together do not satisfy the requisites of a holographic testament.

[3-5] Under the rule of integration a will may be written on several sheets of paper provided all the sheets are present at the time of execution. In re Estate of Merryfield, 167 Cal. 729, 731, 141 P. 259. Pages 2 and 3 found with page 1 could not have been integrated therewith because they were not in existence when page 1 was executed. Assuming that decedent when pages 2 and 3 were written intended to integrate page 1 with them—such attempted integration failed because the two pages written at an unknown time do not measure up to the statutory requirements of a holographic will. Probate Code, sec. 53. While a finding is of paramount importance to the fortunes of a judgment under attack, yet it derives no divinity. It cannot run counter to facts established by other findings. The finding that the testatrix "adopted" an earlier date in the execution of the undated pages does not even tend to validate them. Even though decedent had expressly entertained the wish to adopt the date on which she had written page 1, such a desire could not have been effectuated because undated writings have no efficacy as holographic wills. In re Estate of Bauer, 51 Cal.App.2d 636, 637, 124 P.2d 630. Neither can pages 2 and 3 be wedged in as a

codicil to page 1. A codicil as such must be executed with the same formalities as a will. Probate Code, sec. 74. Since pages 2 and 3 are not dated they do not comply with the statutory requisites, Probate Code, sec. 53, and the order admitting them to probate should be reversed unless for other considerations respondents' contentions must be sustained.

Respondents contend that (1) the issue of the invalidity of the will by reason of the nullity of pages 2 and 3 was not raised in the court below; (2) the "opposition" merely recited the evidentiary facts; (3) such form of pleading does not constitute a legal opposition to pages 2 and 3 as a part of a single, continuous testamentary instrument with page 1; and (4) therefore, since the issue was not raised in the trial court it cannot be presented on appeal. The implication is that the alleged facts should have been followed by a legal conclusion or by an argumentative statement to raise an "issue."

Such a contention if heeded would lead the court into error. The contestants alleged in their amended opposition to petition for probate that: "(3) * * * In the absence of valid testamentary disposition contestants are the persons entitled to succeed to the estate of said decedent under the provisions of section 229 of the Probate Code." * "(4) Said alleged will dated January 20, 1935, consists of three separate pages in the handwriting of said decedent. The first page was written on or about January 20, 1935, and bears a date and a signature. The second page was written approximately ten years later and bears no date nor signature. The third page was written on or about the time of the second page and bears a signature but no date. The second and third pages were not in existence when the first page was written."

[6, 7] The filing of the "amended opposition" created an adversary proceeding, In re Estate of Relph, 192 Cal. 451, 459, 221 P. 361, which could be resolved only by an order of the court based either upon the statutory insufficiency of the offered documents or upon proof or disproof of the allegations of the opposition. Not even the failure of a complaint to state a cause of action is fatal to a judgment in plaintiff's favor unless the appellant can show that the defect in the pleading resulted in a miscarriage of justice. Drullinger v. Erskine, 71 Cal.App.2d 492, 497, 163 P.2d 48. Inasmuch as the first above quoted findings verify appellants' factual allegations the court erroneously concluded that the three pages are "a single, homogeneous, holographic document," and the order admitting them to probate was an irremediable error.

[8, 9] The authorities cited by respondent (In re Kile, 72 Cal. 131, 13 P. 320; In re Estate of Cartery, 56 Cal. 470; In re Estate of Relph, supra; In re Estate of Stone, 59 Cal.App.2d 263, 138 P.2d 710; In re Estate of Latour, 140 Cal. 414, 73 P. 1070, 74 P. 441) in support of its thesis that no issue was presented by contestants' paragraph 4 are beside the point. In view of the uniform adherence for 99 years to the doctrine that a party on appeal cannot for the first time challenge an adverse pleading as formally insufficient, Clayton v. West, 2 Cal. 381; Christensen v. Jessen, 5 Cal.Unrep. 45, 40 P. 747; Haines v. Stilwell, 5 Cal.Unrep. 27, 40 P. 332; Greiss v. State Investment and Insurance Company, 98 Cal. 241, 244, 33 P. 195; Howland v. Oakland Consolidated Street Railway Company, 110 Cal. 513, 520, 42 P. 983; Drullinger v. Erskine, supra; Grimes v. Nicholson, supra, it would be a grave error for this court now to depart from so salutary a rule. Because of the palpable vices of pages 2 and 3 they constitute neither a codicil nor a part of the holographic will contained in page 1. Since the latter comports with the statute, Prob.Code, sec. 53; In re Carpenter's Estate, 172 Cal. 268, 269, 156 P. 464, L.R.A.1916E, 498, providing for the probate of holographic wills, the order appealed from is correct in so far as it admits page 1 to probate.

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* Probate Code Section 229.

"If the decedent leaves neither spouse nor issue, and the estate or any portion thereof was separate property of a previously deceased spouse, and came to the decedent from such spouse by gift, descent, devise or bequest, or became vested in the decedent on the death of such spouse by right of survivorship in a homestead or in a joint tenancy between such spouse and the decedent, such property goes in equal shares to the children of the deceased spouse and to their descendants by right of representation, and if none, then to the parents of the deceased spouse in equal shares, or if either is dead to the survivor, or if both are dead, in equal shares to the brothers and sisters of the deceased spouse and to their descendants by right of representation."

The order is reversed with instruction to admit to probate only page 1 as the last will and testament of Nellie Dumas.

McCOMB and WILSON, JJ., concur.

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90 Cal.App.2d 538

KAN et al. v. TSANG et al.

TSANG et al. v. BUTTERWORTH et al.

Civ. 13805.

District Court of Appeal, First District, Division 2, California.

March 11, 1949.

1. Receivers 🔑198(1)

Evidence that receiver appointed in suit for dissolution of a partnership in a restaurant business spent more than 110 days at restaurant in general supervision thereof, settlement and allowance of claims against business and settlement of conflicting claims made by partners and saw to it that there was no interruption in business which had an annual profit of $60,000, authorized award to receiver for his services of $4,000.

2. Receivers 🔑194

Where attorney for receiver of a restaurant business consulted with receiver on an average of two or three times per week, advised accountants who were employed to audit books, held conferences with counsel for various partners who were interested in business, prepared accounts for presentation to court and made several court appearances, devoting about 80 days to business of receivership, and accounting indicated a distribution of approximately $200,000 to the partners, allowance to attorney for his services of $6,000 was authorized.

3. Partnership 🔑325(6)

Where receiver of a partnership business and his attorney had been cross-examined by counsel for one of partners on hearing on application of receiver and attorney for allowance for services and counsel submitted matter when judge remarked that he was anxious to get away, in absence of showing that court would not have granted a continuance for further cross-examination if so requested, the fact that counsel subsequently came to conclusion that he should not have terminated his cross-examination was not sufficient to indicate that court abused discretion in refusing to re-open matter for further cross-examination.

4. Trial 🔑377(2)

Refusal of judge to set aside a submission for the taking of further testimony is not an abuse of discretion unless a good excuse is offered for failure to produce testimony before submission.

5. Receivers 🔑199

Where services of receiver and his attorney were practically completed at time of allowance to them of fees, burden of making a showing for additional compensation was on receiver and his attorney.

◆

Appeal from Superior Court, City and County of San Francisco; Thomas M. Foley, Judge.

Action by John Kan, and others against Ernest Tsang, and others for dissolution of a partnership and for an accounting wherein Charles T. Butterworth was appointed receiver. From an order making allowances to receiver and his attorney for their services, Ernest Tsang and others appeal.

Affirmed.

See also Cal.App., 197 P.2d 378.

Robert E. Hatch, of San Francisco, for appellants.

Alden Ames and Sidney A. Romer, both of San Francisco, for plaintiffs.

Mahaney & McDonald, of San Francisco, for respondents.

DOOLING, Justice.

This is an appeal from an order allowing respondent Butterworth $4,000 for services as receiver and respondent Mahaney $6,000 for services as the receiver's attorney.

The action was one for the dissolution of a partnership and for an accounting. The partnership was formed for the operation of a restaurant in San Francisco known as the Cathay House. The partnership was a limited one, the appellant Tsang being the only general partner and as such having full management of the business. Serious friction developed between Tsang and some of the other partners, in particular the plaintiff John Kan, which led to other litigation including that decided by Division One of this court in Tsang v. Kan, 78 Cal.App.2d 275, 177 P.2d 630; and shortly before the commencement of this litigation Kan had gone so far as to appear in the restaurant premises armed with a gun. The complaint prayed for the appointment of a receiver and the court appointed the respondent Butterworth. No appeal was taken from the order appointing the receiver and the fact that counsel for the appellants herein may have opposed the appointment before it was made can have no bearing on the only questions presented on this appeal, which are whether the evidence is sufficient to support the allowances made by the court and whether the court abused its discretion in denying a motion to reopen the proceedings for further cross-examination of the respondents after the matter had once been submitted for decision.

[1] The receiver was appointed June 3, 1946 and immediately took over the property and business. He continued Tsang in the management thereof under his supervision, no change being made in the manner of operation or in the employees of the restaurant. On August 15, 1946 upon application of the receiver the court authorized the employment of respondent Mahaney as his attorney. On August 8, 1946 an interlocutory decree of dissolution was entered by the court on stipulation of the parties and on August 30, 1946 the receiver pursuant to an order of the court sold at public auction all of the assets of the business "save and except only money and money in bank" to appellant Tsang for $25,100.

It is appellants' contention that the services of the receiver and his attorney were only nominal and practically terminated with the sale of the business to Tsang on August 30, 1946. The evidence given by the receiver and his attorney substantially contradicts this assertion.

The partnership did a gross business of $88,000 in the three months between the appointment of the receiver and the sale of the business to Tsang. Its annual profits amounted to $60,000. There was $130,000 belonging to the partnership in bank which was taken over by the receiver together with promissory notes from Tsang to the partnership aggregating $34,000. Up until the time of the sale to Tsang the receiver was at the restaurant at least once every day, seven days per week, and generally twice. He signed all checks on the bank account and saw that the receipts of the business were deposited in bank. He conducted the sale at which the assets of the business were sold. His presence prevented any disrupting incidents among the partners and the volume and profits of the business were as great as before despite the pending action and the ill feeling among the partners.

For reasons undisclosed by the record the sale to Tsang was not confirmed by the court until September 19, 1947. However it does appear that after the sale a conference was held by the receiver and his attorney with counsel for the parties at which an agreement was reached apportioning insurance premiums and other items in such fashion that Tsang on account of the sale was charged an amount in excess of his bid of $25,100 and in the account of the receiver not finally acted upon by the court until September 26, 1947 there was still a disputed item as a part of the sale to Tsang of $384.95.

In the meantime, the sale not having been confirmed, it was the obvious duty of the receiver as well as his legal responsibility to see that the business was properly run so that its value would not be depreciated. After the sale to Tsang and before its confirmation, a period of about one year, the receiver testified that he spent 110 or more days at the restaurant. This involved not only a general supervision but the settlement and allowance of claims against the business and of conflicting claims made by the partners.

[2] The attorney for the receiver testified that the receiver during the entire period consulted with him on an average of two or three times per week. The attorney also advised the accountants who were employed to audit the books on numerous occasions, held conferences with counsel, prepared accounts for presentation to the court and made several court appearances as did the receiver. The attorney estimated that he had devoted about eighty days to the business of the receivership. The money to be distributed to the partners will amount to about $200,000. Many disputed items in the receiver's accounts and reports were settled by negotiation and there still remained four objections to be settled by the court by the same order which allowed the compensation here in issue. With the settlement of those objections and the allowance of an attorney's fee to appellant's attorney for services rendered to the partnership, through the negotiations and good offices of the receiver and his attorney the assets appear ready for distribution to the parties without further dispute.

The trial court was in a better position to know the necessity for the services performed by the receiver and his attorney and to assess their reasonable value than is this court. From the above recital, which might be amplified by detail, it is apparent that this court cannot say that the compensation allowed to the receiver and his attorney is not supported by the evidence. 22 Cal.Jur., Receivers, sec. 125, pp. 533-4, sec. 129, p. 536.

In view of appellants' attempt to minimize the value of the services, particularly after the sale, a letter of appellant Tsang to the receiver dated October 19, 1946, over a month and a half after the sale to Tsang, is of interest. In it Tsang thanks the receiver "for your very understanding way of handling the whole affair" and adds: "I greatly appreciate the many times that you have answered my calls for assistance, especially in the matter of taking inventories and the many other matters pertaining to the discharge of your duties as receiver."

[3, 4] Two hearings were held on the application of the receiver and his attorney for compensation at the second of which counsel for appellants cross-examined both the receiver and his attorney. The matter was then submitted. Thereafter counsel for appellants moved the court to reopen the hearing to permit him to further cross-examine the receiver and his attorney. The only excuse offered for the request to reopen the hearing was given in an affidavit of counsel for appellants wherein he stated that "affiant * * * submitted said matter particularly in mind of the situation that the court stated that it was late for an appointment and was anxious to get away." No showing was made that the court would not have granted a continuance for further cross-examination if so requested and the mere fact that "that evening affiant came to the sober realization that he was not fairly discharging his duty to his clients * * * without eliciting the detail of the services * * *" was not sufficient to make it an abuse of discretion to refuse to set aside the submission to which affiant had voluntarily agreed. The affidavit contains much reference to the failure of the receiver's attorney to furnish the affiant with copies of two written documents from which he had read at the hearings. Since affiant had submitted the matter with knowledge that he had not then had the opportunity to read

either of these documents the failure to supply him with copies after the submission could furnish no ground for setting it aside. It is not an abuse of discretion to refuse to set aside a submission for the taking of further testimony unless a good excuse is offered for the failure to produce the testimony before submission. Loftus v. Fischer, 113 Cal. 286, 289, 45 P. 328; San Francisco Breweries v. Schurtz, 104 Cal. 420, 38 P. 92; Bovais v. Cassassa, 108 Cal. App. 649, 291 P. 886; Chase v. Sunset Mutual Life Ass'n, 101 Cal.App. 625, 281 P. 1054; Houghton v. Lawton, 63 Cal.App. 218, 218 P. 475; 24 Cal.Jur. 770.

[5] The allowance to the receiver was expressed to be "on account for services rendered" and that to his attorney "as partial compensation to be paid on account." It would have been better practice for the court to fix the full compensation to be allowed to the date of the order in view of the fact that the services were practically completed. We express no opinion on the question whether the facts would justify a further allowance since that question is not now before us. The burden of making a showing for additional compensation, if any is asked for or allowed, should be on the receiver and his attorney.

The order appealed from is affirmed.

NOURSE, P. J., and GRIFFIN, J. pro tem, concur.

90 Cal.App.2d 529

FRAGA v. EVANS et ux.

Civ. 7584.

District Court of Appeal, Third District, California.

March 10, 1949.

1. Partnership ⇨95

Evidence authorized recovery of unpaid balance of purchase price of partnership interest sold, as against defense that payment of such balance was conditioned upon resale of property for specified sum.

2. Contracts ⇨212(2)

Where a specified indebtedness is absolute, and is to be paid when certain property is sold, but agreement fails to specify the time within which property shall be sold, law implies that sale shall be made within a reasonable time.

3. Contracts ⇨275

Where specified absolute indebtedness is to be paid when certain property is sold but agreement fails to specify time within which property shall be sold, and property is not sold without fault of creditor, debtor may not avoid the obligation by willfully refusing to sell.

4. Contracts ⇨313(1)

Where a specified absolute indebtedness is to be paid when certain property is sold but agreement fails to specify the time within which property shall be sold, and debtor absolutely repudiates his obligation, upon demand for payment, creditor may sue to recover the amount due.

Appeal from Superior Court, Merced County; R. R. Sischo, Judge.

Action by William Fraga against James Evans and wife for balance of purchase price of partnership interest in cafe business sold. From a judgment for plaintiff, defendants appeal.

Affirmed.

Adams, Griswold & Winton and Gordon H. Winton, Jr., all of Merced, for appellants.

Galvin & Galvin and Stephen P. Galvin, Jr., all of Merced, for respondent.

THOMPSON, Justice.

The plaintiff recovered judgment for $1,500, the unpaid portion of the purchase price of his partnership interest in the Greyhound Cafe business in Livingston, Merced County, which was sold and delivered to the defendants pursuant to an oral agreement. From that judgment the defendants have appealed.

It is contended the findings and judgment are not supported by the evidence. The defendants assert that the $1,500 payment was conditioned upon their reselling the property for $16,000, and that it has not been resold.

The evidence is conflicting regarding the terms upon which said payment of $1,500 was to become due and payable. It appears that defendants owned the building in which the cafe business was conducted. The plaintiff and James Evans are brothers-in-law. They became partners in the cafe business in October, 1945, and operated the business until January 1, 1947, at which time plaintiff sold his interest to the defendants pursuant to an oral agreement of sale for the sum of $3,500. The defendants then took and retained possession of the business and continued to operate the cafe. The partnership was dissolved on the last mentioned date. During the existence of the partnership, the building was enlarged and new equipment was installed at the cost of the partnership. At the time of the sale the building and cafe business was listed with a real estate broker for sale at the price of $16,000. At that time the partnership owed debts in the aggregate amount of about $1,000. A few months after the sale, defendants withdrew the property for resale and "refused to sell" it. At the time of sale the defendants paid plaintiff $2,000 in cash and agreed to give them a promissory note for the unpaid portion of the purchase price, in the sum of $1,500, payable "when he [the defendant] sold that business." The plaintiff's wife testified that she was present when the cafe business was sold to the defendants, and that it was then "understood it would be * * * sold [by the defendants] within two months" from the time the defendants took possession of the business. The defendants failed and refused to execute the note. Plaintiff demanded the execution and delivery of that note several times, which was refused. Sometime in March, 1947, plaintiff's wife called Mr. Evans on the phone and asked him to make and deliver the note for $1,500. Evans refused to do so. He repudiated that debt. He told Mrs. Evans "You have got all you are going to get." The defendants having repudiated the debt of $1,500, plaintiff commenced this action for the unpaid balance of the purchase price of the business, on July 28, 1947.

The defendants contend that the $1,500 payment on the agreed purchase price of $3,500 was conditioned upon their resale of the property, including the building, for the sum of $16,000, and that since it was not resold the consideration for the $1,500 failed, and that sum was therefore not due, owing or payable. The defendants claim the agreement was that if they sold the building and business for less than $16,000, the difference between that valuation and the actual price received should be divided equally between the parties and that said $1,500 indebtedness would be reduced to that extent. Both the plaintiff and his wife testified to the contrary. They said that the defendants promised to give them a note for said balance of the purchase price. The only uncertainty disclosed by the record is the time when said note was to become due if the property was not resold. They said that sum was to be paid when the defendants sold the business, but both of them specifically denied that the debt depended upon the sale of the business, or that it was to become invalid or void if the business should not be sold by the defendants. Mrs. Fraga added the statement that it was understood the business was to be sold within two months' time. She testified in that regard: "We were to get a note to cover the $1,500.00 to be payable within a certain time. At that time it was understood it would be two months, the place would be sold within two months."

James Evans admitted that he discussed with the plaintiff his expectation of reselling the property within sixty or ninety days. He was asked on cross-examination: "That was your expectation, that you would sell it within the next 30 or 60 days?" to which he replied, "Yes, he took something over 90 days and he didn't sell it."

The trial court found that, prior to January, 1947, the plaintiff and defendant James Evans were partners in the Greyhound Cafe business at Livingston, and that, on the 15th of that month, plaintiff sold and delivered possession of his interest in said business to Evans for the agreed sum of $3,500; that the sum of $2,000 was then paid plaintiff in cash, and that defendant refused, on or about March 15, 1947, to pay plaintiff the said unpaid portion of the purchase price in the sum of $1,500, and then he denied that he owed said sum or any sum whatever to plaintiff; and that defendant was indebted to plaintiff in said sum of $1,500, together with interest at the rate of 7% per annum from said last mentioned date to March 29, 1948. Judgment was accordingly rendered against the defendant James Evans for said amount. From that judgment the defendants appealed.

[1] We are satisfied the findings and judgment are adequately supported by the evidence. The evidence sufficiently shows that plaintiff sold to his partner, James Evans, his interest in the Greyhound Cafe business in January, 1947, for $3,500, and that Evans promised to pay plaintiff the unpaid balance of the purchase price in the sum of $1,500; that, after repeated demands therefor, the defendant repudiated said indebtedness on or about March, 1947, and refused to pay the same or any part thereof, and that said defendant is indebted to plaintiff therefor.

[2-4] Where a specified indebtedness is absolute, and is to be paid when certain property is sold, but the agreement fails to specify the time within which the property shall be sold, the law implies that the sale shall be made within a reasonable time. Weaver v. Grunbaum, 31 Cal.App.2d 42, 51, 87 P.2d 406; Rosenheim v. Howze, 179 Cal. 309, 312, 176 P. 456; Bartholomae Oil Corporation v. Oregon Oil & Development Co., 106 Cal.App. 57, 64, 288 P. 814. If the property is not sold and the creditor is free from fault on that account the debtor may not avoid the obligation by wilfully refusing to sell the property. Rosenheim v. Howze, supra; Ottney v. Finnie, 5 Cal. App.2d 356, 362, 42 P.2d 714. When a debtor absolutely repudiates his obligation, as the defendant Evans did in the present case in March, 1947, upon demand for payment the creditor is entitled to maintain an action to recover the amount due. Looney v. Scott, 71 Cal.App. 308, 314, 235 P. 76; Spangenberg v. Spangenberg, 19 Cal.App. 439, 445, 126 P. 379.

The appellants failed to cite a single authority in support of their contentions in this case.

We conclude that the findings and judgment are adequately supported by the evidence.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

In re WILLIS' ESTATE.

KUCHEL v. WILLIS.

Civ. 16620.

District Court of Appeal, Second District,
Division 3, California.
March 3, 1949.
Hearing Granted May 2, 1949.*

1. Statutes 🔑245

Proceedings under tax statutes are in invitum and the statutes will be strictly construed in favor of taxpayer and against the taxing power.

2. Corporations 🔑62

A "share of stock" constitutes an undivided share or interest in the property, assets, profits or business of the corporation, being an interest in the corporation aliquot and undivided as to specific properties or assets.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Share of Stock".

3. Corporations 🔑96, 174, 182

Stockholders are joint owners of franchise and property of corporation, each being entitled to an undivided share thereof, evidenced by a certificate of stock.

4. Corporations 🔑182

Property, legal ownership and title to which are in corporation, is held by corporation as trustee for its stockholders, each of whom has a proportionate beneficial ownership in assets of the corporation.

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* Subsequent opinion 215 P.2d 453.

5. Taxation ⚷904

Federal income tax deficiency levied against corporation after state inheritance tax on transfer of stock in corporation passing under will had been fixed and paid constituted a "contingency" which "burdened" and "diminished" legatee's interest in corporation within statute providing for inheritance tax refund. Revenue and Taxation Code, §§ 14361 et seq., 14401.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Burden", "Contingency" and "Diminish".

6. Taxation ⚷904

Statute providing for inheritance tax refund where gift was valued without allowance for a "contingency" which subsequently happened burdening or diminishing the interest of transferee should be construed as applying to a contingency arising entirely apart from the transfer, since it is the policy of inheritance tax law to tax only the net value of property received by transferee. Revenue and Taxation Code, § 14401.

7. Taxation ⚷363½

Liability for income taxes arises at the time income is received and does not depend upon an assessment.

8. Taxation ⚷363½

An income tax "deficiency" is the excess of the amount determined to be the correct amount of the tax over the amount reported by taxpayer.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Deficiency".

9. Taxation ⚷904

Where federal income tax deficiency was levied against corporation after state inheritance tax on transfer of stock in corporation passing under will had been fixed and paid, legatee was entitled to inheritance tax refund, though order fixing such tax had become final before application for refund was made. Revenue and Taxation Code, § 14401.

Appeal from Superior Court, Los Angeles County; Kurtz Kauffman, Judge.

Proceeding in the matter of the estate of Charles Golden Willis, also known as Chas. G. Willis, and as C. G. Willis, deceased, upon petition filed by Bertram Paul Willis, as executor of decedent's estate, against Thomas H. Kuchel, controller of the state of California, for refund of a portion of inheritance tax paid on bequest of shares of corporate stock. From an order directing refund as prayed, respondent Controller appeals.

Order affirmed.

James W. Hickey, Chief Inheritance Tax Atty., of Sacramento, Morton L. Barker, of Los Angeles, and Raymond G. LaNoue, Deputy Inheritance Tax Attys., of Sacramento, for appellant.

Arnold Praeger, of Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by the State Controller from an order of the probate court directing a refund of a portion of an inheritance tax paid on a bequest of shares of corporate stock. The appeal is presented on an agreed statement of facts. Rules on Appeal, Rule 6; 22 Cal.2d 1, 6.

Charles Golden Willis died February 26, 1946. His will, duly admitted to probate, bequeathed to Bertram Paul Willis 691 shares of the common stock of C. G. Willis & Sons, a corporation, and half of the residue of his estate. The 691 shares of stock were appraised by the inheritance tax appraiser as having a value of $198,779.97 on the date of death. The appraiser made the appraisal on the basis of a balance sheet which the corporation submitted to him showing the assets and liabilities of the corporation as of February 26, 1946.

Bertram Paul Willis was taxed with the 691 shares of stock and with half of the residue. The total value of the estate taxed to him was $262,721.40 upon which the tax was reported to be $15,794.93. On April 14, 1947, an order was made fixing the tax in that amount. The tax was paid to the county treasurer. The order became final.

On December 12, 1947, the Commissioner of Internal Revenue for the United States levied a deficiency income tax for the years 1943 and 1944 against C. G. Willis & Sons in the sum of $17,802.58. The deficiency was paid by the corporation to the Collector of Internal Revenue on December 30, 1947. It is agreed that if the income tax deficiency had been determined by the Commissioner of Internal Revenue at or prior to the time the inheritance tax appraiser made his appraisal of the 691 shares of stock or prior to the time of payment of the inheritance tax the appraiser would have taken such deficiency into consideration in determining the value of the stock as of the date of death. The value of the 691 shares as of the date of death, had the income tax deficiency been established prior to that date, would have been $183,944.20, instead of $198,779.97, resulting in a reduction of $1,335.22 in the total amount of tax which would have been due from Bertram Paul Willis.

On March 9, 1948, Bertram Paul Willis filed a petition in the court below for a refund of the amount by which the inheritance tax would have been reduced had the value of the 691 shares of stock been reduced by the proper proportion of the income tax deficiency on the ground that the levy of the deficiency against the corporation served to reduce the value of the shares of stock and that he was entitled to a refund under the provisions of section 14401 of the Revenue and Taxation Code. The court ordered a refund as prayed. The Controller appeals.

The question for decision is whether respondent is entitled to the refund under the provisions of section 14401 of the Revenue and Taxation Code, which reads: "If any tax has been paid to the county treasurer on a transfer subject to a contingent incumbrance or any contingency which might burden, abridge, defeat, or diminish the estate or interest of the transferee, and the gift was valued without allowance for the incumbrance or contingency, upon the taking effect of the incumbrance or the happening of the contingency the person who paid the tax is entitled to a refund in an amount equal to the difference between the tax paid and any smaller tax that would have been paid on a valuation of the estate or interest actually enjoyed or of the estate or interest remaining after the taking effect of the incumbrance or the happening of the contingency." The problem is whether the levy of the deficiency was such a contingency and whether respondent's interest in the shares of stock was burdened or diminished by the levy against the corporation.

[1] Proceedings under tax statutes are in invitum and the statutes will be strictly construed in favor of the taxpayer and against the taxing power. Estate of Potter, 188 Cal. 55, 64, 204 P. 826; Estate of Steehler, 195 Cal. 386, 389, 233 P. 972; Uhl v. Badaracco, 199 Cal. 270, 282, 248 P. 917; People v. Mahoney, 13 Cal.2d 729, 739, 91 P.2d 1029; McDougald v. Boyd, 172 Cal. 753, 756, 159 P. 168.

[2, 3] A share of stock constitutes an undivided share or interest in the property, assets, profits or business of the corporation. Newell-Murdoch Realty Co. v. Wickman, 183 Cal. 39, 45, 190 P. 359; Estate of Duffill, 180 Cal. 748, 756, 183 P. 337; MacDermot v. Hayes, 175 Cal. 95, 114, 170 P. 616; Burke v. Badlam, 57 Cal. 594, 601; Atkins v. Gamble, 42 Cal. 86, 99, 10 Am.Rep. 282; 6a Cal.Jur. 352, sec. 189. It is an interest in the corporation aliquot and undivided as to specific properties or assets. Fletcher Cyclopedia Corporations, Perm.Ed. Vol. 11, sec. 5100. "The stockholders are the joint owners of the franchise and property of the corporation, each being entitled to an undivided share thereof, and the only office of the certificate is to furnish the evidence of the quantum of interest held by the owner of the certificate." Atkins v. Gamble, supra, 42 Cal. 86, 99, 10 Am.Rep. 282; see, also, Robbins v. Pacific Eastern Corp., 8 Cal.2d 241, 275, 65 P.2d 42; Jean v. Jean, 207 Cal. 115, 120, 272 P. 313; 6a Cal.Jur. sec. 189, p. 352. "* * * property is held by the corporation in trust for the stockholders, who are the beneficial owners of it in certain proportions called shares, and which are usually evidenced by certificates of stock. The share of each stockholder is undoubtedly property, *but it is an interest in the very property held by*

the corporation. It is his right to a proportionate share of the dividends and other property of the corporation. * * *" (Italics added.) Burke v. Gamble, supra, 57 Cal. 594, 601. "When one purchases or acquires stock in a corporation, no matter at what time, he acquires a fractional interest in the capital stock, assets, profits, and liabilities of the corporation." 13 Am. Jur. 465, sec. 412. In Gregory v. State of California, 77 Cal.App.2d 26, 36, 174 P.2d 863, 175 P.2d 542, it was held that a gift to a corporation was an indirect gift to the stockholders of the corporation.

[4] The distinction is between legal and equitable ownership or title. The legal ownership and title is in the corporation. The beneficial or equitable ownership is in the stockholders. San Diego v. S. D. & L. A. R. R. Co., 44 Cal. 106, 116; Rossi v. Caire, 174 Cal. 74, 81, 161 P. 1161; W. F. Boardman Co. v. Petch, 186 Cal. 476, 481, 199 P. 1047; Miller v. McColgan, 17 Cal. 2d 432, 437, 110 P.2d 419, 134 A.L.R. 1424; 13 Am.Jur. 465, sec. 411. In W. F. Boardman Co. v. Petch, supra, it was said, 186 Cal. at page 481, 199 P. 1050: "A corporation is the creature of its stockholders and it holds its property in trust for them. As between themselves and the corporation, the stockholders are the beneficial owners of the property held by the corporation. Havemeyer v. Superior Court, 84 Cal. [327], 362, 24 P. 121, 10 L.R.A. 627, 18 Am.St.Rep. 192; Ashton v. Dashaway Ass'n, 84 Cal. [61], 65, 22 P. 660, 23 P. 1091, 7 L.R.A. 809; Hobbs v. Tom Reed, etc., Co., 164 Cal. [497], 499, 501, 129 P. 781, 43 L.R.A.,N.S., 1112; Rossi v. Caire, 174 Cal. 81, 161 P. 1161."

It thus appears that respondent as a stockholder had a proportionate beneficial ownership in the assets of the corporation.

[5] Was that share burdened or diminished by the happening of a contingency within the meaning of section 14401? A contingency is defined as: "The quality of being contingent or casual, the possibility of coming to pass; also an event which may occur; a casualty; a mere possibility of happening; an uncertain future event; some specified time, thing, or event, in the future, which may or may not occur; also a fortuitous event which comes without design, foresight, or expectation. 'Contingency' implies futurity, has the element of uncertainty and doubt, is in the nature of a casualty, accident, or chance, and results from an agency, the operation of which is uncertain, and is dependent on a possibility and on causes which are undetermined or unknown. * * *" 17 C. J.S., Contingency, p. 181. See, also, Verdier v. Roach, 96 Cal. 467, 474, 31 P. 554; Vandegrift v. Riley, 220 Cal. 340, 351, 30 P.2d 516. The levy of the deficiency income tax was a fortuitous event which came without design, foresight or expectation. At the date of death of the testator it was a contingency possible of happening. Applying the rule of construction which we have stated, it appears clear that the levy of the deficiency income tax was a contingency within the meaning of section 14401.

We think it obvious that the happening of the contingency—the levy of the deficiency assessment—imposed a burden upon and diminished respondent's interest in the corporation. The noun "burden" is defined as "that which is grievous, wearisome, or oppressive; also, an encumbrance of any kind", and, as a verb, to "oppress with anything which is borne with difficulty or trouble; surcharge; as to *burden* a nation with taxes." 1 Century Dict. 724. Webster defines a "burden" as "an obligatory expense which inconveniences." Webster's New Int.Dict., 2d Ed., p. 357; see, also, 12 C.J.S., Burden, p. 559. The word has been frequently used with reference to taxes. Hewitt v. Dean, 91 Cal. 5, 13, 27 P. 423; Pioneer Express Co. v. Riley, 208 Cal. 677, 687, 284 P. 663; 24 Cal.Jur., sec. 9, p. 25. In Wells v. City of Savannah, 181 U.S. 531, 541, 21 S.Ct. 697, 701, 45 L. Ed. 986; the court said: "The word 'burthen' * * * is certainly sufficiently comprehensive to include municipal taxes." Cf. Savings & Loan Society v. Austin, 46 Cal. 415, 495; see, also, Cook v. Pennsylvania, 97 U.S. 566, 24 L.Ed. 1015. The deficiency assessment was a burden upon the assets of the corporation. It follows that it was likewise a burden upon respondent's share or interest in those assets. It was an "obligatory" expense which was paid out of assets. It reduced both the quantum and value of respondent's interest.

Respondent's interest was likewise diminished. "Diminish" is defined as: "to make less in any manner; to reduce in bulk, amount, or degree; to lessen." Webster's New Int.Dict., 2d Ed., p. 732. From a practical as well as a legal point of view, shares of stock have no value other than the value of the assets which they represent. Burke v. Badlam, supra; People v. Nat. Bk. of D. O Mills & Co., 123 Cal. 53, 60, 55 P. 685, 45 L.R.A. 747, 69 Am. St.Rep. 32. Spokane & Eastern Trust Co. v. Spokane County, 153 Wash. 332, 280 P. 3. When the deficiency assessment was paid out of corporate assets, thereby decreasing them, respondent's interest was correspondingly decreased. After payment of the deficiency, respondent's 691 shares of stock evidenced a smaller quantum of tangible property; although his absolute title to the shares was not affected, his equitable interest in the corporate assets was reduced in amount. If the assessment had been so great as to consume all of the corporate assets, his interest would have disappeared completely, for the value of his stock would then represent nothing but the paper upon which the certificates were printed. The value of a share of stock is measured by and corresponds proportionately to the value of the corporate capital, property and assets. Chesebrough v. City & County of San Francisco, 153 Cal. 559, 563, 96 P. 288; People v. National Bank of D. O. Mills & Co., 123 Cal. 53, 60, 55 P. 685, 45 L.R.A. 747, 69 Am.St.Rep. 32; Fletcher Cyclopedia Corporations, Perm.Ed., Vol. 11, sec. 5100. In Chesebrough v. City & County of San Francisco, supra, 153 Cal. 559, at page 563, 96 P. 288, 289, the court observed: "Shares of stock represent the value of all the assets of the corporation. People v. National Bank of D. O. Mills & Co., 123 Cal. 60, 55 P. 685, 45 L.R.A. 747, 69 Am.St.Rep. 32. As the shares of stock represent no value independent of the corporate property, when all such property is assessed to the corporation, it would be double taxation to assess the shares as well as the corporate property." "Taxation of corporations and taxation of stockholders are separate and distinct matters, although of course a tax on a corporation is indirectly a tax on all the stockholders." Cooley Taxation, 4th Ed., Vol. 3, sec. 969. "When the property of the corporation is assessed to it, and the tax thereon paid, who but the stockholders pay it? It is true that it is paid from the treasury of the corporation before the money therein is divided, but it is substantially the same thing as if paid from the pockets of the individual stockholders. * * * In the case of the corporation, take away all of its property, which, it must be remembered, includes its franchise, and the shareholder no longer has any property." Burke v. Badlam, supra, 57 Cal. 594, 601. If the corporation makes, it is the stockholders' gain, and if it loses, they bear the loss. San Diego v. S. D. & L. A. R. R. Co., supra, 44 Cal. 106, 116. This is in effect agreed to by the parties, for, as we have stated, the agreed statement of facts says that the appraiser made his appraisal on the basis of the assets and liabilities of the corporation on the date of death; that if the income tax deficiency had been determined at that time he would have taken it into consideration in determining the value of the stock; and that it would have resulted in a reduction of $1,335.22 in the total tax which would have been due from respondent.

Estate of Miller, 184 Cal. 674, 195 P. 413, 16 A.L.R. 694, involved a transfer of stock made in contemplation of death, subject to tax. After the transfer and before the death of the transferor, the United States adopted the federal estate tax law. The United States made claim against the estate for taxes under this law. The validity of the claim was contested and was undetermined when the inheritance tax was reported in the administration of the Miller estate. The transferees—trustees—when it came to fixing the inheritance taxes on the transfer under California law, claimed that in case the claim of the United States should be finally upheld, the amount of the claim as established should be deducted from the value of the stock transferred in order to obtain the value upon which the California tax should be computed. In sustaining the claim of the trustees the Supreme Court said, 184 Cal. at page 677, 195 P. 414, 16 A.L.R. 694: "* * * the plain purpose of the act was that the clear market value of the beneficial interest transferred should be its net clear value", and, 184 Cal. at page 680, 195 P. 415, 16 A.L.R. 694: "* * * It is plain that what the transferee receives is only the portion of what the decedent left which remains after the federal [estate] tax is taken." The court quoted from Estate of Kennedy, 157 Cal. 517, 526, 108 P. 280, 29 L.R.A.,N.S., 428, as follows: "It would appear to be a most absurd and inequitable provision that imposed a tax on one for the privilege of succeeding as heir, devisee, or legatee to certain property of the decedent, when the very property to which he is so held to succeed is lawfully diverted by the probate court (in this case by operation of law) to other purposes and never can be distributed to him."

Our conclusion is fortified by reference to other provisions made in the law for refund. The Inheritance Tax Law is Part 8 of Division 2 of the Revenue and Taxation Code. Chapter 10, of Part 8 treats of "Refunds." Article 1 provides for a refund of the tax where the order fixing the tax is subsequently modified or reversed. Article 2 provides for a refund of any payment made in excess of the amount specified in the order fixing the tax. Article 3 provides for a refund of any additional tax if it is later found to exceed, or when added to the amount of the inheritance tax imposed by the state, to result in a total tax in excess of, the maximum state tax credit allowed by the federal estate tax law. Article 4 provides for a refund if a donee of a gift of a power of appointment on which a tax has been paid to the county treasurer irrevocably exercises, or obligates himself to exercise, the power, in whole or in part, in favor of a charitable beneficiary, and the superior court modifies its original order fixing the tax by a new order eliminating the gift as a taxable transfer to the extent that the power is so exercised, or obliged to be exercised. Article 4 also provides for a refund if property subject to a power of appointment on the gift of which a tax has been paid to the county treasurer goes, in whole or in part, to a charitable beneficiary as the result of a nonexercise of the power, in whole or in part, by the donee of the power, and the superior court modifies its original order fixing the tax by a new order, eliminating the gift as a taxable transfer to the extent that the property goes to the charitable beneficiary. In neither case is any time limit fixed for the exercise of the power or the making of the obligation to exercise it. Section 14401 is in Article 5, headed "Tax Where Property Valued Without Allowance for Incumbrance or Contingency." Aritcle 6 provides for a refund if any tax has been paid to the county treasurer at the highest rate possible on a transfer subject to a contingency or condition, upon the occurrence of which the right, interest, or estate of the transferee may, in whole or in part, be created, defeated, extended or abridged, and thereafter on the happening of the contingency or condition the property involved, or any part of it, goes to a person to whom a transfer of the property is exempt or to a person to whom a transfer of the property is taxable at a rate less than the rate on which the tax paid was computed. No time limit is fixed within which the contingency or condition must happen. Article 7 provides for a refund if any debt is proved against an estate after the distribution of any property, on the transfer of which the tax imposed has been deducted from the property or collected from the transferee, and the latter is required by order of the court to pay the debt, or any part of it. Article 7 expressly provides in section 14424, "there is no limitation governing the time within which debts may be proved against the estate of a decedent after the distribution of any property in the estate." See, also, sec. 13985. Section 13984, which is in Article 2, "Deductions," provides that if any deduction for a debt was erroneously allowed, the court may enter an order assessing the tax on the amount erroneously deducted, and says that "* * * there is no limitation governing the time within which it may be proved that any deduction for a debt was erroneously allowed, nor the time within which an order assessing tax on the amount erroneously deducted may be made."

[6-8] Appellant argues that when section 14401 speaks of a transfer subject to a contingency, it can only have reference to a contingency imposed or created by the testator himself. The argument is without merit. It will be seen by a reference to the sections we have referred to in Article 10 that every conceivable contingency that may be created by the testator himself is covered by other sections of the inheritance tax law. We know of no contingency that can be created by a testator himself which is not covered by sections other than section 14401 and appellant has not advised us of any. If the contingency referred to in section 14401 means only one imposed or created by the testator himself, the section is a dead letter. Section 14401 authorizes a refund in appropriate cases irrespective of the facts giving rise to the contingency. Since it is the policy of the Inheritance Tax Law to tax only the net value of the property received by the transferee the section should be construed as applying to a contingency arising entirely apart from the transfer. Its plain meaning is to authorize a refund where a tax has been imposed on the transfer of an estate or interest which for any reason is subject to "any contingency" which later happens. The section is grounded on equitable principles and was enacted to permit refunds to the extent that inheritance taxes have been paid upon the transfer of an estate or interest in property which, due to the happening of an uncertain but possible event—a contingency—, is not "actually enjoyed" by the taxpayer. The word "contingency", in our opinion, refers to an event, the nature and possibility of which are determined by facts existing at the date of transfer, the occurrence of which is uncertain or contingent. Obviously a "contingency", within the meaning of section 14401, is neither a change in market value after the date of death, or a subsequent destruction of the property transferred, or the happening of any other event extraneous to the interest transferred at the date of death but which subsequently affects it. Here we are not dealing with subsequent depreciation in value, but with actual value at the date of death of the testator. We are concerned with a then existing dormant liability of the corporation,—the transfer of an interest subject to a contingency, which happened on the levy of the deficiency. "Liability for income taxes arises, and in some sense it may be said that the tax accrues, at the time the income is received, and does not depend upon an assessment." 27 Am. Jur. 433, sec. 225. A "deficiency" is the excess of the amount determined to be the correct amount of the tax over the amount reported by the taxpayer. It is an amount of tax due representing the difference between the amount returned by the taxpayer and the amount which, in fact and in law, is due the government. Mertens, Law of Federal Income Taxation, Vol. 9, p. 15, secs. 49.13, 49.14.

[9] Appellant's argument that a refund may not be had because the order fixing the tax had become final before respondent applied for the refund is untenable. The same contention was made by appellant in Estate of Brown, 196 Cal. 114, 236 P. 144, and there held to be without merit. See, also, Estate of Rath, 10 Cal.2d 399, 408, 75 P.2d 509, 115 A.L.R. 836. A casual perusal of the provisions of chapter 10 of the law exposes its fallacy.

The interest actually enjoyed by respondent and the interest remaining after the happening of the contingency was the value of the shares of stock as fixed by the appraiser less the proper proportion of the income tax deficiency. The refund ordered was that proportion.

Order affirmed.

SHINN, P. J., and WOOD, J., concur.

90 Cal.App.2d 523

ABRAHAMSON v. CITY OF CERES et al.

Civ. 7553.

District Court of Appeal, Third District, California.

March 10, 1949.

Hearing Denied May 5, 1949.

1. Municipal corporations ⚷747(3)

City was not liable for death of boy who was alleged to have been negligently shot by city's police officer acting within the course and scope of his employment, since officer was acting in a governmental capacity.

2. Municipal corporations ⚷182

Chief of police of municipal corporation of the sixth class was not personally liable for death of boy alleged to have been negligently shot by police officer of city while acting in scope of his employment, where chief of police did not personally co-operate with officer in the shooting. Gen.Laws, Act 5233, § 852.

3. Municipal corporations ⚷744

City clerk of municipal corporation of sixth class was not liable for death of boy alleged to have been negligently shot by police officer in scope of his employment, since city clerk has nothing to do with appointment or retention of peace officers, nor any power to participate in any way with appointment or retention of police officers. Gen.Laws, Act 5233, § 852.

4. Municipal corporations ⚷741(2)

Where claim for death of boy, alleged to have been negligently shot by police officer of city in scope of his employment, recited that it was addressed to members of city council, to clerk, to mayor, and to individual members of council, and that each of them should take notice of claim for damages against them, individually and in respective official capacities, there was sufficient compliance with statute relating to a claim for damages to charge mayor and other councilmen with liability. Government Code, §§ 1954, 1981, 1982.

5. Municipal corporations ⚷741(1)

Statutory requirement that claim for damages be filed with city clerk within 90 days after accident has occurred, though it applies to a case where it is proper to hold a city liable, was not applicable where only individual councilmen of city were chargeable with liability for death of boy shot by police officer of city, and city was not chargeable. Government Code, § 1981.

6. Municipal corporations ⚷741(1)

Statutory provision that claim for damages be filed with city clerk is intended for the convenience of a claimant who, instead of finding and serving councilmen of city, need only file the claim with the clerk who represents board of councilmen for receipt of such claim. Government Code, § 1981.

◆

Appeal from Superior Court, Stanislaus County; B. C. Hawkins, Judge.

Action by Frank A. Abrahamson against the City of Ceres (a municipal corporation), Floyd W. Randall, and others, to recover, on behalf of the heirs of plaintiff's son, for the death of the son who was fatally wounded by a bullet fired by Floyd W. Randall while acting as a police officer of the City of Ceres. From a judgment in favor of all defendants except Floyd W. Randall, the plaintiff appeals.

Judgment affirmed in part and reversed in part.

C. Ray Robinson, Willard B. Treadwell, and Margaret A. Flynn, all of Merced, for appellant.

Myron Moyle and Frank B. Collier, both of Modesto, for respondents.

ADAMS, Presiding Justice.

This is an appeal from a judgment for all but one of the named defendants, which judgment followed an order sustaining their joint demurrer to both counts of plaintiff's first amended complaint, without leave to amend. The demurrer was overruled as to defendant Floyd W. Randall.

The action was filed by plaintiff, the father of Gary Frank Abrahamson, a minor aged 14 years, to recover for the heirs of said minor damages alleged to have been sustained by reason of the wrongful death of the minor, and for funeral expenses. The defendants named in the action were the City of Ceres, a municipal corporation, the five members of its council who are charged individually and as members of the council, the clerk of said city, individually and as such clerk, the chief of police, and Randall, a police officer of the city. The material allegations of the first amended complaint are that Randall was the agent, servant and employee of each and all of the other defendants; that acting within the course and scope of his employment, on or about February 11, 1947, he wilfully, wantonly, negligently and carelessly discharged a firearm, to wit, a pistol, and as the sole, direct and proximate result thereof said minor was struck by the bullet and killed; that a written verified claim for damages was served on four of the councilmen and on the police officer on April 4, 1947, on the other councilman and the chief of police on April 5, 1947, and on the clerk on June 4, 1947. The second count adopted all the allegations of the first count and added that the councilmen, the clerk and the chief of police negligently and carelessly appointed, hired and retained the defendant Randall as a police officer of the city, knowing or with notice that he was a reckless, unfit, careless and negligent person, and incompetent and inefficient to perform or render the services for which he was employed.

Defendants' demurrer asserted that neither count stated a cause of action; that there was no allegation that the claim was presented to and filed with each of the defendants and with the clerk within the 90 day limitation of time prescribed in section 1981 of the Government Code, which thus barred the action; that it was not alleged that defendants or any of them other than Randall directed the acts complained of or personally participated or cooperated therein; and as to the second count, it was specified that there was a variance between the amended complaint and the claim, in that the complaint alleged that all of the defendants except the city of Ceres and Randall "negligently and carelessly appointed, hired and retained" Randall, whereas the claim did not include Mayor Kline or Disney, the clerk, and did not charge that either Kline or Disney had anything to do with the appointment or retention of Randall, or that either of them had notice or knowledge that Randall was a reckless, unfit, careless and negligent person, etc.; and that there was a misjoinder of defendants in that Kline and Disney were not proper parties, since the claim did not state any liability on their part or any claim for damages against them.

Section 1954 of the Government Code provides for the liability of the members of the council of a municipal corporation for the negligent act or omission of an appointee or employee if they knew or had notice that the person appointed or employed was inefficient or incompetent to perform or render the services for which he was appointed or employed; or if they retained such inefficient or incompetent person after knowledge or notice of such inefficiency or incompetency.

Section 1981 of the Government Code reads:

"Whenever it is claimed that any person has been injured or any property damaged as a result of the negligence or carelessness of any public officer or employee occurring during the course of his service or employment or as a result of the dangerous or defective condition of any public property, alleged to be due to the negligence or carelessness of any officer or employee, within 90 days after the accident has occurred a verified claim for damages shall be presented in writing and filed with the officer or employee and the clerk or secretary of the legislative body of the school district, county, or municipality, as the case may be."

As for the contents of the claim, section 1982 provides: "The claim shall specify the name and address of the claimant, the date and place of the accident and the extent of the injuries or damages received."

[1] As for the defendant City of Ceres, we think the demurrer was properly sustained as a municipality cannot be held liable in damages for the negligent acts of its police officers acting in a governmental capacity. See Wood v. Cox, 10 Cal.App. 2d 652, 653, 52 P.2d 565, and cases there cited; 6 McQuillin Municipal Corporations, Revised 2d Ed., sec. 2591, p. 525; 14 Cal.

L.Rev. 233; 1 Opinions of Attorney General 149 (1943).

[2] We think also that the demurrer was properly sustained as to the chief of police and the city clerk. The city of Ceres is a municipal corporation of the sixth class (Roster of Public Officials), and under Act 5233, sec. 852, Vol. 2 Deerings General Laws, relating to municipal corporations of the sixth class, the council alone has the power to appoint a chief of police and subordinate officers and employees, and provides that they shall hold office during the pleasure of the council. Regarding the liability of a chief of police for the torts of a police officer, the court said, in Bower v. Davis, 13 Cal.App.2d 678, 679, 57 P.2d 574, 575, quoting from the opinion in Michel v. Smith, 188 Cal. 199, 205 P. 113, as follows:

> "In this capacity he may not be held liable in damages for the unlawful acts and omissions of the subordinates of the department, selected pursuant to the provisions of the charter, unless it can be shown that he has directed such acts or personally co-operated therein."

In the case before us, as in the Bower case, there was no allegation that the chief of police had any knowledge of the incident which resulted in the shooting of the boy, or that he directed or co-operated therein. Also see Van Vorce v. Thomas, 18 Cal.App.2d 723, 726, 64 P.2d 772; Downey v. Allen, 36 Cal.App.2d 269, 273–274, 97 P.2d 515.

[3] We further think that the demurrer was properly sustained as to the city clerk, for he had nothing to do with the appointment or retention of the police officer, nor had he any power to participate in any way with the appointment or retention of such police officer.

As for the alleged variance between the claim and the amended complaint it is stated in the demurrer that the claim omitted the name of Mayor Kline, while the complaint charged him equally with the other four members of the council. The complaint alleged that the claim was served on Mayor Kline on April 5, 1947, which was within the time specified by section 1981, supra. In material part the claim recited that it was addressed to the members of the City Council of the City of Ceres, a municipal corporation, to E. N. Disney, the clerk of the city council, to Henry Kline, mayor of the city, and to defendants Rohde, Barham, Vincent and Ludden, members of the city council. It further alleged that they and each of them should take notice that the undersigned presented and filed with them and each of them his verified claim for damages against them and each of them, individually and in their respective official capacities, as provided for by the laws of the state. However, it also stated that Rohde, Barham, Vincent and Ludden, members of the city council, and Triplett, the chief of police, negligently and carelessly appointed, hired and retained Randall as a police officer of the city, knowing or with notice that he was a reckless, unfit, careless and negligent person, and incompetent and inefficient to perform or render the services for which he was appointed.

It also stated the date and place of the accident and recited that at the stated time and place Randall, while acting in his capacity and within the scope of his authority as a police officer of the city, did wilfully, wantonly, negligently and carelessly discharge a pistol, and as a direct and proximate result of said negligence and carelessness did strike Gary Frank Abrahamson so that as a direct and proximate result thereof said minor was killed.

It is apparent from the foregoing that the claim contains more than is required by section 1982 of the Government Code; and, to say the least, it must have been manifest to Mayor Kline or any other reasonable person reading the claim that all five members of the council were charged with liability. In Sandstoe v. Atchison, Topeka & Santa Fe Railway Co., 28 Cal.App.2d 215, 223, 82 P.2d 216, consideration was given to a claims statute and it was there held that in the absence of an intention to mislead, a *substantial compliance* with the statute was sufficient. In Dillard v. County of Kern, 23 Cal.2d 271, 277, 144 P.2d 365, 150 A.L.R. 1048, the court cited numerous cases and held, with reference to claims statutes, that it is the general rule that substantial compliance will suffice. And in Knight v. City of Los Angeles, 26 Cal.2d 764, 767, 160 P.2d 779, 781, the court said that "the rule of substantial compliance prevents the requirement of the impossible or absurd."

[4] From the contents of the claim and the fact that it was served upon Mayor Kline, we conclude that there was a sufficient compliance with the statute to charge him and the other four councilmen with the alleged liability.

[5, 6] As for the failure to file the claim with the city clerk within the 90 days provided for by section 1981, supra, since all five of the councilmen were served with the claim, as to them nothing would have been accomplished by filing a copy of the claim with the clerk. We think that the requirement that the claim be filed with the city clerk, while it applies to a case where it is proper to hold a city liable, does not apply to a case, as here, where only the individual councilmen are chargeable with liability. It appears reasonable that the provision in section 1981 that the claim be filed with the clerk is intended for the convenience of the claimant who, instead of finding and serving the councilmen need only file the claim with the clerk who only represents the board of councilmen for the receipt of such claim. See Natural Soda Products Company v. City of Los Angeles, 23 Cal.2d 193, 203, 143 P.2d 12, 18, where it was stated, concerning the purpose of the requirement that claims be filed: "The principal purpose of the requirement that claims be filed is to provide the city with full information concerning rights asserted against it, so that it may settle those of merit without litigation." What was there said regarding a city is equally applicable to the councilmen in the instant case.

Since only the five councilmen can be held liable under the amended complaint, and each of them was served with the claim within the statute of limitations, we conclude that the trial court erred in sustaining their demurrer without leave to amend.

The judgment is affirmed as to the defendants City of Ceres, Henry Triplett, the chief of police, and E. N. Disney, the city clerk; and it is reversed as to the defendants Rohde, Barham, Vincent, Ludden and Kline.

PEEK and THOMPSON, JJ., concur.

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PEOPLE v. GIESBRECHT et al.

Civ. 7556.

District Court of Appeal, Third District, California.
March 11, 1949.

1. Taxation ⚷319(1)

Employment commission's rule restricting "agricultural labor" for purposes of exemption from unemployment insurance contribution to operations performed on farm on which materials were produced, by employees of the owner or tenant of the farm on which materials in their raw or natural state were produced, and excluding operations incidental to manufacturing or commercial operations, was valid. Gen. Laws, Act 8780d, § 7(a)

2. Taxation ⚷219

Where workmen were not employees of farm owner or of tenants, but were employees of an individual baling hay on contract with farmers, such services in baling hay did not constitute "agricultural labor" within exemption provisions of the Unemployment Insurance Act. Gen.Laws, Act 8780d, § 7(a).

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Agricultural Labor".

3. Taxation ⚷219

Even though one hay-baler workman on one occasion performed some service in cutting or raking hay, which services might be exempt from the Unemployment Insurance Act, such service could not render the commercial enterprise of baling hay under contract with farmers wholly agricultural, so as to exempt such baling from the provisions of the act, since as soon as the hay was cut, raked, harvested, and delivered for baling, the exemption from the act ceased, and the subsequent hay-baling operations became subject to contributions under the act. Gen.Laws, Act 8780d, § 7 (a).

◆

Appeal from Superior Court, Merced County; R. R. Sischo, Judge.

Suit by People of the State of California, successor to California Employment Stabilization Commission, successor to California Employment Commission (formerly Unemployment Reserves Commission), against J. V. Giesbrecht and others, individually and as copartners doing business as Giesbrecht Bros. and GIESBRECHT BROS. a copartnership, to collect under the Unemployment Insurance Act unpaid contributions due from workmen employed in a hay-baling enterprise. From a judgment for defendants, plaintiff appeals.

Judgment reversed.

Fred N. Howser, Atty. Gen. and William L. Shaw and Chas. W. Johnson, Deputy Attys. Gen., for appellant.

L. A. Macnicol, of Merced, for respondents.

THOMPSON, Justice.

This is an appeal by the People of the State of California (successor to California Employment Stabilization Commission, successor to California Employment Commission) from an adverse judgment rendered in a suit to collect unpaid contributions due from workmen employed in a hay-baling enterprise under Section 45 of the Unemployment Insurance Act of California. Stats.1935, Ch. 352, p. 1226, as amended; 3 Deering's Gen.Laws, Act 8780d. The trial court determined that "The services performed by the defendants' employees in baling hay constituted agricultural labor, and therefore, are excluded from the provisions of the Unemployment Insurance Act of the State of California." Judgment was rendered accordingly that plaintiff take nothing by the action.

The evidence shows without conflict that the defendants, J. V. Giesbrecht and his two sons, were engaged in the enterprise of baling hay, on contract, for various farmers in Merced County during the years from 1938 to 1941, inclusive. They were not employees of any of said farmers. They owned and operated two or three hay-baling outfits. They hired two crews, consisting of five men in each crew. The workmen were paid by the defendants a stipulated sum per ton. The defendants were paid a stipulated contract price per ton for baling the hay. The defendant Frank Giesbrecht testified regarding the basis upon which they conducted their hay-baling operations, and hired their workmen, as follows:

"Q. Now did you hire men as employees in connection with your hay-baling operations? A. Yes. * * *

"Q. And did you pay them wages? A. Paid them by the ton, it was on a tonnage basis, *it was all contract labor.*" (Italics added.)

No contributions were paid by the defendants during the period of time which is involved in this suit, as required by the Unemployment Insurance Act.

The only question on this appeal is whether the finding of the trial court that the hay-baling services performed by the defendants constituted "agricultural labor" is supported by any competent evidence. In other words, we are required to determine whether, under the undisputed facts of this case, the services performed by the defendants in baling hay were exempt from contributions because that constituted "agricultural labor" under Section 7(a) of the Unemployment Insurance Act, or as defined by Rule 7.1 adopted by the commission. The last-mentioned rule appears on page 4 of appellant's opening brief, and is discussed and relied upon by both parties.

Rule 7.1 defines "agricultural labor" which is exempt from the provisions of the act to include all services performed:

"(1) By an employee on a farm, in connection with the cultivation of the soil, the raising and harvesting of crops; * * *

"(2) By an employee in connection with the drying, processing, packing, packaging, transporting and marketing of materials, which are produced on the farm or articles produced from such materials, providing such drying, processing, packing, packaging, transporting, or marketing is carried on as an incident to ordinary farming operations as distinguished from manufacturing or *commercial operations.*

"The services hereinbefore set forth do not constitute agricultural labor *unless they are performed by an employee of the owner or tenant of the farm on which the materials in their raw or natural state were produced. Nor do such services constitute agricultural labor if they are carried on as an incident to manufacturing or commercial operations.* * * *" (Italics added.)

[1] The preceding rule has been uniformly upheld as a valid delegation of authority and a practical definition of agricultural labor as that term is used in the act in question. California Employment Comm. v. Butte County Rice Growers Ass'n, 25 Cal.2d 624, 632, 154 P.2d 892; California Employment Comm. v. Rose, 67 Cal.App.2d 864, 867, 155 P.2d 702; California Employment Comm. v. Kovacevich, 27 Cal.2d 546, 165 P.2d 917.

[2, 3] The respondents attempt to distinguish the application of the foregoing cases on the asserted ground that some of the work performed by their employees was performed by "cutting, raking and baling hay" on the farms where it was produced. However, there is no competent evidence in this case that the defendants cut or raked hay as a part of their hay-baling enterprise, or that any of defendants' workmen were *employed by the owners or tenants of farm land* to cut or rake their hay. The only language upon which the respondents rely in support of their assertion that any portion of said services was performed by "cutting, raking and baling hay" appears in a statement of Mr. Piester, one of defendants' hay balers, made in a transcript of evidence of a pre-assessment hearing held in Merced November 25, 1941, which was offered in evidence by plaintiff for the sole purpose of showing "compliance by the plaintiff with the statutory administrative procedure" of enforcing plaintiff's claim to unpaid contributions to the unemployment insurance fund. The offer was objected to by the defendants, but the objection was overruled and the record was received and marked Exhibit number 5. That record merely shows, on page 11, that the examiner inquired from Mr. Piester to determine how long he worked for the defendants as a hay baler, and if "he didn't work on Case No. 1?" to which he replied "No." He was then asked, "But what did you do?" to which he replied "I went—I run a little—had a little cut down model A tractor, * * * to pull a rake. And I was raking grained hay at that time." He was then asked, "And was it an operation which was necessary and concerned with this hay baling operation—part of it?" to which he replied "Yes." He was then asked, "In other words, getting hay ready for the press; is that it?" to which he answered, "Yes, all mowed and raked and put up and bagged." That is the only evidence in this record that any employee of the defendants cut or raked hay incident to the hay-baling operations or otherwise. That statement was not referred to in the evidence adduced at the trial. Neither party suggested at the trial that the cutting or raking of hay was a part of the hay-baling contract or enterprise. It definitely appears defendants hired their workmen and paid them a stipulated sum per ton. One of the defendants testified that they paid them "by the ton, it was on a tonnage basis, it was all contract labor." Even though that statement is deemed to be competent evidence that the cutting and raking of hay may have been a part of the enterprise of baling hay by contract, which we do not concede, still it clearly appears such workmen were not *employees of the owners or tenants of the land* upon which the hay was produced, and upon the contrary, that they performed that service solely as defendants' workmen as a part of their hay-baling contract. In any event that statement of Piester regarding his incidental raking of hay is not determinative of this appeal. That circumstance could not change the undisputed independent nature of the hay-baling enterprise. Even though one of defendants' workmen, on one occasion, performed some service in cutting or raking hay, which services may be exempt from the provisions of the Unemployment Insurance Act, it could not render the commercial enterprise of the defendants' baling

of hay under contract wholly agricultural so as to exempt that industry from the provisions of the act. California Employment Commission v. Kovacevich, supra [27 Cal. 2d 546, 165 P.2d 920]. The last cited authority distinguishes between services performed for the growers, under paragraph (1) of Rule 7.1 "in connection with the cultivation of the soil, the raising and harvesting of crops," which are agricultural in nature, from "commercial operations" as provided by paragraph (2) of that rule. The former services are held to be agricultural labor which are exempt from the act, while the latter are held to be commercial in nature and therefore subject to the act. Quoting with approval from a case cited on page 557, of 27 Cal.2d, on page 923 of 165 P.2d, the Supreme Court holds that "As soon as the fruit is delivered by the growers to the plaintiff for processing, grading, packing, and marketing, then the *exemption ceases.*" (Italics added.) Applying that rule to the present case, it follows that, as soon as the hay was cut, raked, harvested and delivered to these defendants for baling, under their contract, the exemption from the act ceased, and the subsequent hay-baling operations became subject to contributions under that act.

We are impelled to hold that the court erred in determining that defendants' hay-baling enterprise constitutes agricultural labor, and that it is therefore exempt from the provisions of the Unemployment Insurance Act. In the Rose case, supra, under almost exactly the same contracts and conditions which exist in this case, we definitely held that the baling of hay by contract, either on or off the farms where it was produced, constituted commercial operations which were subject to the act in question. That conclusion was approved by the Supreme Court in the Kovacevich case. It is true that the latter case disapproved certain quoted language in the Rose case. Commenting on the essential elements which led this court to decide that Rose was engaged in commercial operations of baling hay which subjected him to the payment of contributions under that act, the Supreme Court said 27 Cal.2d at page 559, 165 P.2d at page 924:

"* * * However, the actual decision in the Rose case is entirely in line with the views herein expressed. There the employer was engaged in the business of baling hay on contract for various farmers. Sometimes the hay was baled on the farms where it was produced, but usually it was hauled to a central location nearby to save the cost and inconvenience of moving the hay-baling equipment. As so conducted, *such independent enterprise was distinct from the farmers' 'cultivation of the soil, the raising and harvesting of crops,' and the hay-baling labor would properly come within subdivision (2) of our rule as services 'in connection with the drying, processing, packing, packaging, * * * of materials which are produced on the farm.' Labor so identified would not be agricultural unless 'performed by an employee of the owner or tenant of the farm on which the materials * * * were produced.'*

"From these observations it is clear that hay baling is an admirable example of 'the nature of the work, modified by the custom of doing it,' affecting the category into which the work falls—agricultural or industrial." (Italics added.)

The Kovacevich case involved the ownership and operation of a fruit packing plant by the defendant. He owned no farm, orchard or vineyard. He contracted with fruit growers to purchase their crops on the trees or vines for stipulated prices. He sometimes contracted to irrigate and prune the vines or trees, and to *girdle, thin and harvest the crops.* The fruit was then hauled to his plant where it was processed and packed for market. The trial court determined that the defendant, having purchased unmatured crops which he cultivated and harvested, was engaged in agricultural labor, regardless of his packing plant operations, and therefore rendered judgment for the defendant. That judgment was reversed on appeal. The trial court was directed to determine the amount of contributions due from "that part of the services in question classified as 'packing house labor' and 'office help,' and to enter judgment for appellant accordingly."

Upon the foregoing authorities we conclude that the defendants in this case are liable for contributions based on all services rendered in the hay-baling enterprise.

The judgment is reversed.

ADAMS, P. J., and PEEK, J., concur.

90 Cal.App.2d 533

WOOD et al. v. METZENBAUM et al.

Civ. 7587.

Sac. 5977.

District Court of Appeal, Third District, California.

March 10, 1949.

Appeal and error 🔑78(3)

An order sustaining demurrer to and dismissing cross-complaint for failure to amend within time allowed, or at all, was not final appealable order, where chief action upon which cross-complaint was founded was pending and undetermined on merits, and cross-complaint raised substantially same issues as were presented by amended complaint and answer. Code Civ.Proc. §§ 442, 963; Civ.Code, § 1624.

◆

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by J. W. Wood and others against Walter Metzenbaum and Rose Metzenbaum and others to recover undisclosed money retained by defendants as plaintiffs' agents and brokers. The named defendants filed a cross-complaint. From a judgment dismissing the cross-complaint, the named defendants appeal.

Appeal dismissed.

Walter Metzenbaum, of Los Angeles, for appellants.

John F. McCarthy and Henry D. Lawrence, both of Long Beach, and Rowland & **Craven,** of Sacramento, for respondents.

THOMPSON, Justice.

This is a purported appeal from a judgment of dismissal of the cross-complaint of defendants Walter Metzenbaum and Rose Metzenbaum, rendered pursuant to an order sustaining plaintiffs' demurrer thereto, with leave to amend. Said defendants refused to amend within the time allowed, or at all. The suit based on the complaint and answer is still pending.

Two questions are involved: First, Is the judgment appealable? Second, Does the cross-complaint adequately state a cause of action under Section 442 of the Code of Civil Procedure?

The amended complaint alleges that the defendant Walter Metzenbaum, who is an attorney at law and appears for appellants, was a duly licensed real estate broker and that the other named defendants are his wife, daughter, son and the son's wife; that Oulton Land Company owned the "Oulton Ranch" on Twitchell Island in Sacramento County, described in Exhibit "A" attached to the complaint, which was subject to an oil and gas lease held by the Standard Oil Company of California, by the terms of which lease the owner of the land was entitled to one-eighth royalty in all oil or gas extracted therefrom. It is alleged that on August 15, 1943, plaintiffs employed said defendants Walter Metzenbaum and M. Metzenbaum as their agents and brokers to purchase the land for plaintiffs in consideration of one-third of said one-eighth of all royalties paid to plaintiffs under said oil and gas lease as defendants' commissions for negotiating said purchase; that at all times the Oulton Land Company was willing to sell said land for the sum of $110,000, which fact was known to the defendants but unknown to plaintiffs, and that the defendants falsely represented to plaintiffs that the sum of $125,000 was the least the owner would accept for said land; that relying on said false representations plaintiffs executed with the defendants as their brokers on August 19, 1943, a written agreement to pay the owner of said land said sum of $125,000, in consideration of which services plaintiffs agreed to pay the defendants one-third of said one-eighth royalties as broker's commissions for negotiating the purchase, and plaintiffs thereupon agreed to and did purchase said land, and deposited with Title Insurance and Guaranty Company the sum of $10,000 as part payment of the purchase price thereof; that thereafter, and on August 21, 1943, the defendants fraudulently entered into a written contract with the Oulton Land Company to purchase the land in their own names and they did purchase it for the sum of $110,000, payable in the sum of $40,000 cash, plaintiffs' $10,000 deposit being included therein, and the balance of $70,000 to be paid the owner by defendants' notes in said sum, secured by their trust deed to the property; that plaintiffs had no knowledge of said purchase of land by the defendants for said sum of $110,000, until June 1, 1945; that defendants, at the time of acquiring their title to the land conveyed it to plaintiffs, pursuant to their agreement of August 15th, for the pretended purchase price of $125,000, retaining their one-third of one-eighth of all royalties derived from the oil and gas lease, and also wrongfully and fraudulently retaining said sum of $15,000, being the difference between their purchase price of $110,000 and said sum of $125,000, which they represented to plaintiffs to be the amount paid to Oulton Land Company. The complaint further alleges that subsequent to defendants' purchase of the land in September, 1943, they were paid and wrongfully retained the sum of $8,108.06 in royalties from the oil and gas lease without the knowledge or consent of plaintiffs, and that defendants wrongfully and fraudulently converted said sum of $15,000 to their own use and benefit. The amended complaint prays for judgment for said sum of $15,000, with interest, for an accounting of all moneys received by the defendants from royalties paid to them from the oil and gas lease, and for judgment for the amount thereof belonging to plaintiffs, together with interest, and for a decree quieting title to the land in plaintiffs, and determining that defendants have no right, title or interest in said land.

The defendants, Walter Metzenbaum and his wife Rose, jointly answered the amended complaint, denying the material allegations thereof, including the alleged fraudulent statements, concealed profits of the transaction and conduct, and also affirmatively alleged as defenses that the said Walter and M. Metzenbaum purchased the land and oil and gas lease from Oulton Land Company in their own names and thereafter sold the land and two-thirds of one-eighth of the royalties to be derived from said oil and gas lease to plaintiffs; that the alleged oral agreement employing them as brokers to purchase the land from the owners was a unilateral contract, lacking mutuality and therefore void under Section 1624 of the Civil Code.

The defendants Walter and Rose Metzenbaum also filed a cross-complaint, to which plaintiffs demurred on the grounds that it fails to state facts sufficient to constitute a cause of action, and that another suit was previously filed and is now pending in the City and County of San Francisco, involving the same issues. The cross-complaint alleges plaintiffs' complaint asserts they agreed with the defendants, on August 19, 1943, that defendants, *as their brokers and agents,* would purchase from the owners the land in question and the oil and gas lease, upon terms specified, in consideration of one-third of one-eighth of the royalties to be derived from the oil and gas lease as commissions, but that "*it was manifested* that the minds of the said defendants and the plaintiffs had never met and that, *if the claims of the plaintiffs that said defendants acted as agents of plaintiffs * * * was well founded and true,* that a mutual mistake had taken place, * * * and that no actual contract had been made" (italics added); that the *defendants believed* they were making an actual sale of the land to plaintiffs, and that a mutual mistake thereby occurred. The cross-complaint does not purport to recite the conversation or facts with relation to the agreement upon which the defendants assume that the alleged mistake was founded. It does state that defendants purchased the land from the former owners and that they sold and conveyed it to plaintiffs for $125,000, the sum of $55,000 of which was paid by plaintiffs to them in cash, and the balance of $70,000 was to be paid upon terms specified and that a trust deed was executed by plaintiffs to secure said unpaid portion of the purchase price; that plaintiffs took possession of the land and have retained and farmed it for more than two years. The cross-complainant states that defendants elect to rescind the entire transaction and prays for an accounting. No fraud or previous notice of rescission is alleged. It is not alleged defendants suffered any loss by the contract. Defendants' election to rescind is evidently conditional, for it is merely stated that "*if* the claim of the plaintiffs that said defendants acted as agents of plaintiffs" is well founded, a mutual mistake occurred and they then elect to rescind the transactions.

From the judgment dismissing the cross-complaint for failure to amend that pleading, this appeal was perfected.

The respondents contend that an appeal under Section 963 of the Code of Civil Procedure does not lie from the judgment dismissing the cross-complaint since the judgment is not *final* because the chief action remains to be tried in which the question of the agency of the defendants as plaintiffs' brokers is a definite issue to be determined therein.

We are of the opinion the judgment dismissing the cross-complaint, under the circumstances of this case, is not appealable. The chief action to recover undisclosed money retained by the defendants as plaintiffs' agents and brokers is still pending. The complaint alleges that relationship between the parties in that transaction. The answer denies that allegation. Defendants' conditional rescission is founded exclusively upon the alleged mistake in that regard. Plaintiffs must prove in the pending action their alleged contract of employment of defendants as their agents and brokers, to entitle them to recover judgment. That is a distinct issue in the case. The judgment of dismissal of the cross-complaint is therefore not a final judgment.

In Sjoberg v. Hastorf, 33 Cal.2d 116, 199 P.2d 668, 669, recently decided by the Supreme Court, which was an appeal from an order denying defendant's petition for arbitration, it was held that the petition was "essentially a cross-complaint for specific performance of a contract to arbitrate" and that "its dismissal did not terminate the main action." The appeal was therefore dismissed by the Supreme Court on the ground *that the order was not appealable.* The court said:

> "Under California procedure there is ordinarily only one final judgment in an action. [Citing authorities.] A cross-complaint is not considered sufficiently independent to allow a separate final judgment to be entered upon it [citing authorities], unless the judgment or order on the cross-complaint may be considered final as to some of the parties. * * *
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> "The question remains whether the order may be considered a final judgment in a collateral proceeding growing out of the action. * * *
>
> "An appeal is allowed if the order is a final judgment against a party in a collateral proceeding growing out of the action. * * * It is not sufficient that the order determine finally for the purposes of further proceedings in the trial court *some distinct issue in the case;* it must direct the payment of money by appellant or the performance of an act by or against him. [Citing authorities.] There is no such direction in the present case. If appellants have a right to arbitration they may assert it on the appeal from the final judgment in the contract action. Thus no greater hardship will result than in any case where a party is forced to stand trial because of an erroneous ruling of the trial court. The appeal is dismissed." (Italics added.)

The foregoing language appears to apply to the situation in the present case.

We therefore conclude that the order and decree dismissing the cross-complaint for failure of the defendants and cross-complainants to amend that pleading within the time allowed by the court or at all, after the demurrer thereto had been sustained with a specified time granted in which to amend it, is not such final judgment or order from which an appeal lies under Section 963 of the Code of Civil Procedure. That appears to be true in this case because the chief action, upon which the cross-complaint was founded, is still pending and undetermined on its merits, in which action substantially the same issues are presented by the amended complaint and answer which were raised by the cross-complaint. It is therefore not necessary for us, at this time, to pass upon the sufficiency of the allegations of the cross-complaint.

The purported appeal from the order sustaining the demurrer to the cross-complaint, and dismissing that pleading for failure to amend it within the time allowed, or at all, is therefore dismissed.

ADAMS, P. J., and PEEK, J., concur.

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90 Cal.App.2d 638

PEOPLE v. DOWELL.

Cr. 4276.

District Court of Appeal, Second District,
Division 1, California.
March 15, 1949.

Larceny 🔑65

Evidence, including testimony of handwriting expert to effect that defendant wrote indorsements on back of stolen bonds, supported conviction of grand theft.

◆

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Marshall Lee Dowell was convicted of grand theft, and he appeals.

Appealed.

Gladys Towles Root, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

DORAN, Acting Presiding Justice.

Defendant, accused by information, with the offense of Grand Theft, was adjudged guilty by the jury and appeals from the judgment that followed.

It is contended that the evidence "is insufficient to sustain a conviction".

The evidence reveals that defendant was residing with the victim of the theft, Mrs. Birdie M. Brown; that at that time, as Mrs. Brown testified, "he was supposed to be married to my daughter". Defendant left on July 31st and in that connection Mrs. Brown further testified:

"Q. When did this defendant and your daughter leave your home? A. Well, my daughter didn't leave. She remained there. He left about the 31st of July.

"Q. However, your daughter remained there after he left?"

After defendant left Mrs. Brown discovered the theft of seven $50.00 bonds. The next day a Mr. Shackelford received one of Mrs. Brown's $50.00 bonds from defendant to secure a five-dollar loan.

Defendant testified:

"Q. Did you stay at the home of Mrs. Birdie M. Brown approximately July 31st, 1945? A. Not on July 31st. I stayed there about—It was the 26th and 27th, I believe, two days and one night.

"Q. Did you stay at her house after the 27th of July? A. No, I didn't.

"Q. Where did you go after July 27th, 1945? A. Went to San Bernardino.

"Q. How long did you remain in San Bernardino? A. Until August 1st.

"Q. And then where did you go, on August 1st? A. I left for Kansas City.

"Q. And did you go directly to Kansas City from San Bernardino on that date? A. Well, I went to Gallup, New Mexico. I stayed in Gallup one day.

"Q. You left San Bernardino on the 1st of August, 1945? A. That is right."

With regard to questions relative to defendant's previous record, the following appears on cross-examination:

"Mr. Galliano: Q. What kind of a felony was it, sir? A. Car theft and forgery.

"Q. And when was that? A. 1945.

"Q. Have you been convicted of any other felony? A. No. sir.

"Q. Where was that last felony that you spoke of—the car theft? A. Oklahoma.

"Q. Isn't it a fact that you were convicted of a felony in Walla Walla, Washington? A. That is right. I told you, forgery.

"Q. Oh, that is a different one? A. Yes. You said how many times, I told you forgery and car theft."

Examples of defendant's handwriting were in evidence as well as the bonds with the purported signature of the owner on the back thereof. Testimony of a handwriting expert to the effect that defendant wrote the indorsements on the back of the bonds was received in evidence by stipulation. The jury had the exhibits to compare for the same purpose.

The defendant, as a witness, denied the theft and denied the transaction with Mr. Shackelford above referred to.

In the light of the foregoing, appellant's appeal cannot be upheld. The evidence is amply sufficient to support the judgment.

Judgment affirmed.

WHITE, J., concurs.

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90 Cal.App.2d 543

PEOPLE v. RAVENSCROFT.

Cr. 4287.

District Court of Appeal, Second District,
Division 1, California.

March 11, 1949.

Rehearing Denied March 21, 1949.

1. Criminal law ⇨478(1)

The qualifications of an expert witness on bookmaking matters depend on long experience and a study of race track gambling and its modus operandi as carried on at race tracks and in haunts of bookmakers. Pen.Code, § 337a, subd. 2.

2. Criminal law ⇨478(1)

Extent of special knowledge acquired by police officer who specialized in bookmaking cases while assigned to vice squad in Los Angeles County, as to practices and paraphernalia used by bookmakers in Ventura County, went to weight of his testimony in prosecution in Ventura County of alleged bookmaker, rather than to the admissibility of such testimony. Pen.Code, § 337a, subd. 2.

3. Criminal law ⇨481, 1153(2)

Whether qualification of a witness with respect to knowledge or special experience is sufficiently established, is a matter resting largely in discretion of trial court, and its determination will not be overturned on appeal unless there be an actual want of evidence to support it or a clear abuse of discretion in ruling on evidence given on subject.

4. Criminal law ⇨478(1)

In prosecution in Ventura County for occupying a building with papers for purpose of recording bets on result of horse races, police officer who had specialized in bookmaking cases in Los Angeles County and who was familiar with paraphernalia used in bookmaking business in Los Angeles County, was properly permitted to testify that exhibits found in Ventura County were bookmakers' paraphernalia, where officer had previously made an investigation in Ventura County, and testified that practices of bookmakers and paraphernalia used by them in Ventura County were similar to those in Los Angeles County. Pen.Code, § 337a, subd. 2.

5. Gaming ⇨98(5)

Evidence sustained conviction of occupying a building with papers for purpose of recording bets on result of horse races. Pen.Code, § 337a, subd. 2.

◆

Appeal from Superior Court, Ventura County; Louis C. Drapeau, Judge.

Edward Albert Ravenscroft was convicted of occupying a building with papers for purpose of recording bets on the results of horse races, and he appeals.

Judgment affirmed.

Gustafson & Rosenmund, of Oxnard, and Leland E. Zeman, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen. and Howard S. Goldin, Deputy Atty. Gen., for respondent.

WHITE, Justice.

The District Attorney of Ventura County filed an information in the Superior Court wherein defendant was accused of occupying a building in the City of Oxnard with papers for the purpose of recording bets upon the result of horse races—the offense defined in subdivision 2 of section 337a of the Penal Code.

Following the entry of a plea of not guilty and waiver of jury trial, the cause was by stipulation submitted to the trial court on the transcript of the proceedings had at the preliminary examination. Defendant was adjudged guilty. From such judgment of conviction he prosecutes this appeal.

The facts, in brief, are as follows:

One Maxwell Sanders was lessee of the premises in question. They are divided into two separate parts, with a common entryway, the portion to the right being used as a card room (operating under a city license issued to Sanders), while the part to the left was utilized as a jewelry store and pawn shop (also operating under a city license issued to Sanders). About two weeks prior to his arrest, defendant had entered into an oral agreement with Sanders for the use or rental of the premises. While testifying as a witness, Sanders described the agreement as follows: "Well it was more or less of an oral agreement that if they made any money they would take care of the expenses. I would get my overhead and my rent and I would make some money; anyhow, I didn't know the amount".

Mr. Sanders also testified that for some two weeks prior to defendant's arrest, he, Sanders, visited the premises in question and saw defendant and the latter's wife there present.

Chief of Police Clark of the City of Oxnard testified that when he placed defendant under arrest he had a conversation with the latter as follows: "I asked Mr. Ravenscroft what he had to do with the place and he said, well that he had an interest in the card room, that Mr. Sanders owed him some money and that he had an interest in there through that".

At about 3:50 o'clock on the afternoon of August 25, 1948, Chief of Police Clark, accompanied by Officers Jewell and Hinostro, entered the pawn shop side of the premises where they encountered defendant's wife who had been seated at a small table in the rear. As the officers approached she left the table and went to the counter. Proceeding to where Mrs. Ravenscroft had been seated the officers found a radio, some racing sheets, racing forms and tabs. A musical program was then being broadcasted, but shortly thereafter announcement was made of racing results from the station to which the radio was tuned. Near the table at which Mrs. Ravenscroft was seated, there was a telephone on a small stand.

The officers also found in the room, on the table by the telephone, ten cardboard or heavy paper cards upon which there appeared such notations as "Carl, Mrs. Wilson, Armstrong, Bob, Clarence, Mark, Cash" and certain numerals. Also found were several papers entitled "National Scratch Sheet", which the chief of police testified could be and were lawfully sold in Ventura County.

Shortly after the arrival of the officers, defendant, accompanied by Sanders, entered the pawn shop side of the premises from the card room and were placed under arrest (the case against defendant Sanders was dismissed and he became a witness for the prosecution). It was stipulated that if called as a witness, Officer Jewell would testify substantially the same as Chief Clark.

Victor C. DeNisi testified that he was an investigator attached to the Office of the District Attorney of Los Angeles County and assigned to the vice squad. That during the preceding four years he had specialized in bookmaking cases and had made approximately 200 investigations during that time. That he was familiar with the paraphernalia used in the business of bookmaking.

On voir dire Officer DeNisi declared that he knew the paraphernalia common to bookmaking, that he was familiar with the use of certain sheets, radio and paraphernalia which were customarily used by bookmakers in Los Angeles County. At one point in his testimony the officer stated that he had never operated in Ventura County; that he had never testified in Ventura County; that he had never testified in the Superior Court of Ventura County; that he had never made an arrest in Ventura County for bookmaking, and that he was not familiar as to how bookmakers worked in that county. However subsequently, Officer DeNisi testified that approximately a year previous he had made a bookmaking investigation in Ventura County together with the District Attorney thereof. That at that time he had seen bookmaking paraphernalia and that the same was similar to that used in Los Angeles County. He then testified that he was familiar with bookmaking, its paraphernalia in Ventura County, although he had never made an arrest therein nor had he testified in court there. The witness further testified that he had talked to bookmakers in Los Angeles County, that he had made numerous arrests therein, and that he had there testified as to the meaning of certain signs and symbols found on bookmaking paraphernalia, had been cross-examined on his knowledge of such signs and symbols, and had qualified in the Superior Court on bookmaking matters.

Shown the foregoing people's exhibits, the witness testified as to the character of the documents in question, as well as to the significance of the cryptic letters, words and figures which were written on those documents. Also, that in his opinion the same were such papers as ordinarily are used by bookmakers.

The aforesaid witness, Maxwell Sanders, in addition to testifying concerning his arrangements with defendant for use of the premises by the latter, also testified that the above mentioned exhibits were not his property and that he did not participate in any bookmaking activities in or around his place of business. This witness also testified that defendant's wife came into the store just a "couple of minutes" prior to the arrival of the officers, and that "all she (defendant's wife) had to do with the place" was to "bring him (defendant) a sandwich in the place".

The defendant did not take the witness stand in his own behalf nor did he present any testimony in his defense.

It is conceded by the defendant that if People's Exhibit No. 1 (the betting markers) were properly admitted into evidence, "that necessary items were present and that there is an inference that the items were used for the purpose of recording bets". However, while further conceding that the papers constituting Exhibit No. 1 were proper subjects for expert testimony as to the nature and character thereof, and that a qualified expert might state what, in his opinion, was the peculiar significance attaching to the words, letters and figures which appeared on this exhibit, he earnestly insists that Officer DeNisi was not a qualified expert. This, for the reason that the officer was not familiar with the operations of bookmakers in Ventura County. Admitting that the witness was qualified as an expert on bookmaking activities in Los Angeles County, defendant maintains that he was not qualified to testify as an expert on the same matters in Ventura County.

[1-4] From a review of the cases involving the matter here in question, including People v. Newman, 24 Cal.2d 168, 174, 176, 148 P.2d 4, 152 A.L.R. 365; People v. Miller, 67 Cal.App.2d 382, 385, 154 P.2d 435; People v. Klein, 71 Cal.App.2d 588, 591, 163 P.2d 71; People v. Hinkle, 64 Cal.App. 375, 378, 221 P. 693; People v. Hatfield, 77 Cal.App. 212, 218, 246 P. 95, and People v. Derrick, 85 Cal.App. 406, 408, 259 P. 481, it is at once manifest that the qualifications of an expert witness on bookmaking matters depend upon long experience in cases of that character, a study of race track gambling and its modus operandi as carried on at race tracks and in the haunts of bookmakers. People v. Hinkle, supra, 64 Cal.App. at page 378, 221 P. 693. We know of no rule requiring that an expert witness on bookmaking matters be compelled to establish a familiarity with such practices within the county wherein he is testifying. However, it is noteworthy in the case at bar, that the witness DeNisi, while admitting he had never made an ar-

rest or testified in a bookmaking case in Ventura County, nevertheless testified that because of an investigation he had theretofore made in that county, he was familiar with the practices of bookmakers and the paraphernalia used by them in said county. That the same was similar to the practices and paraphernalia used in Los Angeles County. The extent of the special knowledge acquired by the witness as to practices and paraphernalia used in Ventura County went to the weight of his testimony rather than to its admissibility. People v. Hinkle, supra, 64 Cal.App. at page 378, 221 P. 693. And as was said in the case just cited, 64 Cal.App. at page 379, 221 P. at page 694, "Whether or not the qualification of a witness with respect to knowledge or special experience is sufficiently established is a matter resting largely in the discretion of the trial court, and its determination of the matter will not be overturned on appeal unless there be an actual want of evidence to support it or a clear abuse of discretion in ruling upon the evidence given on the subject. Vallejo & N. R. Co. v. Reed Orchard Co., supra, [169 Cal. 545, 147 P. 238]." The expert testimony of the witness DeNisi was therefore properly admitted, and the paraphernalia concerning which he gave testimony was properly received in evidence as an exhibit.

[5] Finally, appellant contends that, assuming the foregoing Exhibit No. 1 was properly received in evidence, the entire record is barren of sufficient evidence to support the judgment of conviction. In support of this claim appellant urges (1) that he did not keep or occupy the room in which the paraphernalia was found, and (2) if he did keep or occupy the room, he had no knowledge of the existence therein of the incriminatory documents. The evidence of the witness Maxwell Sanders, coupled with the admissions of the appellant to the chief of police furnish ample evidence that appellant occupied the premises in question. People v. Roseberry, 23 Cal.App.2d 13, 14, 71 P.2d 944. Although appellant was not actually on the premises at the time the officers entered thereon, the evidence was sufficient to establish the fact that he kept and occupied the premises whereon the betting paraphernalia was found and reasonably warranted the inferences drawn by the trial court that appellant conducted, maintained, managed, possessed, tenanted or did business on the premises in question in the manner denounced by the Penal Code. People v. Newland, 15 Cal.2d 678, 679, 680, 104 P.2d 778; People v. Kabakoff, 45 Cal.App.2d 170, 172, 173, 113 P.2d 760; People v. Pruitt, 55 Cal.App.2d 272, 273, 275, 130 P.2d 767.

For the reasons herein stated, the judgment is affirmed.

DORAN, Acting P. J., concurs.

90 Cal.App.2d 549

HARVEY v. HARVEY et al.

Civ. 16674.

District Court of Appeal, Second District,
Division 2, California.
March 11, 1949.

1. Husband and wife ⇨262(1)

Finding that stock owned by decedent in corporation organized by decedent and his brothers after decedent's marriage and received in exchange for transfer of tangible assets of partnership of which decedent was a member was decedent's separate property, was contrary to statutory presumption that all property acquired after marriage is community property. Civ.Code, § 164.

2. Executors and administrators ⇨426, 451(4)

Right of administratrix to maintain action against officers and directors of corporation in which her decedent was a stockholder to enjoin defendants from transferring corporate funds to themselves and a partnership in which decedent was a member depended upon her position and responsibility as administratrix to preserve property of estate within her custody during period of administration and not upon the nature of stock in corporation as community or separate property of decedent and finding that stock owned by decedent was his separate property should be disregarded as irrelevant.

3. Corporations ⚷312(3)

That surviving partners proposed to continue operation of business until distribution of deceased copartner's estate, anticipating that interest of estate in partnership business would be distributed under will to them as testamentary trustees whereupon they would continue to operate business for themselves and as trustees, would not justify payment to partnership of funds accruing to corporation whose capital stock was owned by surviving partners and decedent, even though such payments were customary in decedent's lifetime.

4. Partnership ⚷243, 255(1)

The interest of deceased partner's estate in partnership business was fixed as of date of partner's death and losses thereafter sustained by partnership were not chargeable to estate and debts thereafter incurred by partnership were its own obligations without right of contribution from estate. Civ. Code, § 2425.

5. Partnership ⚷255(1)

In action by administratrix of estate of deceased partner, finding that business and assets of partnership were such as to render its liquidation impracticable and inadvisable until a purchaser therefor could be found was objectionable in that it in effect authorized indefinite continuation of partnership after death of a partner contrary to statute. Probate Code, § 571.

6. Partnership ⚷243

A partnership is automatically dissolved by death of one of the partners even though the business continues to function as usual. Civ.Code. §§ 2425, 2436.

7. Appeal and error ⚷1008(1)

In action by administratrix of estate of deceased partner and shareholder in corporation owned by partners to recover corporate funds transferred to partnership since death of plaintiff's decedent and enjoin future transfers of such funds, whether such transfers were made without authority was a question for trier of facts.

8. Corporations ⚷207

Administratrix of estate of deceased shareholder had the same right as any other shareholder to protect corporate assets from dissipation and it was her duty to do so.

9. Corporations ⚷312(3)

Long continued practice of transferring to partnership funds accruing to corporation organized and owned by partners, use of such funds to pay obligations of individual partners and partnership and fact that books of both partnership and corporation properly reflected all transactions between the entities would not justify such transfer of corporate funds after death of one of the partners, in absence of evidence that such transfers were authorized by charter or by-laws of corporation or by action of its board of directors.

10. Corporations ⚷312(3)

Evidence that after partner's death no portion of corporation's indebtedness to partnership was liquidated by charging partnership for use of corporate assets and rolling stock refuted trial court's finding that transfers to partnership of funds accruing to corporation owned by partners were made for full consideration consisting of book entries fully reflecting correct charges against partnership.

11. Appeal and error ⚷655(1)

Finding of trial court which is either self-contradictory, unsupported by evidence or contrary to the evidence should be stricken from record.

12. Executors and administrators ⚷450

Finding that administratrix of estate of deceased partner and shareholder in corporation organized and owned by partners would not be damaged by continued transfer of corporate funds to partnership and surviving partners was unsupported by the evidence, where it was impossible to ascertain from the record what, if anything, was due from corporation to partnership or from partnership to corporation.

13. Appeal and error ⚷1071(5)

Findings of fact immaterial to the issues before the court may be disregarded on appeal.

14. Corporations ⟹320(11½, 13, 14)

In action by administratrix of estate of deceased partner and shareholder to enjoin officers and directors of corporation organized and owned by partners from transferring corporate funds to partnership and recover funds thus transferred since death of plaintiff's decedent, court should determine whether any disbursements of corporate funds had been made to partnership or surviving partners without consideration, enjoin defendants from making such payments and adjudge that corporation be reimbursed for any such payments.

◆

Appeal from Superior Court, Los Angeles County; Otto J. Emme, Judge.

Suit by Alice B. Harvey, as administratrix with the will annexed of the estate of Frank A. Harvey, deceased, and Alice B. Harvey, individually, against Jesse E. Harvey, Sr., as President of Harvey Brothers, Inc., and others to enjoin officers and directors of named corporation in which plaintiff's decedent was a shareholder from transferring corporate funds to themselves and a partnership of which decedent was a member and to recover funds theretofore transferred. From an adverse judgment, plaintiff appeals.

Judgment reversed with instructions.

Herbert Gall and Thomas F. McGrath, both of Los Angeles, for appellant.

John H. Miller, and Walter H. Miller, both of Los Angeles, for respondents.

MOORE, Presiding Justice.

Individually and as administratrix of her deceased husband's estate plaintiff sued (1) for an injunction against the officers and directors of a corporation in which decedent was a shareholder to prohibit them from transferring corporate funds to themselves and to a partnership of which decedent was a member; also, (2) for funds theretofore transferred. From the judgment entered she appeals.

In 1908 Frank Harvey entered into a partnership with his brothers, Jesse and James, to engage in the business of supplying rock, gravel and concrete mix to contractors. In 1919 Frank married appellant. In 1926 the three brothers incorporated, organized and transferred to Harvey Brothers, Inc. all their tangible assets except the good will of the partnership, and in return received and divided equally among themselves its 10,000 shares of capital stock. The brothers continued to operate the partnership using the corporation's equipment and property until the death of Frank on December 22, 1946. Upon her appointment as administratrix with will annexed, appellant became the authorized custodian of the estate of her decedent which included 3,333⅓ capital shares in Harvey Brothers, Inc. Her complaint in equity alleges that (1) the surviving brothers as officers had received all funds accruing for the benefit of the corporation, (2) they had transferred such funds to the partnership and to themselves as individuals, and (3) unless restrained and held to an accounting the brothers will continue to dissipate the corporate funds and that the stock she holds as administratrix will become worthless. The trial court made numerous findings and conclusions of law and entered judgment that plaintiff take nothing by her action. This appeal is based solely upon the grounds that the evidence adduced at the trial does not support the findings and judgment, and that the findings are inconsistent.

[1, 2] A review of all the evidence taken at the trial readily demonstrates that it relates exclusively to the question of what payments, if any, were made by the corporation to the partnership or to the individual defendants, or by the partnership to the corporation. By its second finding the court expressly refrained from determining the question whether "plaintiff is the heir of one third of the shares of stock of Harvey Brothers, Inc. * * * and also on the question of how said stock is disposed of by the will of said Frank A. Harvey. * * *" Despite this reservation the court next found (finding III) that the stock owned by decedent at his death was his separate property. Not only is such a finding unsupported by the evidence, but it is entirely irrelevant to the issues before the court and unnecessary to a determination thereof. It is also contrary to the

presumption of section 164 of the Civil Code that all property acquired after marriage is community property. Since the stock was admittedly a part of the estate and properly within the custody of appellant as administratrix, no question of the status of the stock whether community or separate was properly before the court. Her right, if any, to maintain her action did not depend upon the character of the property she held, but upon her position and responsibilities as an administratrix. Regardless of the ultimate disposition of the property the administratrix, as such, was liable for its preservation during the period of her administration. Her action, instituted in the best interests of the estate, was predicated not upon her rights as an heir of her husband but upon her duties as conservator of his estate pending disposition thereof. It follows, therefore, that since the character of ownership was not a proper issue and since it was not necessary to a proper determination of the case to ascertain whether the stock was community or separate, and since there is no evidence in the record to support a finding that it was separate, such a finding was not only without evidential support but was irrelevant and should be disregarded and stricken from the record.

[3] Appellants next object to the finding (V) "That prior to the death of Frank A. Harvey, said Frank A. Harvey, Jesse E. Harvey and James E. Harvey were members of a partnership known as Harvey Brothers; that since the death of Frank A. Harvey, said Jesse E. Harvey and James E. Harvey have continued said partnership and have continued to do business as Harvey Brothers, a partnership, as surviving partners and trustees of said partnership, [and propose to so continue said business until the distribution of the estate of said Frank A. Harvey, at which time they anticipate distribution of the interest of the estate of Frank A. Harvey in said business to them as testamentary trustees, and if they so receive distribution they will continue to operate said business for themselves and as trustees under the will of said Frank A. Harvey, deceased, and as directed in said will."] (Brackets inserted.) It is apparent from an inspection of the above finding that the bracketed words are entirely conjecture and in no way constitute a finding of fact. But it is not apparent that such a conjecture as to the ultimate disposition of the estate has any bearing upon the question whether corporate funds were improperly paid to the partnership. If the funds were improperly disbursed appellant's position both as administratrix and as shareholder was prejudiced thereby; if the funds were properly paid over to the partnership, no finding was necessary as to what use was or would be made of them. The fact that respondents asserted that they would continue to operate said business for themselves and as trustees under the will did not justify continued payments of money to the partnership if it was not entitled thereto.

[4] Respondents contend that since one third of the assets of the partnership and one third of the stock of the corporation belong to the estate it does not matter whether the corporation pays money to the partnership or vice versa. While such payments may have been the custom in decedent's lifetime, it by no means follows that it is proper to continue them after the dissolution of the partnership by his death. Civil Code, sec. 2425. The detriment that might befall a shareholder in the corporation is illustrated by the experience of the partnership in the year following the death of decedent during which the partnership sustained a substantial loss. No portion of such losses is charageable to the estate, because the estate is a thing apart from the partnership. The estate's interest is fixed as of the date of decedent's death and debts thereafter incurred by the partnership are its own obligations without right of contribution from the estate.

[5, 6] By finding VI it was determined that the business and assets of the partnership are of such character as to render its liquidation impracticable and inadvisable until a purchaser therefor can be found. Appellant's objection to this finding is also well taken. In effect it authorizes the indefinite continuation of the partnership after the death of a partner, a procedure not in accordance with section 571 of the Probate Code. Respondents counter with the argument that the business is such that

it cannot be wound up profitably, and the estate given its share. But this argument overlooks the distinction between winding up a business and winding up the partnership interest in that business. The business as such may be continued even though the partnership is terminated. In fact this is the usual procedure, because a partnership is automatically dissolved by the death of one of the partners even though the business continues to function as usual. Civil Code, secs. 2425, 2436.

[7-10] Appellant's contention that the evidence does not support the findings is directed chiefly against finding IX [1]. In the copy on the margin hereof numbers are inserted for reference herein. The first four clauses thereof were alleged by appellant in her complaint and admitted by respondents. As to them there can be no dispute. As to clauses 5 and 6 appellant alleged the transfers of funds to have been made without authority. Respondents' denial thereof raised an issue for settlement by the trier of fact. A review of all the evidence taken fails to disclose provisions of the by-laws or charter in accordance with which the payments were made. The testimony of Jesse, president of the corporation, was that the board of directors had never met to make any authorization of the disbursements, although two board meetings were held in 1947 for other purposes. In their brief respondents assert that the officers of the corporation "were simply following practices that had been engaged in for years," apparently relying upon clause 7 of finding IX. Assuming that previous transfers were in derogation of the rights of the corporation, such practices would not be sanctified by mere repetition or lapse of time. The practice of making such transfers prior to the death of Frank Harvey does not determine their correctness now. Upon his passing, one third of the corporate stock passed to new ownership, to wit, the devisees of deceased subject to administration. The rights of the new shareholder cannot be prejudiced by a careless custom indulged in by his deceased predecessor. The estate is a new minority shareholder and the adminstra-

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[1] "Finding IX.

"[1] That since the death of Frank A. Harvey the said Jesse E. Harvey, James E. Harvey, and Jesse E. Harvey, Jr., also known as Jesse M. Harvey, have received all funds accumulating from the profit of Harvey Brothers, Inc., a corporation; [2] that said funds have been paid into their hands by reason of the rental of property owned by Harvey Brothers, Inc., a corporation; [3] that the exact amount of funds received by defendants is well known to defendants and each of them; [4] that since the death of Frank A. Harvey defendants have transferred and continue to transfer funds coming into their hands as officers and directors of Harvey Brothers, Inc., a corporation, to Harvey Brothers, a partnership, and to themselves as individuals; [5] that said transfers have been made under the authority of the charter and by-laws of Harvey Brothers, Inc., a corporation, [6] and that said transfers and all of them have been authorized by the Board of Directors of Harvey Brothers, Inc., a corporation, formally or informally, [7] but in all instances by common consent and in conformity to the method of doing business followed by said corporation for twenty years last past; [8] that none of said transfers have been or will be made for the benefit of Jesse E. Harvey, James E. Harvey, or Jesse E. Harvey, Jr., also known as Jesse M. Harvey, as individuals, or as partners or employees of Harvey Brothers, a partnership; [9] that none of said transfers of funds were made to said partners or to said defendants as individuals other than as a transfer of funds to said partnership to enable it to meet its payroll and general expenses, or to defendants individually to enable them to meet their expenses, [10] and that all said transfers were made by said corporation for full and adequate consideration consisting of entries in an open account on the books of said corporation fully reflecting the correct charges against said partnership, and by entries in the books of said partnership fully reflecting proper credits in favor of said corporation, and that thereafter in cases of advances to defendants individually, by credits on the books of the partnership and charges against the partners' personal capital account; [11] that all of said transfers were made under the authority of the President and the Secretary-Treasurer of said corporation delegated to them by the Articles of Incorporation and the by-laws, and in conformity with the practice of said corporation for twenty years last past."

trix has not only the same right as any other shareholder to protect the corporate assets from dissipation but it is her duty to do so. It follows therefore that the unlawful practice by the brothers in Frank's lifetime has no bearing upon the question of the legality or illegality of the practice after the death of Frank Harvey. Clause 8 of finding IX is contradictory of itself. If the admitted transfers were not made for the benefit of the surviving partners or the partnership, for whose benefit were they made? Such a purported finding is an absurdity. Clause 9 may be taken as true upon its face for it was admitted in respondent's answer. But this is the very reason why appellant brought her action. The use of the funds to pay the obligations of the individual partners and the partnership in no way justifies the disbursements by the corporation if such disbursements were unlawful in the first instance. Such a finding leaves unsettled the question: were the payments to the partnership unlawful? Clause 10 of finding IX is perhaps the closest approach to an answer to this question found in the entire transcript. But even admitting that the books of both the partnership and the corporation properly reflected all transactions between the two entities, such book entries would not of themselves justify illegal payments of corporate funds. In reliance upon this finding respondents assert that the corporation became indebted to the partnership in 1931 in a large amount and that any payments by the former to the latter were credited against this debt. But the record discloses that the partnership used the equipment and assets of the corporation and, until 1931, paid to the corporation $10,000 yearly rental therefor. Thereafter, to and including 1947, no rental payments were made by the partnership to the corporation although the partnership continued to use all the assets and equipment owned by the corporation. Thus, equipment valued in excess of $46,000 was used, rent free, by the partnership during the year appellant was administratrix. Jesse testified that during 1947 no portion of this debt was liquidated by charging the partnership for the use of corporate assets and rolling stock. Such testimony completely refutes the finding that the transfers were made for full consideration consisting of book entries "fully reflecting the correct charges against said partnership * * *" The criticisms above in reference to clauses 5, 6 and 7 apply with equal force to 11.

[11] Thus it is evident that except clauses 1, 2, 3 and 4, all of finding IX is either self-contradictory, unsupported by evidence, or contrary to the evidence. It should therefore be stricken from the record.

[12] Appellant also contends that the finding (X) that she will not be damaged by continued payments by the corporation to the partnership and to the surviving partners and that such payments will cause herself and the corporation no injury is not supported by the evidence. It is readily apparent that the estate, as a minority shareholder, will not be prejudiced by the corporation's paying its just debts whether those debts were contracted before the death of Frank Harvey or during the period of appellant's administration. But it is just as apparent that the estate, as a minority shareholder, will be prejudiced by payments which the corporation is not obligated to make. From the confused state of the record it is impossible to ascertain what, if anything, is due from the corporation to the partnership or from the partnership to the corporation.

[13] Appellant's final objection is to finding XI. The material parts thereof to which appellant objects are repetitious of previous findings as to how respondents have heretofore conducted the business and how they anticipate conducting it in the future. Therefore, the demonstrated falacies of the previous findings are also applicable to finding XI. Since the other facts determined by such finding are immaterial to the issues before the court, they may be disregarded.

[14] In view of the conclusions above announced with reference to findings III, V, VI, IX, X and XI and since the remainder of the findings are insufficient to support the judgment, it is ordered that the judgment be reversed with instructions (1) to determine whether any disbursements of corporate funds have been made to the defendants without consideration; (2) to en-

join the defendants from making such payments; (3) to adjudge that the corporation be reimbursed for such payments, if any.

McCOMB and WILSON, JJ., concur.

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90 Cal.App.2d 640

PEOPLE v. GOOLD.

Cr. 4308.

District Court of Appeal, Second District,
Division 2, California.
March 15, 1949.

Criminal law ⚿997

Alleged prejudicial misconduct of district attorney at trial, alleged error of trial court in submitting issue as to whether defendant's confession was made while he was mentally deficient, alleged error in refusing to grant trial separate from that of codefendants, alleged error in instructions to jury, and complaint that medical testimony as to defendant's sanity, was unbelievable were matters to be considered on appeal and were not reviewable by writ of error coram nobis.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Harry Fuller Goold was convicted of murder in the first degree. His appeal from the judgment and from an order denying a new trial was affirmed, and thereafter defendant filed a petition for a writ of error coram nobis. From an order denying the petition, defendant appeals.

Affirmed.

Harry Fuller Goold, appellant, in pro. per.

Fred N. Howser, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

WILSON, Justice.

On June 18, 1931, an information was filed against defendant charging him with the crime of murder in the first degree. He entered pleas of "not guilty" and "not guilty by reason of insanity." The jury found him guilty as charged and found that he was sane at the time of the commission of the offense. An appeal from the judgment and from the order denying a new trial was affirmed. People v. Goold, 215 Cal. 763, 12 P.2d 958.

On September 14, 1948, defendant filed in the superior court an unverified petition for writ of error coram nobis. The petition was denied and defendant has appealed from the order of denial. In his brief he presents the following grounds for a reversal of the order: (1) The district attorney was guilty of prejudicial misconduct at the trial; (2) the trial court erred in submitting to the jury the question whether or not his confession was made while he was so mentally deficient as to be unable to understand its meaning; (3) the trial court erred in refusing to grant him a trial separate from his co-defendants, or to permit a trial on the issue of insanity by a different jury, with his own attorney opening and closing the argument; (4) errors in the instructions to the jury; (5) the evidence of the doctors who testified that he was sane was inherently improbable and unbelievable.

Since all the grounds stated were reviewable on appeal they are not available to him as reasons for the granting of a petition for a writ of error coram nobis. People v. Superior Court, 4 Cal.2d 136, 149, 150, 47 P.2d 724; People v. Black, 114 Cal. App. 468, 470-471, 300 P. 43; People v. Krout, 90 Cal.App.2d 205, 202 P.2d 635. In fact all the grounds relied on by defendant were decided adversely to his contention. 215 Cal. 763, 12 P.2d 958.

Order affirmed.

MOORE, P. J., and McCOMB, J., concur.

ERICKSON v. BOOTHE.

Civ. 7486.

Sac. 5905.

District Court of Appeal, Third District, California.

March 5, 1949.

Rehearing Granted April 4, 1949.*

1. Appeal and error 🔑1195(1)

Although an unqualified reversal remands a cause for a new trial and places parties in the trial court in same position as if cause had never been tried, opinion of reviewing court must be followed so far as applicable.

2. Appeal and error 🔑1203(5)

Where District Court of Appeal reversed without directions a judgment determining that a lessee had not validly exercised an option to re-lease premises, and opinion stated that lessee had fully performed conditions required and that executrix of lessor was not entitled to a writ of restitution, and parties had stipulated as to all of the facts, new trial after reversal was useless and trial court could properly follow appellate opinion and enter judgment in favor of lessee.

3. Appeal and error 🔑1203(5)

Where executrix brought action for declaratory relief under lease, and District Court of Appeal reversed judgment for executrix without directions, voluntary dismissal of action by executrix on same date lessee made motion in trial court for judgment in his favor did not deprive trial court of inherent power to enter a judgment following the opinion of the appellate court.

4. Appeal and error 🔑1208(8)

Where lessee voluntarily abandoned possession of premises only after order of trial court determined that he had not validly exercised option to re-lease premises, such action on part of lessee was not a "voluntary abandonment" depriving him of his right to possession after appellate court subsequently determined that executrix of lessor who brought action had no right to a writ of restitution.

5. Appeal and error 🔑1208(2)

Trial court has inherent power to order restitution of property to party deprived thereof by its own erroneous judgment.

6. Declaratory judgment 🔑329

Where lessor's executrix brought action for declaratory relief to determine rights and duties under a lease, and only issue raised by pleadings was whether option for renewal had been validly exercised by lessee, evidence of alleged nonpayment of rent, acts of waste and abandonment of possession was inadmissible as outside scope of issues.

7. Judgment 🔑251(1)

A judgment can only encompass matters put in issue by the pleadings.

8. Appeal and error 🔑439

District Court of Appeal is not empowered to vacate judgment of a trial court upon motion of one of the litigants, such power being confined to the trial court under certain prescribed conditions; and even that court is deprived of its limited jurisdiction to do so by an appeal. Code Civ. Proc. § 473,663.

9. Declaratory judgment 🔑384

Where lessor's executrix brought declaratory action for determination of rights and duties under a lease and only issue raised by pleadings was whether action for renewal had been validly exercised, lessee on determination that renewal had been properly exercised was not entitled to an accounting of rents, issues and profits by the executrix for period during which she had possession of the premises as result of former erroneous judgment but such claims were properly subject of a separate action.

Appeal from Superior Court, Merced County; R. R. Sischo, Judge.

Action by Mazie Erickson, formerly Mazie Tangeman, executrix of the last will and testament of Timothy Carlon, deceased, against Clyde D. Boothe, for declaratory relief in regard to a lease entered into by the guardian of the estate of Timothy H. Carlon as lessor and by defendant as lessee. From a judgment in favor of defendant, plaintiff appeals.

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* Subsequent opinion 207 P.2d 894.

Affirmed in part, and reversed in part.

See also 203 P.2d 122.

Lafayette J. Smallpage, of Stockton, and T. B. Scott, of Modesto, for appellant.

Edward T. Taylor, of Modesto, for respondent.

PEEK, Justice.

This is the second of a series of appeals arising out of a controversy between Mazie Erickson as executrix of the last will of Timothy H. Carlon, deceased, and respondent Boothe. The original action was for declaratory relief in regard to a lease entered into by the guardian of the estate of Timothy H. Carlon as lessor and by Boothe as lessee, and in particular a clause thereof giving the lessee an option to release the property upon compliance with certain conditions therein prescribed. The sole question presented in said action was whether or not the lessee had validly exercised the option which question was determined adversely to him by the trial court. On appeal the judgment was reversed without directions. See Erickson v. Boothe, 79 Cal. App.2d 266, 179 P.2d 611.

After the remittitur went down from this court a dismissal of the action was filed on July 21, 1947 on behalf of Mazie Erickson, as executrix, and on the same day Boothe filed a motion in the trial court for judgment in his favor. After a hearing on said motion judgment in accordance therewith was entered on October 3, 1947. In essence the judgment provided that Boothe was entitled to be restored to possession of the property and to an accounting of the rents, issues, and profits thereof by Mazie Erickson, as executrix, during the period in which she had possession of the premises as a result of the former erroneous judgment of the trial court. It is from this judgment so entered in favor of Boothe, that Mazie Erickson in her representative capacity has now appealed.

[1] Appellant first asserts that the reversal without further directions had the effect of remanding the cause for a new trial; that upon a new trial she will amend her complaint to allege nonpayment of rent by respondent, the commission of acts constituting waste to appellant's damage, and the voluntary abandonment of the premises by respondent in accordance with an agreement with appellant that she would waive costs of suit and damages upon the issues above mentioned. Her contention is that a reversal without directions sets the case at large, and in support thereof relies upon cases such as Central Savings Bank of Oakland v. Lake, 201 Cal. 438, 257 P. 521, wherein it is held that an unqualified reversal remands the cause for a new trial and places the parties in the trial court in the same position as if the cause had never been tried.

However, it is also the rule that the opinion of the reviewing court must be followed so far as applicable. In re Estate of Pusey, 177 Cal. 367, 170 P. 846. Turning then to our opinion on the former appeal it is readily apparent therefrom that at the original hearing it was conceded by Erickson that Boothe properly exercised his option to release the premises; that had Carlon lived Boothe had performed all of the conditions precedent to the exercise of his right to lease the premises, and continued occupancy thereof by Boothe would have been lawful. The opinion concluded with the following language: "* * * it being agreed that appellant [Boothe] has fully performed, the executrix was not entitled to a writ of restitution." [79 Cal.App.2d 266, 179 P.2d 619].

[2] By reason of the issues raised in the declaratory relief action and by virtue of the admissions appearing therein and in particular the stipulation of the parties as to all of the facts (which stipulation appears in said original proceeding), a new trial after the reversal by this court would have been a wholly idle and useless act. Obviously there remained no issue of fact to be re-examined upon a retrial, and hence the only question presented was one of law. Therefore the trial court properly followed the opinion of this court and entered judgment in favor of Boothe.

Furthermore, in considering appellant's contention, it is pertinent to note the record discloses that appellant has neither amended nor moved to amend her complaint, nor has she filed a separate action setting forth the alleged nonpayment of rent, acts of waste and voluntary abandonment of possession by the respondent, nor has she taken any steps to have the cause set down for a new trial. On the contrary, the record shows that appellant filed a dismissal of the original complaint for declaratory relief on the same date that respondent made his motion in the trial court for the judgment appealed from.

[3-5] The voluntary dismissal of her action by appellant did not deprive the trial court of its inherent power to enter the judgment herein attacked. Schubert v. Bates, 30 Cal.2d 785, 185 P.2d 793. While appellant asserts that respondent voluntarily abandoned possession of the premises, the record discloses that he left the premises only after the order of the trial court entering judgment in the original action. Such action on the part of respondent did not constitute a voluntary abandonment so as to deprive him of his right to possession. Erickson v. Boothe, supra; Schubert v. Bates, supra. And while appellant additionally states in her brief that respondent agreed in writing to give up possession of the premises it is sufficient to state that the record fails to disclose any such agreement. In any event it is well established that the trial court has inherent power to order restitution of property to the party deprived thereof by its erroneous judgment. Schubert v. Bates, supra.

[6] Appellant next contends that the trial court abused its discretion in entering the judgment without hearing evidence of the alleged nonpayment of rent, acts of waste, and abandonment of possession, which appellant asserts will be alleged in an amended complaint upon a new trial of the cause as set forth with regard to her first contention. However, as previously stated she has done nothing in this regard, but on the contrary dismissed her action. Moreover, the only issue raised by the pleadings was whether or not the option for renewal had been validly exercised. Therefore, such evidence sought to be introduced by appellant was outside the scope of the issues and was inadmissible. Fuentes v. Tucker, 31 Cal.2d 1, 187 P.2d 752.

[7] The last contention of appellant is that the judgment is erroneous in that it embraces matters not placed in issue by the pleadings. Specifically, appellant contends that there was no issue raised as to any accounting of the rents, issues, and profits as ordered by the judgment. This contention is not without merit since it is the general rule that a judgment can only encompass matters put in issue by the pleadings. Hyde v. Hagen, 70 Cal.App.2d 517, 161 P.2d 242.

[8, 9] The record further discloses that on October 22, 1948, appellant Erickson filed a motion in this court to vacate the last mentioned judgment and to dismiss the foregoing appeal in the event that this court should grant the motion. This court is not empowered to vacate the judgment of a trial court upon the motion of one of the litigants, such power being confined to the trial court under certain prescribed conditions, see secs. 473 and 663, C.C.P., and even that court is deprived of its limited jurisdiction to do so by an appeal. See 14 Cal.Jur. 1017.

The observation of counsel for appellant, prefacing the concluding statement of her reply brief, cannot be denied—"This case is becoming somewhat confusing". By reason of such confusion we feel impelled to reiterate what was in effect said in our previous opinion and the essence of the views expressed herein: that it is clear that Boothe is entitled to be restored to possession of the premises, and that portion of the judgment so decreeing must be affirmed; that whatever claims either party may have against the other should not be the basis for the filing of progressively confusing motions, which can only needlessly prolong the present litigation, and that such claims should be the subject of a distinct and separate action, thereby finally terminating this controversy.

For the foregoing reasons the judgment is affirmed except that portion which orders appellant to account to respondent, which is reversed, and the motion to vacate the judgment is denied.

ADAMS, P. J., and THOMPSON, J., concur.

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90 Cal.App.2d 457

ERICKSON v. BOOTHE.

Civ. 7486.

Sac. 5905.

District Court of Appeal, Third District, California.

March 5, 1949.

1. Appeal and error 🔑440
Parties 🔑60

Under proper circumstances, after trial has been concluded, judgment entered and motion for new trial denied, a motion for substitution of parties may be granted; and rule applies even after an appeal has been taken. Code Civ.Proc. §§ 385, 389.

2. Executors and administrators 🔑439

Where executrix of lessor dispossessed lessee after judgment, but judgment was reversed and lessee determined to be entitled to possession, and before lessee had been reimbursed for executrix' use of property, probate court's decree of final distribution transferred entire estate to executrix as an individual, lessee was without recourse for any judgment he might have against executrix and trial court could properly grant motion for substitution of executrix as distributee and require her to be bound as an individual by judgment determining that lessee was entitled to possession of the premises. Code Civ.Proc. §§ 385, 389; Probate Code, § 730.

3. Appeal and error 🔑82(1)

Order substituting distributee of estate for executrix in action determining rights under a lease and made after final judgment determining that lessee was entitled to possession was a "special order made after final judgment" from which an appeal could be taken. Code Civ.Proc. § 963.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Special Order Made After Final Judgment".

◆

Appeal from Superior Court, Merced County; R. R. Sischo, Judge.

Action by Mazie Erickson, formerly Mazie Tangeman, executrix of the last will and testament of Timothy Carlon, deceased, against Clyde D. Boothe for declaratory relief and determination of rights and duties under a lease. From an order permitting defendant to make a substitution in parties plaintiff and to bind Mazie Erickson as an individual, and sole distributee of the estate, plaintiff appeals, and defendant moves to dismiss the appeal.

Order of substitution affirmed, and motion to dismiss denied.

Lafayette J. Smallpage, of Stockton, and T. B. Scott, of Modesto, for appellant.

Edward T. Taylor, of Modesto, for respondent.

PEEK, Justice.

This is the third of a series of appeals arising out of the prior litigation between the same parties. See Erickson v. Boothe, 79 Cal.App.2d 266, 179 P.2d 611, Erickson v. Boothe, Cal.App., 203 P.2d 119, to which reference is made for the background of this appeal.

On October 28, 1948 defendant Boothe filed a notice in the trial court for an order to compel Mazie Erickson, individually, as sole distributee of the estate of Timothy H. Carlon, deceased, to continue this action, and be bound as an individual by the judgment of the trial court entered on October 1, 1947, which judgment provided that Boothe was entitled to the possession of the premises and to an accounting. It is this judgment which forms the basis of the second appeal by Mazie Erickson, as executrix of the last will of Timothy H. Carlon, to which reference was heretofore made. The motion for substitution was based on the ground that Mazie Erickson, as such executrix, did on or about June 25, 1948, procure the estate to be distributed to her as sole distributee and therefore she should be substituted as plaintiff in her individual capacity. As an individual she has opposed this motion on the ground that Boothe had not requested notice of any of the proceedings in the probate of the estate. Also in her opposition thereto she has again set forth all of the prior allegations as to the dismissal of the action for declaratory relief after the judgment had been reversed by this court, the motion for possession and an accounting, the objections thereto, and the entry of the judgment which is the subject of the appeal in Erickson v. Boothe, supra.

At the time of the oral argument this court, by a minute order dated November 3, 1948, approved the foregoing order of substitution. Thereafter on November 13, 1948, she filed her motion for an order of this court revoking the order approving the substitution on the ground that the trial court was without jurisdiction to make the substitution and that an appeal had been taken therefrom and that the same was then pending before this court. Boothe opposed this motion on the ground that the order of substitution was proper under the circumstances existing.

The sole question presented on this phase of the case is whether the trial court had power to order such substitution. Section 385 of the Code of Civil Procedure provides in part that:

"* * * In case of any other transfer of interest, the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding."

Rule 48 of Rules on Appeal amplifies the same provision with relation to reviewing courts, stating that:

"Whenever a substitution of parties to a pending appeal is necessary, it shall be made by proper proceedings instituted for that purpose in the superior court. On suggestion thereof and the presentation of a certified copy of the order of substitution made by the superior court, a like order of substitution shall be made in the reviewing court * * *".

Of the several arguments raised by appellant only two are in point so far as the present proceeding is concerned, (1) that sections 385 and 389 of the Code of Civil Procedure refer only to substitutions before the entry of judgment, and (2) that in any event the substitution of a party plaintiff is of no concern to a defendant.

[1] We find no merit in appellant's first contention. It is well established that under proper circumstances after a trial has been concluded, judgment entered and motion for a new trial denied, a motion for substitution may be granted, Curtin v. Salomon, 80 Cal.App. 470, 251 P. 237, and this same rule applies even after an appeal has been taken. Fay v. Steubenrauch, 138 Cal. 656, 72 P. 156.

In the similar case of Higgins v. Kay, 168 Cal. 468, 143 P. 710, 712, the court stated: "Undoubtedly the court may make a substitution such as was sought here upon a proper showing", and although the order substituting a new party plaintiff therein was reversed it was solely because of the failure of the moving party, the defendant, to give due notice to the plaintiff.

[2] The showing made by defendant herein more than conforms to the rule laid down the Higgins case, supra, in substantiating the order of substitution of the trial court for the following reasons: It is not denied that respondent Boothe was dispossessed of the property by Erickson after the original judgment which was reversed by this court. 79 Cal.App.2d 266, 179 P.2d 611. Consequently Boothe may well be entitled to compensation for the long period of time Erickson has been in possession of and used the property for her own benefit. However, even though Boothe might obtain a money judgment against Erickson as executrix, such a judgment could only be that said executrix pay in due course of administration of the estate, the money, if any, found to be due Boothe. Furthermore no execution could issue upon

the judgment and it would not operate to create a lien upon the property of the estate. Section 730, Prob.Code. Therefore, when by the decree of final distribution the whole of the estate was transferred to Erickson as an individual, there was nothing left out of which such judgment could be paid as provided in said section 730. In other words any juridiction of the probate court which might theretofore have attached ceased by virtue of said decree of distribution, and so far as Boothe was concerned he was helpless and without recourse of any sort. Hence under the circumstances disclosed by the record before us the granting by the trial court of the motion for substitution by Boothe was not such an abuse of discretion, or at all, as would warrant intervention by this court.

[3] This then brings us to a consideration of the final question herein involved, to-wit: the motion by Boothe to dismiss the within appeal from the order of substitution on the ground that the same was nonappealable, which motion was opposed by Erickson. Although neither party has seen fit to cite authority for their contentions in this regard it would appear that such order is a "special order made after final judgment" such as is contemplated in section 963 of the Code of Civil Procedure wherein is enumerated those matters concerning which an appeal may be taken.

The order of substitution appealed from is affirmed and the motion to dismiss is denied.

ADAMS, P. J., and THOMPSON, J., concur.

33 Cal.2d 534

Ex parte HOROWITZ.

PEOPLE v. HOROWITZ.

L. A. 20199.

Cr. 4854.

Supreme Court of California.

Feb. 28, 1949.

1. Criminal law 🔑1023(12)

Order denying a petition for writ of error coram nobis is appealable under statute authorizing appeal by defendant from any order made after judgment affecting his substantial rights, and such appeal is governed by procedural rules for appeal in criminal cases. Pen.Code, § 1237, subd. 3; Rules on Appeal, rule 31.

2. Appeal and error 🔑356
Criminal law 🔑1069(6)

Time requirements for taking an appeal in both criminal and civil cases are mandatory and appellate courts are without jurisdiction to consider an appeal which has been taken after expiration of statutory period. Rules on Appeal, rule 31.

3. Criminal law 🔑1069(6)

Where notice of appeal was not filed within ten days after making of order denying petition for writ of error coram nobis, appeal from such order must be dismissed for want of jurisdiction. Rules on Appeal, rule 31.

4. Habeas corpus 🔑25(1)

The grounds upon which relief may be granted by habeas corpus are broader than those available for issuance of writ of error coram nobis.

5. Criminal law 🔑706

Conflict between testimony of two prosecution witnesses did not show that prosecuting attorney knew which one was mistaken or falsifying or that he deliberately sought to convict defendant by use of perjured testimony, and, in absence of knowledge as to which witness was mistaken or falsifying or means of acquiring such knowledge, prosecuting attorney properly produced both witnesses and let jury decide the facts.

6. Habeas corpus 🔑30(1)

That a witness for prosecution did not disclose until after probate of will had been denied that she had seen will without signatures of subscribing witnesses did not necessarily establish as ground for relief on habeas corpus that her testimony to that effect in prosecution for forgery of will was fabricated, the effect of such belated disclosure upon her credibility being a question for jury upon the criminal trial.

7. Habeas corpus 🔑30(1)

That witness' ability to read was at most, slight, did not necessarily establish that her testimony upon trial for forgery of will that she had seen will after death of testatrix without signatures of subscribing witnesses was fabricated or charge prosecutor with knowledge of deliberate falsification as ground for relief on habeas corpus.

8. Criminal law 🔑706

Prosecution properly submitted to jury conflicting testimony of two witnesses in prosecution for forgery of a will, notwithstanding defendant's contention that testimony of one of the witnesses was deliberately falsified.

9. Evidence 🔑570

That expert witnesses disagree does not necessarily reflect upon the honesty of their opinions.

10. Habeas corpus 🔑30(1)

That prosecution failed to have chemical tests made of ink used on allegedly forged will and that particular expressions of a witness, taken out of context, appeared inconsistent with other statements of the witness did not establish that prosecution deliberately used false testimony unfavorable to defendant and suppressed evidence which would have been favorable to him as ground for release on habeas corpus from imprisonment under sentence for forgery of a will.

11. Habeas corpus 🔑25(1)

That district attorney did not investigate defendant's charge that will had been mutilated by others until after trial of will contest and then charged defendant himself with mutilation of the will, upon which charge defendant was acquitted, did not show fraud in procuring defendant's conviction of forgery of the will as ground for his release from imprisonment on habeas corpus.

12. Forgery ⚿7(1)

A will is an "instrument" within meaning of statute making it a felony to knowingly procure or offer any false or forged instrument to be filed in any public office. Pen.Code, § 115.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Instrument".

13. Forgery ⚿16

Exhibiting forged will in effort to obtain personal property which had belonged to alleged testatrix constituted "uttering" a forged will in violation of statute. Pen. Code, § 470.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Utter".

14. Habeas corpus ⚿30(2)

Discrepancy between indictment and evidence as to date when defendant uttered allegedly forged will afforded no ground for release on habeas corpus from imprisonment under sentence for uttering such will. Pen.Code, § 470.

15. Criminal law ⚿1209

Evidence warranted conviction of four separate offenses of uttering a forged will, filing such will for probate, offering forged will in evidence in probate proceeding and preparing a forged and antedated will with intent to defraud based on different acts though involving the same instrument, and order that sentences run consecutively did not constitute punishment of one act more than once. Pen.Code, §§ 115, 132, 134, 470, 654.

16. Criminal law ⚿1202(1)

In determining whether defendant had previously been convicted of a felony as affecting minimum sentence to be imposed upon subsequent conviction, court could not consider contention that defendant was only 15 years of age at time of prior conviction of robbery in another state and should not have been sentenced to state prison therefor. Pen.Code, § 3024(c).

17. Habeas corpus ⚿92(1)

Conviction of forgery of a will established that will had been forged and the question of genuiness of will was not open to review in habeas corpus proceeding to obtain release from imprisonment under sentence for forgery.

18. Habeas corpus ⚿25(1)

Existence of disputed issues of fact and conflicts in the evidence at trial for a criminal offense, or discovery of new evidence pertinent to such issues affords no ground for relief on habeas corpus.

19. Criminal law ⚿1160

The weight of the evidence is primarily for jury, after which it may be reviewed by trial judge and a new trial granted if in his discretion it appears that the weight of the evidence, despite substantial conflict, does not sustain jury's finding, but determinations of jury and trial judge as to the facts are conclusive on appeal, if there is substantial conflict in the evidence.

20. Pardon ⚿4

If a miscarriage of justice is claimed after termination of court procedures, the ultimate remedy rests in an appeal to the Governor for a pardon. Const. art. 7, § 1.

21. Habeas corpus ⚿120

It is the policy of Supreme Court to deny an application for habeas corpus which is based upon grounds urged in a prior petition which has been denied, where no change in the facts or in the law substantially affecting the rights of the petitioner is shown.

22. Habeas corpus ⚿120

Grounds of alleged invalidity of conviction known to defendant at time of appeal from conviction or application for habeas corpus, but not then presented should not be considered upon subsequent application for habeas corpus.

EDMONDS, J., dissenting in part.

Appeal from Superior Court, Los Angeles County; Arthur Crum and Thomas L. Ambrose, Judges.

Harry Horowitz was convicted of forging a will and other offenses and he appeals from an order denying his petition for writ of error coram nobis and applies for a writ of habeas corpus.

Appeal dismissed, motion for appointment of experts by court denied and writ of habeas corpus discharged and petitioner remanded to custody.

Morris Lavine, of Los Angeles, for petitioner.

Fred N. Howser, Atty. Gen. and Frank Richards, Deputy Atty. Gen., for respondent.

SCHAUER, Justice.

This is an application for the writ of habeas corpus (Crim. 4854), with which has been consolidated an appeal from an order denying a petition for writ of error coram nobis (L.A. 20199). In these proceedings Harry Horowitz (hereinafter sometimes called petitioner) attacks the validity of four judgments of conviction by virtue of which he is confined in the state prison at San Quentin. For the reasons hereinafter stated, we have concluded that this court is without jurisdiction to entertain the coram nobis appeal and, further, that petitioner has not shown, in the habeas corpus proceeding, that he is unlawfully imprisoned.

Factual Background

The judgments of conviction which petitioner attacks are of forging a will (Pen. Code, § 470), causing to be filed a false will (Pen.Code, § 115), offering in evidence a false will (Pen.Code, § 132), and preparing a false will with intent to allow it to be produced for a fraudulent purpose in a probate proceeding (Pen.Code, § 134). According to evidence adduced at the trial and believed by the jury, petitioner wrote the will on a sheet of paper which was blank except for the genuine signature of his adoptive mother and procured the signatures of two women (Emma Cordova and Maria Matus) as purported witnesses. Petitioner's adoptive mother, Esther Horowitz, died on December 31, 1942, at the sanitarium of Mrs. Irene Drucker. Petitioner instituted proceedings for probate of the forged will. Morris Horowitz, husband of Esther, contested the will and probate was denied. In accord with the suggestion of the probate judge, the criminal prosecution of petitioner was then instituted.

Previous Attacks Upon the Judgments

The judgments of conviction growing out of such prosecution were affirmed by the District Court of Appeal (People v. Horowitz (1945), 70 Cal.App.2d 675, 161 P.2d 833) and petitions of appellant Horowitz for rehearing and for hearing by the Supreme Court were denied. Shortly after the going down of the remittitur (October, 1945) Horowitz petitioned the Los Angeles superior court for the writ of habeas corpus and the writ of error coram nobis. The superior court issued the writ of habeas corpus and, after hearing (January, 1946), discharged it and denied the petition for coram nobis. Horowitz appealed from the order of denial but the appeal was subsequently dismissed. (Petitioner states that he failed to prosecute the appeal because it came before the same court which had affirmed the judgments of conviction and he felt that the justices of that court were prejudiced against him.) Another petition for habeas corpus was denied by this court without opinion (September 19, 1946). Each of these previous attacks upon the judgments was based primarily, as are the proceedings now before us, upon the contention that the prosecution used false and perjured evidence, with knowledge of its character, to procure petitioner's conviction. (See Mooney v. Holohan (1935), 294 U.S. 103 [55 S.Ct. 340] 79 L. Ed. 791, 98 A.L.R. 406; In re Mooney (1937), 10 Cal.2d 1, 15, 73 P.2d 554.)

The Coram Nobis Appeal

[1-4] An order denying a petition for the writ of error coram nobis is made appealable by section 1237 of the Penal Code ("An appeal may be taken by the defendant * * * 3. From any order made after judgment, affecting the substantial rights of the party"). (People v. Perez (1908), 9 Cal.App. 265, 266, 98 P. 870, followed in People v. Schwarz (1927), 201 Cal. 309, 312, 257 P. 71; People v. Gilbert (1944), 25 Cal.2d 422, 444, 154 P.2d 657 [appeal under comparable section 1238 which provides that the People may appeal "5. From an order made after judgment, affecting the substantial rights of the people"].) An appeal in such cases is, therefore, gov-

erned by the procedural rules for "Appeals in Criminal Cases" (Rules on Appeal, Part V, Rule 31). Petitioner's notice of appeal was not filed within ten days after the making of the order appealed from as required by Rule 31. In both criminal and civil cases, "the time requirements for the taking of an appeal are mandatory, and * * * the appellate courts are without jurisdiction to consider an appeal which has been taken subsequently to the expiration of the statutory period." (People v. Slobodion (1947), 30 Cal.2d 362, 365, 181 P.2d 868, 870; People v. Lewis (1933), 219 Cal. 410, 413-414, 27 P.2d 73, and cases there cited.) Therefore, this court "has no discretion but must dismiss the appeal of its own motion even if no objection is made." (In re Estate of Hanley (1943), 23 Cal.2d 120, 123, 142 P.2d 423, 425, 149 A.L.R. 1250, and cases there cited.) However, petitioner's contentions sought to be raised on his coram nobis appeal have been reiterated by him in the habeas corpus proceeding. The grounds upon which a court may grant relief by habeas corpus are broader than those available for issuance of the writ coram nobis (In re Lindley (1947), 29 Cal.2d 709, 724, 725, 177 P.2d 918), and the contentions sought to be advanced by petitioner are more appropriately urged, and will be considered, upon his application for habeas corpus.

Petitioner's Contention That the Prosecution Knowingly Used False Evidence

Petitioner alleges that the prosecution knowingly used perjured testimony of Mrs. Irene Drucker to the following effect: On or about January 6, 1943, in the evening, petitioner called upon Mrs. Drucker and demanded possession of articles of personal property which had belonged to his mother and which were in Mrs. Drucker's possession. For the purpose of substantiating his claim he produced a sheet of paper which was blank except that it bore the signature of Esther Horowitz. Mrs. Drucker refused to deliver the property to petitioner. Later petitioner returned to Mrs. Drucker and again displayed the paper; on this occasion it bore the substance of the forged will and the word "Witnesses," but no signature of any attesting witness.

The questions whether this testimony was wilfully false as to material matters and whether the prosecution used such testimony with knowledge that it was perjured, were tried out before the Honorable William R. McKay on the above mentioned previous habeas corpus and coram nobis proceedings in the superior court in January, 1946, and were resolved adversely to petitioner. In his present petition for habeas corpus petitioner states in detail his reasons for his continued insistence that they be tried out again. Such reasons, with explanations of their want of merit, are as follows:

[5] (1.) Attorney Irving Buchalter, who handled the probate proceedings for petitioner, was a witness (called by both the People and the defendant) at the criminal trial. He testified for the prosecution that petitioner had shown him the will and other documents on January 5, 1943, and had left them in Buchalter's possession on the day of January 6, 1943; i. e., before Mrs. Drucker, according to her testimony, saw the paper bearing only the signature of petitioner's mother. The prosecuting attorney recognized and called the jury's attention to this conflict in the evidence. In oral argument he told the jury, "Now, of course, it is obvious to you ladies and gentlemen that if Mr. Buchalter saw the document on January 5 and at that time it contained the names of Emma Cordova and Maria Matus, that Mrs. Drucker could not have seen it on the 6th, as she testified that she did see it on or about the 6th, because at that time the will was in the possession of Mr. Buchalter." The fact that there was a conflict between the testimonies of two prosecution witnesses may indicate that one was mistaken or even lying but does not show that the prosecuting attorney knew which one was mistaken or falsifying or that he deliberately sought to convict the defendant by the use of perjured testimony. Indeed, in the absence of such knowledge on his part, or means of acquiring that knowledge, it is difficult to imagine how he could act more fairly, in the discharge of his duty, than to produce both witnesses and let the jury decide the fact.

[6] (2.) Upon the trial of the will contest Mrs. Drucker testified for contestant

Morris Horowitz. She did not then testify as to having seen the forged will in various stages of preparation. After probate of the will had been denied and petitioner had moved for a new trial of the will contest Mrs. Drucker made an affidavit in opposition to the motion for new trial, in which she stated that she had seen the will without the signatures of subscribing witnesses. That her mention of this matter was belated does not as petitioner argues, necessarily establish that she fabricated her testimony. The effect of such belated mention upon her credibility in the light of her earlier testimony, was for the jury to determine upon the criminal trial of petitioner and the question was properly presented to that fact finding body. The effort of petitioner's counsel to impeach the testimony of Mrs. Drucker in this respect is shown by the following excerpt from the transcript:

"Q. Did you make an affidavit in which you swore that you had never told any one prior to the 24th day of September, 1943 [i. e., after probate of the will was denied], that the two signatures that you claim were not on the document you saw were not there? A. I did. * * *

"Q. Did you swear also that you had not mentioned this fact, such fact to the attorneys for the contestant * * * before or at the time of the trial of the contest? A. That is right."

[7] (3.) Petitioner alleges that at the time when, according to Mrs. Drucker's testimony, she saw and identified the paper upon which the will was forged, she could not read; that she then "did not even know the letters of the English alphabet." That there was a question as to the extent of Mrs. Drucker's literacy was known to petitioner before the criminal trial. Such question was properly gone into on cross-examination in an effort to cast doubt upon her credibility and it was brought out that her ability to read was, at the most, slight. This fact, although it was material for the consideration of the triers of fact in determining the weight of her testimony, does not necessarily establish, and certainly does not charge the prosecutor with knowledge of, deliberate falsification on her part.

[8] (4.) Petitioner alleges that he informed the district attorney of the asserted perjury "before, during, and subsequent to petitioner's conviction," and that the district attorney refused to investigate the charge. The mere fact that the prosecuting attorney knew of the above matters reflecting upon Mrs. Drucker's credibility, and of petitioner's claim, did not require him to accept petitioner's charge that she was wilfully falsifying. The prosecution did not have to refrain from calling Mrs. Drucker and to rest its case, as to this issue, solely upon the testimony of handwriting experts simply because of petitioner's accusations. It could and did decide that complete investigation of, and fair presentation of evidence concerning, the asserted crimes of petitioner required the production of the two witnesses (Mrs. Drucker and Mr. Buchalter) whose testimones were in conflict, and the frank submission to the jury of the question of which witness should be believed. It is possible, of course, that either or both witnesses could have been innocently mistaken as to various details of recollection.

[9, 10] Petitioner charges, also, that testimony of handwriting experts, known by the prosecution to be false, was introduced against him and that expert testimony favorable to petitioner was suppressed by the prosecution. In elaborating these charges petitioner makes it apparent that they are without substantial support. The fact that experts disagree does not necessarily reflect upon the honesty of their opinions. The fact that no chemical tests of ink used on the disputed document were made by the prosecution witnesses does not, in the light of any other circumstance shown, indicate that the prosecution anticipated, or should have anticipated, that the results of such tests, if made, would be unfavorable or at all enlightening; accordingly, the failure to have such tests made, does not establish that the prosecution "suppressed" evidence which, if adduced, would have favored petitioner. "There is no compulsion on the prosecution to call any particular witness or to make any particular tests so long as there is fairly presented to the court the material evi-

dence bearing upon the charge for which the defendant is on trial. [Citations.]" (People v. Tuthill (1947), 31 Cal.2d 92, 98, 187 P.2d 16, 19.) The fact that particular expressions of a witness, taken out of context, seem inconsistent with other statements of the witness does not show that he is lying. Yet, search of the entire record discloses, it appears to be upon these considerations that petitioner relies as basis for his grave charges that the People, intent upon procuring his conviction, deliberately used false testimony unfavorable to petitioner and suppressed true evidence favorable to him.

[11] Petitioner complains that before the trial of the will contest he informed a deputy district attorney that the will had been mutilated by "spoilation of the first down-stroke in the letter H in the name of the subscribing testatrix"; that the district attorney refused to investigate this charge; and that the People were guilty of "fraud" in subsequently prosecuting petitioner on the basis of this will. The factual situation as to the asserted mutilation of the will was as follows: After it was filed for probate it was removed from the files by counsel for contestant Morris Horowitz and examined by handwriting experts employed by him. Petitioner suggests that it was on this occasion that the will was mutilated. Also, after the will was filed for probate petitioner himself obtained possession of it. It was the theory of the prosecution that petitioner then mutilated the document. He was tried and acquitted on this charge. People v. Horowitz (1945), supra, 70 Cal.App.2d 675, 684, 161 P.2d 833. It was apparent that the district attorney did investigate the claimed mutilation of the will. The facts that this investigation was not initiated immediately upon petitioner's suggestion, but rather after trial of the will contest at the suggestion of the probate judge, that such investigation led the district attorney to the conclusion that petitioner himself should be charged with mutilation, and that upon the trial he was acquitted of that charge, do not, in view of the other circumstances shown, sustain a charge of "fraud."

Petitioner's Contention That He is Being Punished Four Times for One Act

Petitioner complains of the order, made by the trial court which sentenced him, that the sentences run consecutively. He urges that such order is in violation of the provision of section 654 of the Penal Code that "An Act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one * * *." *

Petitioner was charged with and found guilty of violating the following four sections of the Penal Code:

Penal Code, § 470: "Every person who, with intent to defraud, * * * falsely makes * * * any * * * will, * * * or utters, publishes, passes, or attempts to pass, as true and genuine, * * * [the forged will], knowing the same to be false * * *, with intent to prejudice, damage, or defraud any person * * * is guilty of forgery."

[12] Penal Code, § 115: "Every person who knowingly procures or offers any false or forged instrument to be filed * * * in any public office within this state, which instrument, if genuine, might be filed * * * under any law of this state * * * is guilty of felony." (A will is an instrument within the contemplation of section 115. People v. Davidian (1937), 20 Cal.App.2d 720, 723, 67 P.2d 1085.)

Penal Code, § 132: "Every person who upon any trial * * * offers in evidence, as genuine or true, any * * * paper * * *, knowing the same to have been forged or fraudulently altered or antedated, is guilty of felony."

Penal Code, § 134: "Every person guilty

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* This contention was first made to the trial court at the time it ordered that the sentences run consecutively. It was again made by defendant in his closing brief on appeal to the District Court of Appeal. That court mistakenly stated in its opinion (page 684 of 70 Cal.App.2d, 161 P.2d 833) that the four sentences ran concurrently. The contention was reiterated in the petition for rehearing and in the petition for hearing by this court.

of preparing any false or antedated * * * paper * * * with intent to produce it, or allow it to be produced for any fraudulent or deceitful purpose, as genuine or true, upon any trial * * * is guilty of felony."

Petitioner relies upon cases which hold that one who, with reference to the same instrument, is guilty of more than one of the acts denounced by section 470 (e. g., making and uttering a false instrument), is guilty of but one forgery; "notwithstanding each act may by itself constitute the offense, all of them together do no more, and likewise constitute but one and the same offense." (People v. Frank (1865), 28 Cal. 507, 513; in accord are People v. Shotwell (1865), 27 Cal. 394, 400, 401; People v. Harrold (1890), 84 Cal. 567, 569, 24 P. 106; People v. Ley Shon (1895), 108 Cal. 440, 442, 41 P. 480; People v. Driggs (1909), 12 Cal.App. 240, 242, 108 P. 62, 64.) These cases, however, are clearly distinguishable, for in each of them the above holding, or its substance, was made in answer to the contention that the indictment or information charged more than one offense (i. e., more than one violation of section 470), a mode of pleading formerly not permitted under section 954 of the Penal Code. In none of such cases did the indictment or the information purport to charge, in addition to the offense denounced by section 470 of the Penal Code, another offense disparately defined and denounced by another code section. (See People v. Driggs (1909), supra.) When (after section 954 was amended to permit such pleading) an indictment charged, in separate counts, violations of section 134 and section 470 of the Penal Code, it was held that "Clearly, two separate offenses are set forth, and it is plain that each offense required proof of facts additional to those involved in the other"; the court rejected defendant's contention that there was but one offense and that therefore the order that the two sentences run consecutively was erroneous. (People v. Glab (1936), 13 Cal.App.2d 528, 537, 57 P.2d 588, where defendant falsely made a will and offered it for probate.)

[13, 14] In the present case, as previously indicated, the indictment alleged and the jury found petitioner guilty of four instances of criminal conduct, and the record of the trial (which is filed with us) shows evidence sufficient to support the jury's determination that petitioner committed four separate offenses upon four separate occasions, as follows:

1. Petitioner was charged with and found guilty of a violation of section 470 of the Penal Code, committed as follows: "On or about" December 15, 1942, in Los Angeles, he "did * * * wilfully, unlawfully, fraudulently and feloniously make, forge, alter and counterfeit a certain will [set out in words and figures] and did then and there utter, publish and pass the same, knowing said will to be false, forged and counterfeited," with intent to defraud Morris Horowitz. It appears from the record, and we must assume that the jury believed, that at some time shortly after January 6, 1943, in the course of his efforts to obtain from Mrs. Drucker the personal property which had been his mother's, petitioner exhibited to Mrs. Drucker the paper bearing the forged will and his mother's signature. This display of the instrument for the purpose of obtaining the property constituted "uttering" in violation of section 470 as charged in Count I of the indictment. (See 12 Cal.Jur., Forgery, § 8.) The discrepancy in dates ("on or about" December 15, 1942, according to the indictment; shortly after January 6, 1943, according to the evidence) can furnish no ground for relief on habeas corpus. Petitioner does not claim, nor does the record show, that the conviction of offense 1 was based, not upon the just described instance of criminal conduct, but upon one of the hereinafter described instances of criminal conduct numbered 2, 3 and 4.

2. It was alleged, the evidence sufficiently showed, and the jury found that on January 11, 1943, petitioner violated section 115 of the Penal Code by filing the will for probate.

3. It was alleged, the evidence sufficiently showed, and the jury found that on July 26, 1943, petitioner violated section 132 of the Penal Code by offering the forged will in evidence in the probate proceeding.

4. Petitioner was charged with and found guilty of a violation of section 134 of the Penal Code, committed as follows: "on or about" January 9, 1943, petitioner "did wilfully, unlawfully annd feloniously and knowingly prepare a false and antedated instrument in writing, to wit, a purported will as being the genuine will of Esther Horowitz, bearing a date of the 8th day of December, 1942, with the intent to cheat and defraud * * * Morris Horowitz," and petitioner on January 11, 1943, "cause[d] the said false and antedated instrument to be filed with the County Clerk * * * for the purpose aforesaid of cheating and defrauding * * * Morris Horowitz." The evidence supports the view that petitioner prepared the will "about" January 9 as charged; that its actual preparation may have been done on several different days is immaterial. No claim was made on appeal to the District Court of Appeal, on petition for rehearing in that court or on petition for hearing in this court, nor does petitioner now contend, that the conviction of offense 4 was founded on the filing of the will for probate, the act constituting offense 2. As to offense 4 the jury were instructed that "Every person who prepares any false * * * instrument in writing * * * with intent to produce it or allow it to be produced for any fraudulent or deceitful purpose, as genuine or true, upon any trial * * * is guilty of a felony. * * * Violation of Section 134 of the Penal Code * * * requires, amongst other things, the specific intent to produce the false instrument therein referred to or allow it to be produced for any fraudulent or deceitful purpose upon any trial or proceeding. * * * Therefore, before you may find the defendant guilty of the offense therein alleged, if you find that it was committed, you must further find from the evidence and beyond a reasonable doubt that at the time of the commission of said offense the defendant * * * had the specific intent to produce the alleged false document or allow it to be produced for a fraudulent and deceitful purpose upon a proceeding. * * *" Following these instructions the jury, to convict of offense 4, must have agreed that petitioner prepared the will with intent to produce it in the probate proceeding; they cannot be held to have been misled into believing that he could be convicted of offense 4 if they agreed merely that he filed the will for probate, the act underlying conviction of offense 2.

[15] It is thus apparent that on the showing made, and under established law, we must accept the contention of the respondent that petitioner is being punished for four separate acts and that the consecutive running of the sentences does not constitute punishment of one act more than once. Accordingly, since the question is not presented on the record before us, it is unnecessary to decide whether habeas corpus is available to relieve one whose sentences are ordered to run consecutively in violation of section 654 of the Penal Code.

Attack Upon Determination of Prior Conviction of Felony

[16] Petitioner complains of the determination, made at the time of his conviction in California, that in 1926 in Illinois he was convicted of four robberies, felonies, the sentences to run concurrently, and that he served a term of imprisonment therefor in the state prison. This contention is relevant because "for a person previously convicted of a felony either in this State or elsewhere" the minimum term of imprisonment is five years (Pen.Code, § 3024, par. (c)), whereas in the absence of a determination of previous conviction of felony petitioner's minimum term of imprisonment would be two and one half years (Pen.Code, § 18a [six months minimum, applicable to each of the three consecutive sentences for violations of sections 134, 115 and 132]; Pen.Code, § 473 [one year minimum, applicable to the sentence for forgery].) Petitioner avers that he was not a felon but a juvenile delinquent because he was only 15 years of age at the time of such prior conviction. However, he was sentenced to and confined in the state prison at Joliet, Illinois. The courts of this state cannot consider his argument that he should not have been sentenced to state prison for the 1926 offenses. (See In re Wolfson (1947), 30 Cal.2d 20, 31, 180 P.2d 326, 333 ["absurd consequences

would result if the courts of this state could take evidence to prove, and upon that evidence adjudicate for themselves, that a defendant was not guilty of a crime with which he had been charged, for which he had been tried or to which he had pleaded guilty, and of which he had been convicted in another state"].)

Other Contentions

[17] Petitioner has requested that impartial experts be appointed by this court to examine the will. Such examination, he says will reveal its genuineness. But that question was resolved against petitioner on the trial of the criminal charges and cannot be reopened in this proceeding.

[18–20] Petitioner undoubtedly has established that at the trial there were disputed issues of fact and grave conflicts in the evidence. But the existence of such issues and conflicts at the trial, or the discovery of new evidence pertinent to them, presents no ground for intervention by us on habeas corpus. Even if petitioner's cause were presently before us on appeal from the judgments of conviction, the trial court's factual determinations, on such a record, would be conclusive. Under our system of law the weight of the evidence is primarily for the jury; it then may be reviewed by the trial judge and a new trial granted if in his discretion it appears that the weight of the evidence, despite substantial conflict, does not sustain the jury's finding. But on appeal, if there be substantial conflict, the determinations of jury and trial judge must be accepted as final (People v. Tom Woo (1919), 181 Cal. 315, 326, 184 P. 389; People v. Green (1939), 13 Cal.2d 37, 42, 87 P.2d 821) and on habeas corpus, wherein the attack is collateral, the sphere of inquiry and bases of action are still more limited (In re Byrnes (1945), 26 Cal.2d 824, 827, 161 P.2d 376; In re McVickers (1946), 29 Cal.2d 264, 273, 176 P.2d 40). If at the end of court procedures there is claimed to persist a miscarriage of justice, despite all the precautions of the law to the contrary, the ultimate remedy rests in an appeal to the Governor for a pardon. (Cal.Const., art. VII, § 1; In re Lindley (1947), 29 Cal.2d 709, 728, 177 P.2d 918.)

Other contentions of petitioner need not be set out at length. They concern matters which should not be raised on habeas corpus and many of them were presented to, and correctly disposed of by, the District Court of Appeal upon the appeal from the judgments of conviction.

[21, 22] Furthermore, certain grounds of the petition were presented by the previous application to this court for habeas corpus, and it appears that all grounds now urged were then known to petitioner. It is the policy of this court to deny an application for habeas corpus which is based upon grounds urged in a prior petition which has been denied, where there is shown no change in the facts or the law substantially affecting the rights of the petitioner. (In re Niller (1941), 17 Cal.2d 734, 735, 112 P.2d 10; In re De La Roi (1946), 28 Cal.2d 264, 275, 169 P.2d 363.) And as to the presentation of new grounds based on matters known to the petitioner at the time of previous attacks upon the judgment, in Re Drew (1922), 188 Cal. 717, 722, 207 P. 249, 251, it was pointed out that the applicant for habeas corpus "not only had his day in court to attack the validity of this judgment, but * * * had several such days, on each of which he could have urged this objection, but did not do so"; it was held that "The petitioner cannot be allowed to present his reasons against the validity of the judgment against him piecemeal by successive proceedings for the same general purpose."

For the reasons above stated the appeal in L.A. 20199 (coram nobis) is dismissed; the "Motion for Appointment of Experts by Court" is denied; the writ heretofore issued in Crim. 4854 (habeas corpus) is discharged; and petitioner is remanded to custody.

GIBSON, C. J., and SHENK, TRAYNOR, and SPENCE, JJ., concur.

CARTER, Justice.

I concur in the conclusions reached in the majority opinion and generally in the reasons stated therein for such conclusions, but I do not desire to be understood as giving approval to the rules announced in the majority opinions of this Court in People v. Slobodion, 30 Cal.2d 362, 181 P.2d 868, and In re Estate of Hanley, 23 Cal.2d 120, 142 P.2d 423, 149 A.L.R. 1250, as I do not consider the rules announced in these opinions to be good law and I am hopeful that the time will come when the majority of this court will so declare.

EDMONDS, Justice (concurring in part and dissenting in part).

The order dismissing the appeal from the order denying Horowitz relief by way of a writ of error coram nobis necessarily is based upon the conclusion recently stated by a majority of the court that such an application "must be regarded as a part of the proceedings in the criminal case * * *." In re Paiva, 31 Cal.2d 503, 510, 190 P.2d 604, 609. This was a startling and wholly illogical departure from the rule long followed in California and expressly recognized by Mr. Justice Schauer in the same opinion: "That the writ, or the proceeding for it, has been traditionally regarded as civil in nature cannot be disputed." Yet, notwithstanding the traditional classification of the remedy, it was decided that "an order made in a proceeding in the nature of a writ coram nobis is an order in the original case * * *" although none of the cases cited immediately following such characterization of it so hold. On the contrary, in previous consideration of the remedy of coram nobis, it was said: "This is a distinct proceeding and has no connection with any ruling made by the court during trial or any order since made by the court. * * * The record in this case * * * was not vulnerable to the collateral attack made upon it." People v. Superior Court, 4 Cal.2d 136, 151, 47 P.2d 724, 731.

For the reasons, which I stated more fully in the Paiva case, 31 Cal.2d at page 511, 190 P.2d 604, in my opinion the notice given by Horowitz of an appeal from the order denying relief to him was timely filed and the record should be reviewed upon the merits. As to the issues presented in the habeas corpus proceeding and the motion in connection therewith, I concur in the judgment.

33 Cal.2d 514

GORDON v. AZTEC BREWING CO.

L. A. 20783.

Supreme Court of California.

Feb. 28, 1949.

Rehearing Denied March 28, 1949.

1. Negligence ⇨121(2)

Where a bottle containing a liquid under pressure explodes, causing injury, plaintiff in personal injury action is entitled to benefit of doctrine of res ipsa loquitur to supply an inference that bottler was negligent, either in excessively charging the liquid or in failing to discover a flaw in the bottle, if it is probable under the evidence that bottler was negligent in either respect.

2. Negligence ⇨138(3)

In action against brewing company by operator of cafe to recover damages for loss of sight of eye when bottle of beer exploded while operator was transferring bottle from its case to icebox, evidence established probable negligence of company in failing to make any of the standard tests for detection of flaws in bottles, warranting an instruction on doctrine of res ipsa loquitur.

3. Negligence ⇨121(2)

Doctrine of "res ipsa loquitur" may be applied only where instrumentality causing injury was subject to control of the defendant at time of alleged negligent act, but it is not necessary that the instrumentality was in possession of defendant at time of accident, if it is proved that condition of instrumentality had not been changed after it left defendant's possession.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Res Ipsa Loquitur".

4. Negligence ⇨121(2)

The plaintiff, in action for injuries resulting from explosion of a bottle of liquid, may rely on doctrine of res ipsa loquitur, if there is evidence permitting a reasonable inference that bottle was not accessible to extraneous harmful forces and that it was carefully handled by plaintiff or any third person who may have moved or touched it.

5. Negligence 🔑136(6)

In action against brewing company by operator of cafe to recover damages for loss of sight of eye when bottle of beer exploded while operator was transferring bottle from its case to icebox, whether operator sufficiently proved absence of intervening harmful forces after company shipped the bottle, so as to entitle operator to rely on an inference inherent in res ipsa loquitur doctrine that company's lack of care was the proximate cause of injury, was for jury.

6. Negligence 🔑138(2)
Trial 🔑296(3)

In action against brewing company by operator of cafe to recover for loss of sight of eye when bottle of beer exploded while operator was transferring bottle from its case to icebox, instruction on res ipsa loquitur doctrine which omitted reference to fact that, before jury might accord benefit of res ipsa loquitur inference, jury must believe that bottle did not suffer damage at hands of persons other than company, was erroneous, but was not prejudicially erroneous in view of other instructions given on res ipsa loquitur and negligence, where there was strong showing of negligence of company and evidence to refute possibility of intervening damage to bottle.

7. Trial 🔑295(1)

In determining propriety of an instruction, reviewing court should examine charge as a whole.

8. Trial 🔑295(1)

If, when considered together, instructions are found generally to state the applicable law, reversible error is not necessarily present even though an isolated instruction is defective in not containing all of the essential elements.

9. Corporations 🔑1

Where the recognition of fiction of separate corporate existence would foster either an injustice or further a fraud, courts will refuse to recognize it.

10. Corporations 🔑1

Where all corporate assets were transferred to partnership to reduce income tax liability, but firm name remained the same, members of partnership were identical with stockholders of corporation, and partnership carried on beer manufacturing business of corporation without interruption and used same plant, corporation was the alter ego of partnership as regards liability for purchaser's injuries sustained when beer bottle sold by partnership exploded.

11. Pleading 🔑403(2)

Defects in a complaint may be cured by allegations of the answer.

12. Pleading 🔑403(2)

Where it developed during trial that bottle of beer which exploded was sold by partnership to which corporation's assets had been transferred, issue of whether there existed an alter ego relationship between corporation and partnership so as to render corporation liable was sufficiently raised by allegation in corporation's answer denying that it was engaged in business of bottling, selling, and distributing beer at time in question. Code Civ.Proc. § 469.

EDMONDS, J., dissenting.

TRAYNOR, J., dissenting in part.

◆

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Action by Jack Gordon against the Aztec Brewing Company, a corporation, to recover for loss of sight of eye when a bottle of beer allegedly sold by defendant exploded. From a judgment in favor of the plaintiff, the defendant appeals.

Judgment affirmed.

Prior opinion 196 P.2d 38.

Eugene S. Ives, Schell & Delamer, and Gerald F. H. Delamer, all of Los Angeles, for appellant.

Mitchell & Gold and Samuel A. Rosenthal, all of Los Angeles, and Leonard G. Ratner, of Beverly Hills, for respondent.

SHENK, Justice.

This is an action arising out of injuries suffered when a bottle of beer exploded.

The plaintiff operated a cafe in the city of Los Angeles. He was transferring a bottle of ABC beer, a product of the defendant, from its case to an ice box in his cafe when the bottle exploded in his hand, resulting in blindness in his right eye. The defendant was the bottler. From a judgment on a verdict in favor of the plaintiff the defendant appeals.

The first question to be determined is whether on the facts presented the plaintiff was entitled to an instruction on the doctrine of res ipsa loquitur; and if so whether the particular instruction given by the trial court was prejudicially erroneous.

[1] In Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 150 P.2d 436, 438, it was pointed out that a sound bottle of carbonated liquid does not ordinarily explode if it is carefully handled. Where a bottle containing liquid under pressure does explode causing injury the plaintiff is entitled to the benefit of the doctrine of res ipsa loquitur to supply an inference that the bottler was negligent, either in excessively charging the liquid or in failing to discover a flaw in the bottle, if it is probable under the evidence that the defendant was negligent in either respect.

[2] Here there was evidence tending to show the defendant negligent in failing to make any of the standard tests for the detection of flaws in the bottles it distributed. New and used bottles were subjected only to a pasteurization process designed primarily to arrest fermentation, not to reveal weaknesses. An expert having long experience in the manufacture of glass and glass bottles testified that the pasteurization process was not a satisfactory test for strains, thin walls or small stones in the glass. He stated that manufacturers ordinarily subject bottles to three tests, the polariscope test, the hammer test, and the hot and cold plunge test. These tests if properly made were said to disclose all defects. None was utilized by the defendant. There was no showing that their use would have been impracticable or the cost prohibitive. The defendant's duty to make such tests is emphasized by the fact that bottles of its beer were known to explode during pasteurization and afterward during transportation. A sufficiently satisfactory showing of probable negligence on the part of the defendant was therefore made to warrant an instruction on res ipsa loquitur.

[3, 4] The doctrine may be applied, however, only where the instrumentality causing the injury was subject to the control of the defendant. In the Escola case this court rejected the contention that the instrumentality must have been in the possession of the defendant at the time of the accident. It was there stated: "Many authorities state that the happening of the accident does not speak for itself where it took place some time after defendant had relinquished control of the instrumentality causing the injury. Under the more logical view, however, the doctrine may be applied upon the theory that defendant had control at the time of the alleged negligent act, although not at the time of the accident, provided plaintiff first proves that the condition of the instrumentality had not been changed after it left the defendant's possession." While the Escola case differs from the present case in that there the defendant bottler had itself delivered the faulty bottle to the plaintiff's employer the principles laid down govern the case here. It was then declared that a plaintiff may rely on the doctrine of res ipsa loquitur "if there is evidence permitting a reasonable inference that it [the exploded bottle] was not accessible to extraneous harmful forces and that it was carefully handled by plaintiff or any third person who may have moved or touched it." Escola v. Coca Cola Bottling Co., supra, 24 Cal.2d 453, 458, 150 P.2d 436, 439.

[5] Tracing the case containing the bottle which exploded from the defendant's plant to his hand the plaintiff introduced evidence to the effect that it suffered no damage at any stage of its transportation. The course of cases of ABC beer in August of 1944 when the accident occurred was as follows: The cases were loaded on trucks of the La Salle Trucking Company at the defendant's San Diego Plant; La Salle drivers delivered them to a warehouse of the Associated Brewers Distributing Company in Los Angeles where they remained about three days; on August 22 the case

which contained the bottle that exploded was delivered by an Associated driver to the plaintiff. Evidence was presented which showed that La Salle trucks were not involved in accidents during August, 1944; that no accidents occurred in the Associated warehouse that month which might have affected the beer; that the driver who delivered the case to the plaintiff was not involved in an accident en route and did not bump the case; that it was in excellent condition on delivery, and that the plaintiff handled the case and bottle carefully. While this evidence was not conclusive it was the jury's province to determine, after being properly instructed, whether the plaintiff had sufficiently proved the absence of intervening harmful forces after the defendant shipped the bottle to entitle the plaintiff to rely on an inference inherent in the doctrine that the defendant's lack of care was the proximate cause of his injury.

[6] But it is contended by the defendant that even if it be assumed that the doctrine of res ipsa loquitur was correctly invoked the court committed prejudicial error in an instruction on the subject. The following instruction is claimed to be erroneous and to require a reversal: "From the happening of the accident involved in this case, as established by the evidence, there arises an inference that the proximate cause of the occurrence was some negligent conduct on the part of the defendant. That inference is a form of evidence, and if there is none other tending to overthrow it, or if the inference preponderates over contrary evidence, it warrants a verdict for the plaintiff. Therefore you should weigh any evidence tending to overcome that inference, bearing in mind that it is incumbent upon the defendant to rebut the inference by showing that it did, in fact, exercise ordinary care and diligence or that the accident occurred without being proximately caused by any failure of duty on its part." Standing alone this instruction was erroneous for it omitted reference to the fact that before the jury may accord the plaintiff the benefit of the res ipsa loquitur inference it must believe that the bottle did not suffer damage at the hands of persons other than the defendant.

[7, 8] In determining the propriety of an instruction the reviewing court should examine the charge as a whole. Wells v. Lloyd, 21 Cal.2d 452, 458, 132 P.2d 471; Douglas v. Southern Pacific Co., 203 Cal. 390, 396, 264 P. 237. If when considered together the instructions are found generally to state the applicable law, reversible error is not necessarily present even though an isolated instruction is defective in not containing all of the essential elements. Westover v. City of Los Angeles, 20 Cal.2d 635, 637, 128 P.2d 350; Callet v. Alioto, 210 Cal. 65, 70, 290 P. 438.

After the above instruction was given, the court went on to charge: "The instruction just given may appear to constitute an exception to the general rule that the mere happening of an accident does not support an inference of negligence. The instruction, however, is based on a special doctrine of the law which may be applied only under special circumstances, they being as follows: First: the fact that some instrumentality, by which the injury to the plaintiff was proximately caused, was in the possession and under the exclusive control of the defendant at the time the cause of the injury was set in motion. * * * A defendant is deemed to have control at the time of the alleged negligent act although not at the time of the accident, provided plaintiff first proves that the condition of the instrumentality had not been changed after it left the defendant's possession. The defendant is not charged with the duty of showing that something happened to the bottle after it left its control and management. In order to be entitled to the benefit of the doctrine of res ipsa loquitur, the plaintiff must show that every person who moved or touched the bottle after it left the control of the defendant, did so with due care, and that during said time the bottle was not accessible to extraneous harmful forces."

Thus the broad instruction on res ipsa loquitur was followed by qualifying instructions explaining the circumstances which must be present before the inference of negligence can arise, including a charge that the plaintiff must prove that all who dealt with the bottle beside the defendant did so with due care. It is therefore apparent that taken together the entire charge on the subject fairly presented to the jury the element of careful handling and that the erroneous omission of that element from the general instruction was not prejudicial. See Westover v. City of Los Angeles, supra, 20 Cal.2d 635, 637-639, 128 P.2d 350; Juchert v. California Water Service Co., 16 Cal.2d 500, 513-515, 106 P.2d 886; Barham v. Widing, 210 Cal. 206, 216-218, 291 P. 173; McChristian v. Popkin, 75 Cal.App.2d 249, 257-258, 171 P.2d 85; Barsha v. Metro-Goldwyn-Mayer, 32 Cal.App.2d 556, 565, 90 P.2d 371.

For still another reason the defendant's attempt to show reversible error must fail. Apart from instructions on res ipsa loquitur, instructions on general rules governing liability for negligence were given. The jury was instructed that the burden was upon the plaintiff to prove by a preponderance of evidence that the defendant was negligent and that his negligence was a proximate cause of the injury. There was present in this case a strong showing of negligence in the defendant's failure to test the bottles before distributing them to the public where they might cause harm if defective. There was also evidence to refute the possibility of intervening damage to the bottle. Under these circumstances the instruction on res ipsa loquitur, even if erroneous, did not result in a miscarriage of justice, for it is highly improbable that the jury found in the plaintiff's favor without concluding that the defendant was negligent and that the bottle was carefully handled after the defendant parted with it. Gerdes v. Pacific Gas & Electric Co., 219 Cal. 459, 471, 27 P.2d 365, 90 A.L.R. 1071; Junge v. Midland Counties, etc., Corporation, 38 Cal.App.2d 154, 160, 100 P.2d 1073; Gonzales v. Nichols, 110 Cal.App. 738, 741, 742, 294 P. 758.

This action was prosecuted against the defendant corporation only and it is contended that any cause of action for injuries resulting from defects in ABC beer bottles, which arose on the date of plaintiff's injury should have been brought against the Aztec Brewing Company, a partnership, and not the Aztec Brewing Company, a corporation. It appears that the plaintiff did not learn the details of the defendant's structure and its relationship to the partnership until the action against the defendant corporation had proceeded to trial. When these facts were disclosed the plaintiff decided to proceed against the defendant corporation instead of the partnership on the theory that one was the alter ego of the other.

There is no conflict in the evidence on this question. The Aztec Brewing Company, a corporation, was organized in 1932 and thereafter engaged in the manufacture and sale of ABC beer. In March, 1944, the company's structure was changed to a partnership for tax reasons. All of the corporation's property was transferred to the partnership and the business continued as before, the partnership assuming without interruption the manufacturing, bottling and selling of ABC beer. The partners were the same persons as the stockholders in the corporation. They acquired and retained the same proportional interest in the partnership as they had had in the corporate stock. The president and vice president of the corporation became general partners in the new partnership while the other former stockholders became limited partners. The name, Aztec Brewing Company, was retained and a license procured to sell beer under that name. The partnership continued to employ the same personnel and use the same manufacturing plant and offices. No changes were made in labels, packing cases, letterheads or invoices. The corporation was not dissolved, however, but remained in existence to collect debts owed it, continuing for a short time to use the offices of its successor. Checks of the corporation and partnership were differentiated by the addition of the words "corporation" or "a partnership" after the name, Aztec Brewing Company.

On the basis of these facts the trial court instructed the jury: "It has been established in this case that Aztec Brewing Company, a corporation, is the 'alter ego or other self' of the Aztec Brewing Company, a copartnership. Therefore, if one is liable, both are liable." A verdict in the plaintiff's favor was returned against the corporation and partnership and a judgment entered against both.

The defendant contends that the relationship of alter ego was not established as a matter of law and that the instruction to that effect was improper. A similar case was decided by the Supreme Court of the State of Washington in Associated Oil Company v. Seiberling Rubber Company, 172 Wash. 204, 19 P.2d 940. Suit was brought against The Seiberling Rubber Company, an Ohio corporation, to recover on a guaranty alleged to have been executed by the defendant. In the written guaranty, the guarantor was described as Seiberling Rubber Company, a Delaware corporation, and the guaranty was signed "Seiberling Rubber Company." After the answer was filed the plaintiff discovered for the first time that there were two corporations closely allied, the defendant Ohio corporation, and a Delaware corporation having the same name. It was found that the Delaware corporation owned all the stock of the Ohio corporation, that their officers were identical, and that the business affairs of the two corporations were conducted from the same offices. Because of the similarity in names and commingling of business the Washington Supreme Court held that the plaintiff was entitled to treat the two corporations as a single entity, and thus recover from the defendant, although it had not signed the note, since the confusion of the two identities resulted in probable fraud upon third persons dealing with the corporations, whether or not actual fraud was intended. Related also to this case is our decision in Mirabito v. San Francisco Dairy Company, 1 Cal.2d 400, 35 P.2d 513, in which a truck bearing the name of the defendant San Francisco Dairy Company struck the plaintiff. It was urged that the evidence was insufficient to sustain a verdict against the defendant since it was merely a nonoperating subsidiary of the Dairy Delivery Company which carried on the business. The officers of both companies were the same. This court held that the only logical conclusion was that the San Francisco Dairy Company was the alter ego of the Dairy Delivery Company and that the evidence was sufficient to sustain the verdict against the San Francisco Dairy Company. Subsequently an order adding to the judgment the name of the Dairy Delivery Company as the real defendant was sustained. Mirabito v. San Francisco Dairy Company, 8 Cal.App.2d 54, 47 P.2d 530. That these decisions involve two corporations and not a corporation and partnership as in the case before us does not lessen their significance for the same principles apply.

[9, 10] The cases mentioned illustrate in a factual context similar to that before us the rule that where the recognition of the fiction of separate corporate existence would foster an injustice or further a fraud the courts will refuse to recognize it. Stark v. Coker, 20 Cal.2d 839, 846, 129 P.2d 390; Puccetti v. Girola, 20 Cal.2d 574, 578, 128 P.2d 13; Shea v. Leonis, 14 Cal.2d 666, 669, 96 P.2d 332. It is not necessary that the plaintiff prove actual fraud. It is enough if the recognition of the two entities as separate would result in an injustice. Wenban Estate, Inc., v. Hewlett, 193 Cal. 675, 698, 227 P. 723; Minifie v. Rowley, 187 Cal. 481, 488, 202 P. 673. Here confusion would be promoted and an unjust result be accomplished if the maintenance of the two entities controlled by the same persons and having an identical name were permitted to frustrate a meritorious claim. Since the evidence on this question was not contradicted there was no issue of fact requiring submission to the jury and the trial court's determination that as a matter of law the corporate defendant was the alter ego of the partnership must be sustained.

[11, 12] It is contended by the defendant that the issue of whether there existed an alter ego relationship was not pleaded and was therefore not before the trial court. Defects in the complaint may be cured by allegations of the answer. Vaughn v. Jonas, 31 Cal.2d 586, 603–604, 191 P.2d 432; Hartman Ranch Co. v. Associated Oil Co., 10 Cal.2d 232, 248–249, 73 P.2d 1163; Marr v. Postal Union Life

Ins. Co., 40 Cal.App.2d 673, 680–681, 105 P.2d 649. In its answer the defendant denied that it was engaged in the business of bottling, selling and distributing ABC beer at any time mentioned in the complaint. The question of which entity manufactured the beer and was responsible for the safety of its containers, was thereby sufficiently raised. Furthermore, even if the pleadings were to be considered deficient in this respect, it is clear that the defendant has not been misled to its prejudice by any variance between pleadings and proof. Code Civ.Proc. sec. 469. From the beginning of the proceedings it was prepared to maintain, and did maintain throughout the trial, that the liabilities of the partnership could not be fastened upon the corporation.

The judgment is affirmed.

GIBSON, C. J., and CARTER, SCHAUER, and SPENCE, JJ., concur.

TRAYNOR, Justice (dissenting and concurring).

I concur in the judgment.

It is my opinion that the evidence in this case does not warrant the application of the doctrine of res ipsa loquitur and that if defendant's liability is predicated on negligence the instructions on res ipsa loquitur[1] are prejudicially erroneous even though there is evidence that would support the verdict independently of that doctrine.

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[1] The jury was instructed as follows:

"From the happening of the accident involved in this case, as established by the evidence, there arises an inference that the proximate cause of the occurrence was some negligent conduct on the part of defendant. That inference is a form of evidence, and if there is none other tending to overthrow it, or if the inference preponderates over contrary evidence, it warrants a verdict for the plaintiff. Therefore, you should weigh any evidence tending to overcome that inference, bearing in mind that it is incumbent upon the defendant to rebut the inference by showing that it did, in fact, exercise ordinary care and diligence or that the accident occurred without being proximately caused by any failure of duty on its part.

"In making such a showing, it is not necessary for a defendant to overcome the inference by a preponderance of the evidence. Plaintiff's burden of proving negligence by a preponderance of the evidence is not changed by the rule just mentioned. It follows, therefore, that in order to hold the defendant liable, the inference of negligence must have greater weight, more convincing force in the mind of the jury, than the opposing explanation offered by the defendant.

"If such a preponderance in plaintiff's favor exists, then it must be found that some negligent conduct on the part of defendant was a proximate cause of the injury; but if it does not exist, if the evidence preponderates in defendant's favor, or if in the jury's mind there is an even balance as between the weight of the inference and the weight of the contrary explanation, neither having the more convincing force, then the verdict must be for the defendant.

"The instruction just given may appear to constitute an exception to the general rule that the mere happening of an accident does not support an inference of negligence. The instruction, however, is based on a special doctrine of the law which may be applied only under special circumstances, they being as follows:

"First: The fact that some certain instrumentality, by which injury to the plaintiff was proximately caused, was in the possession and under the exclusive control of the defendant at the time the cause of injury was set in motion, it appearing on the face of the event that the injury was caused by some act or omission incident to defendant's management.

"Second: The fact that the accident was one of such nature as does not happen in the ordinary course of things, if those who have control of the instrumentality use ordinary care. . . .

"A defendant is deemed to have had control of an instrumentality where it had control at the time of the alleged negligent act although not at the time of the accident, provided plaintiff first proves that the condition of the instrumentality had not been changed after it left defendant's possession.

"The defendant is not charged with the duty of showing that something happened to the bottle after it left its control and management. In order to be entitled to the benefit of the doctrine of res ipsa loquitur, the plaintiff must show that every person who moved or touched the bottle after it left the control of defendant, did so with due care, and that during said time the bottle was not accessible to extraneous harmful forces."

The majority opinion justifies these instructions on the grounds that there was evidence of negligence on the part of defendant and enough evidence to warrant an inference that there was no change in the condition of the bottle after defendant relinquished control of it. In my opinion the instructions cannot be justified on either ground.

In support of the first ground the majority opinion adduces the evidence that defendant did not apply the standard tests used by bottle manufacturers to ascertain if bottles are free of defects, together with the evidence that bottles frequently broke at the brewery and during their transportation thereafter. The majority opinion thus invokes evidence of defendant's conduct and the quality of his bottles to justify an instruction that negligence may be inferred, not from such evidence, but from the occurrence of the accident itself. The application of the doctrine of res ipsa loquitur depends, however, on the nature of the accident and on whether defendant had exclusive control of the bottle at the time the cause of injury was set in motion. Evidence regarding defendant's bottling procedure is immaterial since the inferences are to be drawn solely from the occurrence of the accident and defendant's control; if the doctrine of res ipsa loquitur is not already applicable such evidence does not render it so.

In support of the contention that the bottle was carefully handled and was not accessible to any extraneous harmful forces after leaving the brewery, plaintiff introduced evidence that the truck that carried the beer to Los Angeles had not been in any accident, that the manager of the company that distributed the beer did not know of any accident in the distributing company's warehouse, that the truck that delivered the beer to plaintiff had not been in any accident, that the man who delivered the beer to plaintiff handled the bottles carefully and observed that the cases appeared to be in excellent condition, and that the beer was handled carefully by plaintiff. The manager of the distributing company, called as a witness for plaintiff, testified as follows:

"Q. During the time * * * [that the bottle was in the warehouse] were you aware of any accident occurring at your warehouse that affected these bottles of beer in any way? A. None whatsoever.

"Q. If there is any accident in your warehouse or in your plant which would cause breakage of bottles does that fact—do the men in your employ, do they bring this information to you? A. Well, they don't, not necessarily, because in handling bottled goods, merchandise like beer, if it is not handled properly it would cause breakage; in other words, if our men taking the beer off the stacks, off the conveyors, and putting it in stacks, when they have to go up seven high or six high, in just loading it on there, they used too much force, the force inside would cause two bottles to bump against each other and the chances are a bottle would break.

"Q. All right, now then, when there is such breakage occurring do your men make reports of this breakage to you? A. No, not necessarily.

"Q. What happens when this breakage occurs; do you just simply stack that case aside? A. No, we put that case aside.

"Q. And do you salvage it? A. We salvage the goods or put in another bottle. If it is just one bottle we just take out the glass and put another full bottle in.

"Q. During * * * [the time that the bottle was in the warehouse] did you personally have any knowledge as to whether some of the cases had any broken bottles of beer in them, that is, the ABC cases? A. There isn't any time that there isn't a bottle or two broken to the case. There is always something broken on account of handling of it.

"Q. You mean handling it at your warehouse? A. Our warehouse, or handling it at the loading of the truck at the brewery, or it can happen anywhere."

The foregoing evidence regarding the handling of the bottle after it left defendant's brewery fails to prove that the bottle was not subject to extraneous harmful forces; in fact it proves just the contrary

There is no indication that the handling that broke many bottles ["There isn't any time that there isn't a bottle or two broken to the case. There is always something broken on account of handling of it."] did not also weaken others enough to make them dangerous.

The doctrine of res ipsa loquitur is based on probabilities. The nature of the injury together with defendant's control must be such that reasonable men can conclude it is more probable than not that the cause of the injury was negligent conduct on the part of defendant. La Porte v. Houston, 33 Cal.2d 167, 199 P.2d 665; Honea v. City Dairy, Inc., 22 Cal.2d 614, 616-617, 140 P.2d 369; Hinds v. Wheadon, 19 Cal.2d 458, 461, 121 P.2d 724; see, Prosser, Torts, p. 297. Reasoning solely from the occurrence of the accident and the evidence of what happened to the bottle after it left defendant's control, one cannot conclude it is more probable than not that the bottle broke because of defendant's negligence, for it is at least as probable that the bottle broke because of handling by the distributor as that it broke because of some defect existent when defendant relinquished control.[2]

The evidence that defendant did not test its bottles and that many broke or exploded at the brewery and during their transporta-

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[2] The error of giving instructions on res ipsa loquitur was aggravated by the language of the instructions as is noted by the opinion of Presiding Justice Shinn for the District Court of Appeal, Second District, Division 3, 196 P.2d 38, 44, which reversed the judgment in this case: "By this instruction the court withdrew from the jury two essential questions of fact, namely, whether plaintiff had established by his evidence that the bottle was probably not rendered unsafe while it was in the hands of other persons after it left possession of the defendant, and whether the defective or dangerous condition of the bottle would probably have been discovered by defendant in the exercise of ordinary care. * * *

"The first sentence of the questioned instruction [quoted in note 1, supra] can be interpreted only as a direction to the jury that, as a matter of law, under the facts as established by the evidence, the res ipsa loquitur inference of negligence was applicable to the defendant; and the succeeding two sentences limited the duty of the jury to weighing this inference against any contrary evidence. This instruction would have been proper only if the mere bursting of the bottle raised an inference that someone had been negligent, and also if it had been proved by clear and uncontradicted evidence that the bottle had been carefully handled by all persons who had possession of it, and that it was not exposed to injury, after it left the hands of the bottler. The bursting of the bottle did not raise an inference of negligence. However, in view of the uncontradicted testimony that the beer bottle was carefully handled by plaintiff, the explosion in itself justified an inference that, when delivered to plaintiff, the bottle was either defective or under excessive internal pressure, for, as said in the Escola case, 'sound and properly prepared bottles of carbonated liquids do not ordinarily explode when carefully handled.' 24 Cal.2d 453, 459, 150 P.2d 436, 439. As we have seen, the expert testimony was to be weighed with the evidence of the methods employed by defendant in determining whether the inference arose that defendant had been negligent. The instruction took this issue from the jury and was prejudicially erroneous.

"Moreover, whether this dangerous condition of the bottle developed while it was in possession of the defendant, rather than one of the intermediate parties who handled it, presented a question of fact as to the manner in which it was handled by these latter persons. We cannot say that the jury could not have reasonably found that the evidence was insufficient to prove that the bottle was carefully handled, and was not subjected to extraneous harmful forces after it left defendant's control. By taking this additional issue of fact from the jury, the foregoing instruction was again prejudicial to defendant.

"Plaintiff, however, refers to the established rule that in determining the propriety of instructions, they must be considered as a whole (Crooks v. White, 107 Cal.App. 304, 312, 290 P. 497), and maintains that this additional error in the quoted instruction was cured by other instructions which followed it. The record shows that the court stated to the jury that the inference of negligence referred to in the quoted instruction was applicable only under certain special circumstances, one of which was that the instrumentality causing the injury 'was in the possession and under the exclusive control of the defendant at the time the cause of the injury was set in motion.' The court then gave the following instructions: 'A defendant is deemed to have tion thereafter is sufficient to warrant a finding that defendant was negligently releasing dangerous and defective bottles on the market. The jury could reasonably conclude, therefore, that plaintiff's injury was caused by defendant's negligence in releasing such bottles. Nevertheless, the fact that there is some support for the verdict in the evidence independent of the doctrine of res ipsa loquitur does not render the erroneous instructions harmless. The effect of adding these instructions to those on the general rules governing liability for negligence is to offer the jury two alternative routes to a verdict for plaintiff. Under general instructions on negligence the jury must decide whether plaintiff has discharged his burden of proving that defendant was negligent and if so, whether that negligence was the cause of the injury. Under the res ipsa loquitur instructions the jury could conclude that this burden was discharged by an inference arising from the occurrence of the accident, even if they found that plaintiff's evidence of defendant's bottling procedure fell short of discharging plaintiff's burden of proving negligence. They were also presented with a very close question as to whether the bottle was defective when defendant relinquished control or developed a defect thereafter. Had it not been for the res ipsa loquitur instructions it is not improbable that they would have concluded that plaintiff had not discharged his burden of proving that defendant's negligence was the cause of the injury.

Whether the giving of instructions on res ipsa loquitur when that doctrine is not applicable is prejudicial, if the evidence is sufficient to support the verdict independently of the doctrine, depends on the particular facts of the case. In Gerdes v. Pacific Gas & Electric Co., 219 Cal. 459, 27 P.2d 365, 90 A.L.R. 1071, the only issue was whether defendant was negligent in not repairing a broken gas line or shutting off the gas with sufficient promptness after being informed of a cave-in affecting its pipes. The court held that the giving of a res ipsa loquitur instruction was not prejudicial because it could not "be presumed that the jury may have believed that said company was free from negligence in this particular, but nevertheless returned a verdict against it, although the evidence as a matter of law clearly showed the company to be free from negligence in all other respects." 219 Cal. at page 471, 27 P.2d at page 370. The evidence was clear as to when defendant was notified of the cave-in, and there was no dispute that the injury

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control of an instrumentality where it had control at the time of the alleged negligent act although not at the time of the accident, provided plaintiff first proves that the condition of the instrumentality had not been changed after it left the defendant's possession. The defendant is not charged with the duty of showing that something happened to the bottle after it left its control and management. In order to be entitled to the benefit of the doctrine of res ipsa loquitur, the plaintiff must show that every person who moved or touched the bottle after it left the control of the defendant, did so with due care, and that during said time the bottle was not accessible to extraneous harmful forces.' It is to be noted that nowhere in these later instructions did the court direct the jury that it must find the indicated facts to be true before the supposed inference of negligence might be applied to defendant. Plaintiff's contention that these later instructions did submit the issue of careful handling to the jury is an insufficient answer, for so construed, they would be in direct conflict with the previous instruction which, as we have seen, took that issue from the jury. It is well settled that reversible error in the form of erroneous instructions cannot be cured by giving other correct instructions, where the effect is to create a clear conflict, and it is impossible to determine which instructions governed the jury's determination. Wright v. Sniffin, 80 Cal.App.2d 358, 363, 181 P.2d 675; Ross v. Baldwin, 44 Cal.App.2d 433, 436, 112 P.2d 666; Akers v. Cowan, 26 Cal.App.2d 694, 699, 80 P.2d 143. The two sets of instructions may be reconciled, but only on the theory that the court was informing the jury that, as a matter of law, the prerequisite fact of subsequent careful handling after the bottle left defendant's control, had been conclusively established. Under this view, the additional error in the original instruction was clearly not cured by the later instructions, but was actually emphasized and further impressed upon the minds of the jury."

was caused by an explosion of gas that escaped from defendant's line.

In Gonzales v. Nichols, 110 Cal.App. 738, 294 P. 758, plaintiff's automobile collided with defendant's truck parked at night in a dip on the traveled part of the highway. The rear light of the truck was obscured. There was no dispute that the truck's position was a contributing cause of the accident, and the court held that in view of the exceptionally clear case of negligence the instruction on res ipsa loquitur did not lead to a miscarriage of justice.

In Junge v. Midland Counties, etc., Corporation, 38 Cal.App.2d 154, 100 P.2d 1073, plaintiff was severly burned by contact with a fence on which defendant's high tension electric line had fallen. The break in the line had caused defendant's automatic circuit breaker to open, thus cutting off the power to the fallen line. Plaintiff was injured because defendant's service man had repeatedly reclosed the switch in an attempt to restore current through the line. The only issue was whether it was negligent to reclose the switch, and there was substantial evidence that to do so was contrary to the practice of well-managed power companies. The court held that in view of the evidence of negligence the instruction on res ipsa loquitur was not prejudicial.

In none of these cases was there any question as to what conduct on defendant's part caused the injury, and in all of them there was substantial evidence that defendant was negligent in respect to that conduct. It is unlikely, therefore, that in any of them the jury would have found in favor of defendant on the issue of whether he was negligent in respect to such conduct and also found him liable by applying res ipsa loquitur. When, as in this case, however, there is doubt as to whether defendant's conduct caused the injury or whether he was negligent in any respect, the giving of instructions on res ipsa loquitur when that doctrine does not apply is prejudicially erroneous. Tower v. Humbolt Transit Co., 176 Cal. 602, 607, 169 P. 227; Gritsch v. Pickwick Stages System, 131 Cal.App. 774, 783-785, 22 P.2d 554; Gray v. Los Angeles Ry. Corporation, 69 Cal.App. 123, 125–126, 230 P. 970.

By approving the res ipsa loquitur instructions given in this case, the majority opinion leaves it to the jury to hold defendant strictly liable not only for defects in its bottles when they leave its control but also for defects that develop in the normal course of marketing procedures. If such liability is to be imposed it should be imposed openly and not by spurious application of rules developed to determine the sufficiency of circumstantial evidence in negligence cases.

In Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 150 P.2d 436, I concurred in the judgment on the ground that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings. I regarded this liability as limited to injuries that could be traced to the product as it reached the market. There was abundant evidence in the Escola case that the bottle was defective at the time defendant delivered it to the restaurant where plaintiff was employed. In the present case the evidence shows that even though the bottle was exposed to extraneous harmful forces, it was subjected to no more than the usual wear and tear incident to normal marketing procedures and nothing unusual happened to it. Since, however, normal handling might have caused the defect, it cannot be inferred from the explosion alone that the bottle was defective when defendant relinquished control. It is therefore necessary to decide whether the bottler's strict liability extends not only to defects existing when he relinquishes control, but also to defects that arise as a result of normal handling thereafter. The facts of this case suggest that not uncommonly a plaintiff will be unable to trace the defect to the bottler or to fix negligence on any of the persons through whose hands the bottle passes before reaching him.

From the time they are capped until they are opened bottles are subject to many hazards. They are bounced and bumped, joggled and jostled, as they are loaded, transported, unloaded, refrigerated, and carried from store to home. At any time along this hazardous course a bottle may become defective and thus a risk to those who handle it. The risk is one the consumer cannot reasonably be expected to anticipate or protect himself against. He does not ordinarily inspect bottles, and in any event it is not likely that he is qualified to detect latent defects. He accepts the bottle on faith. The explosion of bottles is not such a commonplace that those dealing with them ordinarily guard against that risk.

The reasons that make the bottler strictly liable for defects in his bottles when they leave his control extend his liability to defects that result from normal marketing procedures. "Even if there is no negligence * * * public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market. However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection." Concurring opinion, Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 462, 150 P.2d 436, 440.

The bottler's duty to the public is to provide a product that will safely withstand normal marketing procedures before it reaches the consumer. He must foresee the treatment to which his bottles will be exposed in normal handling, and if he has the responsibility for defects that arise therefrom, he will be impelled to select bottles that can withstand strain, to pack bottles in such a way as to minimize the chances of injury to them, and to select avenues for marketing so that they will reach the public in a safe condition. A bottle can hardly be considered not defective if it cannot safely withstand the treatment it will normally receive in carrying its contents to the consumer.

"In the food products cases the courts have resorted to various fictions to rationalize the extension of the manufacturer's warranty to the consumer: that a warranty runs with the chattel; that the cause of action of the dealer is assigned to the consumer; that the consumer is a third party beneficiary of the manufacturer's contract with the dealer. They have also held the manufacturer liable on a mere fiction of negligence. * * *" Concurring opinion, Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 465–466, 150 P.2d 436, 442. Similarly many courts that have not openly made the bottler strictly liable have coupled with the doctrine of res ipsa loquitur a fiction that the plaintiff has proved, or at the trial will be able to prove, that the condition of the bottle did not change from the time it left the bottler until it exploded with the object of fixing liability upon the bottler. See, e.g., Payne v. Rome Coca-Cola Bottling Co., 10 Ga.App. 762, 73 S.E. 1087, 1088; Ortego v. Nehi Bottling Works, 199 La. 599, 605–606, 6 So.2d 677; Stolle v. Anheuser-Busch, Inc., 307 Mo. 520, 529, 271 S.W. 497, 39 A.L.R. 1001; Benkendorfer v. Garrett, Tex.Civ. App., 143 S.W.2d 1020, 1023; MacPherson v. Canada Dry Ginger Ale, Inc., 129 N.J.L. 365, 366, 29 A.2d 868; Macres v. Coca-Cola Bottling Co., 290 Mich. 567, 576–577, 287 N.W. 922; cf. Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 458, 150 P.2d 436;

Hoffing v. Coca-Cola Bottling Co., 87 Cal. App.2d 371, 197 P.2d 56. These decisions tacitly recognize that public policy demands that the bottler's responsibility must be measured in terms of the normal risks attendant upon the handling of bottled beverages. "These bottled beverages, containing explosive gases, are put upon the market with the intention that they will be transported throughout the country and sold to consumers for the profit of the manufacturer. Obviously this should be at his risk. Public policy requires that the manufacturer should assume the risks and hazards of explosion incident to the reasonable and ordinarily careful transportation and handling of these goods in the usual course of business. * * * It is fair to the manufacturer, and will afford the consumer of the beverage and those handling it in the ordinary course of trade reasonable protection, while the contrary rule leaves them practically without redress." Stolle v. Anheuser-Busch, Inc., supra, 307 Mo. 520, 529, 271 S.W. 497, 500, 39 A.L.R. 1001.

In the Escola case the bottler was also the distributor so that it was possible to trace the defect directly to him. A bottler cannot shift the responsibility to provide a product that will be safe in the hands of the consumer by routing his products through others. "The manufacturer's obligation to the consumer must keep pace with the changing relationship between them; it cannot be escaped because the marketing of a product has become so complicated as to require one or more intermediaries." Concurring opinion, Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 467–468, 150 P.2d 436, 443.

EDMONDS, Justice (dissenting).

I concur in the conclusion of Mr. Justice TRAYNOR that the instructions to the jury on the doctrine of res ipsa loquitur were prejudicially erroneous, but I do not agree with the rule of absolute liability stated by him in Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 150 P.2d 436, and now reiterated.

For these reasons, I would reverse the judgment.

Rehearing denied; EDMONDS, J., dissenting.

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33 Cal.2d 590

PEOPLE v. SANFORD.

Cr. 4960.

Supreme Court of California, in Bank.
March 11, 1949.

1. Criminal law ⚷814(3)

Instructions are to be given with reference to the facts in evidence.

2. Homicide ⚷289

In murder prosecution, where evidence pointed indisputably to a homicide committed in the act of perpetrating robbery or burglary, and no defense was offered by defendant, an instruction that defendant was either innocent or was guilty of murder in the first degree, was proper. Pen. Code, § 1126.

3. Criminal law ⚷763(9)

In prosecution for murder committed in perpetration of robbery or burglary, instruction that defendant was either innocent or guilty of murder in first degree, was not improper as depriving defendant of a jury trial by taking from jury the determination of questions of fact. Pen.Code, § 1126.

4. Homicide ⚷253(6)

Evidence that murder was committed in perpetration of robbery or burglary sustained conviction of murder in the first degree.

◆

Appeal from Superior Court, City and County of San Francisco; Daniel R. Shoemaker, Judge.

William H. Sanford was convicted of murder in the first degree. From judgment imposing the death penalty and from an order denying defendant's motion for a new trial, the defendant appeals.

Affirmed.

Gerald J. Kenny, Public Defender and William L. Ferndon, Deputy Public Defender, both of San Francisco, for appellant.

Fred N. Howser, Atty. Gen. and Clarence A. Linn, Deputy Atty. Gen., for respondent.

CARTER, Justice.

This is an automatic appeal from a judgment imposing the death penalty for murder in the first degree, and from an order denying defendant's motion for a new trial.

The defendant, William Sanford, came to San Francisco from Ben Lomond about the 14th of June, 1948. He lived in various cheap hotels in the Mission District for a period of about a week, but then decided he would rather live in a private home. He walked about the District until he saw a sign advertising rooms for rent in a flat at 719 Capp Street. On either June 18th or 19th, 1948, he rented a room in the flat from Mrs. Felippa Griffiths, the victim. The rent receipt for $5 for the first week, which he paid in advance, was made out by one of the other roomers, a Mr. Cohn, at the request of Mrs. Griffiths. During the period of time that he resided in the flat he was not working and spent most of his time in his room. In order to explain this, he informed Mrs. Griffiths that he had been in the service, that he had a bad heart and that he was under medical treatment at Oak Knoll Hospital in Oakland. With the exception of some service in the Coast Guard, the other statements were untrue.

The defendant, a man about 20 years of age, gained the confidence of Mrs. Griffiths (a woman about 55 years of age) by telling her of his war service. Mrs. Griffiths' son had been killed while serving in the armed forces overseas, and his body was being sent back to San Francisco for burial. It appears that the defendant endeared himself to her by telling her that he had been present and knew that the boys who had been killed while in the service had been given proper burials and that a priest had been in attendance. Mrs. Griffiths, by the defendant's own admission, treated him like a son.

The defendant did not testify in his own behalf, and the evidence adduced at the trial was given by others, including police officers who were called to the scene of the crime, and who testified to the facts as related to them by the defendant after his arrest, and to the events which took place while the defendant was in their custody. It appears that he talked freely and voluntarily, offering information as to his past, his reason for coming to San Francisco, admitted committing the crime, and his reasons for killing Mrs. Griffiths. He told the officers that he had come to San Francisco to kill a girl, one Rita Gerstman, to whom he had once been engaged but who had broken their engagement when he started getting in trouble. When he arrived, he had no gun and no money with which to buy one. After seeing the girl again, he decided not to kill her, but to embark on a series of robberies and hold-ups as a way to make his living. However, he had no gun and it was necessary for him to obtain one. He then formulated the plan of robbing Mrs. Griffiths and the other occupants of the flat so that he could get money with which to buy the gun so that he could carry out his purpose. He made his plans for Monday, June 28, 1948, knowing that the other roomers would be away at work. He first thought, so he told officers, of using a heavy vase which was in the hall but felt that her suspicions would be aroused if he appeared at the door of her room with it in his hand and so abandoned that plan. During the time he had lived in the flat he had done some odd jobs around the house and knew that she kept a tool chest in a closet off the back porch. He knocked at the door of Mrs. Griffiths' room, and told her that the hasp or catch on his suitcase was broken and that he needed a wrench with which to repair it, intending to use the wrench as a weapon with which to kill her and thus obtain any money she had, and the keys to the other rooms. She went out on the back porch with him, and opened the tool chest in the closet. She, while in a kneeling position, handed him a monkey wrench and he told her it was too large and not what he wanted; she next handed him a 14 inch Stillson wrench which he also told her was too large, but this wrench he kept in his hand. While she was still going through the chest he raised the Stillson wrench and struck her on the back of the head. She slumped forward and he said that he struck her again when she gave a little scream. At this blow, the blood started to spurt from the wound and so he took some loose clothing which was in the closet and put it over her head and continued beating her on the head with the wrench until he was sure she was dead. In striking her on the back of the head he inflicted injuries so severe that the brain itself was exposed and the skull completely crushed. After this, he took the keys to the other rooms from a nail in the kitchen and, after taking a small amount of jewelry which belonged to Mrs. Griffiths and which he found in the kitchen, he ransacked the other rooms taking clothing, money and a radio therefrom. During the hour and a half that he remained in the house he went back to the porch every three or four minutes to be sure that the woman was dead. He put the articles he had obtained in a suitcase which belonged to Mrs. Griffiths. Before leaving the house, he found the current receipt book in which she kept the record of the rents which had been paid to her, and tore out the stub which bore his name. This was later found in his possession.

After leaving the house he called a man by the name of Fisher who, apparently, was a dealer in stolen property. He then left the articles at a restaurant on Mission Street where Fisher was to pick them up.

The body was not found until Tuesday by the daughter of the deceased. After the defendant had completed his ransacking of the flat he had locked both the kitchen and the back door so that when the daughter arrived to visit her mother she was unable to gain access to the premises, and it was only when the lock on the door was broken that she found her mother. When the police arrived they found the current rent receipt book with the one missing stub. The other roomers were questioned, and it was finally discovered that Mr. Cohn, who was then on a vacation trip to Oregon, was the one who had made out that particular receipt. Upon being questioned by the Oregon Police, he remembered to whom it had been made out—a young man by the name of William Sanford. The police, having the description and name of the defendant, discovered that there were Sanfords living at No. 12-30th Street in San Francisco. These premises were watched for approximately eight hours. At about 2 o'clock in the morning they saw a man leave, go to a restaurant and buy some pie and a newspaper. They then entered the house and found the defendant in one of the bedrooms under the bed. He was at once placed under arrest, and when he was searched, the police officers found in his pocket the stub of the rent receipt which had been missing from the book. When the defendant was informed that he was being arrested for a murder which had occurred at 719 Capp Street, he said "Yes, I did." In his room was found an article of clothing which had been taken from the flat. The defendant told the officers where he had left the suitcase containing the other articles and that Fisher was to pick it up. The officers and the defendant then went to the home of Fisher who told them that after reading the newspaper account of the murder and Sanford's connection with it that he had segregated the clothing and the jewelry. The clothing and radio he had taken to the home of a man named Chouiela on Prospect Street and the jewelry he had tied in a handkerchief and thrown it over a cliff. The clothing and radio were found at Chouiela's residence, and the jewelry was later found in the spot where Fisher had thrown it. All of the clothing, jewelry and the radio were identified at the trial as having come from the residence of Mrs. Griffiths, and from the rooms of the other occupants of the flat.

At all times during the search for the articles the defendant was present with the officers. He talked voluntarily and replied freely when questions were put to him. The officers testified that the defendant readily admitted the crime and his other actions; he said that he expected the extreme penalty for his act, and that he was familar with the fact that murder committed in the act of a robbery or burglary was murder of the first degree; he also said that he wanted the extreme penalty.

The jury, after deliberating one hour, found the defendant guilty of murder of the first degree without recommendation. After the verdict was in, defendant's counsel expressed to the court the desire of defendant, evidently formulated after the jury retired to deliberate, that his plea of "not guilty and not guilty by reason of insanity" be withdrawn, and that this was his wish regardless of what the verdict might be. The Court inquired of defendant if that was what he wanted, and he answered that it was. Permission was then granted that the plea of "not guilty and not guilty by reason of insanity" be withdrawn. At the request of the Assistant District Attorney, to which no objection was made by counsel for defendant, the report of three alienists appointed by the Court to determine the sanity of defendant was incorporated in the Motion. This report set forth the defendant's family background; a report of various crimes, arrests and sentences served by defendant; the details of the present crime; his manner, his physical condition; his purpose of robbery in killing Mrs. Griffiths. The report concluded that the defendant was sane and of more than normal intelligence; that he had planned the act, knew its quality and nature, and that he was fully responsible.

The defendant, in his motion for a new trial upon all of the statutory grounds, further contended that the evidence was insufficient to sustain the verdict, and assigned as error an instruction given to the jury that the only possible finding under the law would be that this was murder of the first degree. The motion for a new trial was denied. There was no instruction which could possibly be construed as defendant's counsel contends. After the verdict was in, and the jurors were polled, the Court made the following statement: "Ladies and Gentlemen, I know you have had a serious and very important decision to make. I think you made the only possible decision you could make in this case. I want to thank (you) for your attention and for your excellent service which you always render in this Court. You will be discharged now until further order."

The defendant contends here that the provision of section 1126 of the Penal Code, which provides that questions of fact are to be decided by the jury, was overlooked by the trial judge when he gave the following instruction to the jury: "Although there are two degrees of murder, the evidence in this case is such that either the defendant is innocent of the charge of murder or he is guilty of murder in the first degree, for murder which is committed in perpetration or attempt to perpetrate robbery or burglary is murder in the first degree, whether the killing was intentional, unintentional or accidental." It is contended that this instruction constitutes reversible error in that it, in effect, deprived the defendant of a jury trial by taking from the jury the determination of questions of fact.

[1-4] There is no merit in defendant's contention. Instructions are to be given with reference to the facts in evidence. The evidence presented at the trial by the People pointed indisputably to a homicide committed in the act of committing a felony—robbery or burglary, and no defense whatsoever was offered by the defendant. It is proper in such a case for the court to advise the jury that the defendant is either guilty or innocent of first degree murder. People v. Alcalde, 24 Cal.2d 177, 148 P.2d 627; People v. Perkins, 8 Cal.2d 502, 66 P.2d 631; People v. Johnson, 219 Cal. 72, 25 P.2d 408. The instructions as a whole correctly stated the law and it is not contended that the defendant was not otherwise accorded a fair trial. The verdict was clearly justified by the evidence, and we find no basis whatever to disturb the judgment.

The judgment and order are, and each of them is, accordingly affirmed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

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90 Cal.App.2d 734

MOOTS v. KASTEN.

Civ. 16808.

District Court of Appeal, Second District, Division 2, California.

March 21, 1949.

Hearing Denied May 19, 1949.

1. Easements 🔑61(8)

Award to lot owner of easement nine inches in width over adjoining property alongside driveway extending from lot owner's garage to street was unsupported in absence of allegation and evidence that strip was necessary to lot owner's enjoyment of her property and that such area had been used by owner for five years.

2. Easements ⚷1

An "easement" is an interest of a landowner in land of another consisting of incorporeal right which entitles its owner to use or enjoy the other's land.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Easement".

3. Easements ⚷3(1)

An easement appurtenant attaches to the land of the owner of the easement.

4. Easements ⚷5

An easement by prescription may be acquired by user for five years but the elements of open and notorious user which is continuous and uninterrupted, hostility to the true owner communicated to him, and exclusive use under claim of right, must be shown.

5. Easements ⚷36(3)

Where a lot owner alleged that automobiles operated over driveway between garage and street overlapped adjoining lot and that an easement had been acquired by adverse user for five years, but where evidence established that wheels or tires did not leave driveway and where only one witness testified that she had seen alleged overlap although a number of other witnesses testified that they had used driveway, evidence was insufficient to establish adverse user.

6. Easements ⚷8(1)

Use by necessity cannot ripen into an easement by prescription as long as the necessity continues, since a way of necessity is by right of implied grant rather than averse, and limitations will not commence to run until the necessity ceases.

7. Easements ⚷8(1)

Trespass on adjoining property as a matter of necessity in using driveway along lot line from garage to street could not ripen into easement by prescription.

◆

Appeal from Superior Court, Los Angeles County; Ben V. Curler, Judge.

Action by Catherine C. Moots against Elsie Kasten to establish an easement. Judgment for plaintiff and defendant appeals.

Reversed with instructions.

James M. Gammon, of Los Angeles, for appellant.

William A. Monten and John A. Ellis, both of Los Angeles, for respondent.

MOORE, Presiding Justice.

Appeal from a judgment in favor of plaintiff awarding her an easement nine inches in width over appellant's property alongside respondent's driveway which extends from the garage in the rear of her house to the street.

Appellant and respondent own and occupy adjacent properties on North Harvard boulevard in the city of Los Angeles. Both lots face west and respondent's property lies to the north of that of appellant. The concrete driveway extends along the lot line and is entirely upon respondent's land. The south wall of her residence is approximately one foot from the north edge of her driveway with the exception of a chimney which protrudes from the wall to the driveway. The distance from the chimney to the southernmost edge of the driveway is approximately 78¼ inches.

In August, 1946, appellant erected a cement wall three to five feet high from approximately the front of her house rearward to the front of respondent's garage. The wall was entirely upon and approximately one inch inside of appellant's property. The construction of the wall resulted in a net clearance of 79¼ inches between respondent's chimney and appellant's wall.

After the erection of the wall respondent commenced the instant action alleging that an easement by prescription, appurtenant to her premises, had been acquired by virtue of the fact that portions of the runningboards and fender parts of respondent's automobile and of those of her visitors had extended over the imaginary line between the two properties during the period necessary for the acquisition of an easement. The court after full hearing personally viewed the premises, made findings and entered judgment that respondent "is the owner of an easement appurtenant * * * for a right of way over" nine inches of appellant's property abutting respondent's driveway and extending from the street to the rear of respondent's house. The court also ordered appellant to remove her wall, enjoined its re-erection and awarded respondent $168 damages.

Appellant contends that the evidence does not support the finding of adverse user. The pertinent finding is as follows:

"Before the wall was constructed, automobiles using the driveway were driven along the extreme south side thereof to avoid contact with the chimney of plaintiff's house, and in being so driven a portion of the automobiles, approximately nine inches in width *of necessity* extended over the property of defendant although the wheels of the cars remained on plaintiff's driveway." (Emphasis added.)

[1] Before discussing the more serious aspects of the assignments of error it is to be observed the court found that (1) prior to the construction of the wall motor cars driven upon the driveway proceeded along the extreme south side thereof to avoid contact with respondent's chimney, thereby causing a portion of such automobiles, about 9 inches in width, to extend over appellant's property; (2) after the wall had been completed the space between respondent's chimney and the north side of the wall was 79¼ inches, leaving 2½ inches clearance on each side of a full-size, standard vehicle placed equidistant from the chimney and the wall; (3) the wall serves no purpose except to close the driveway; (4) it was erected for that purpose and was done with malice; (5) a strip nine inches in width along the northerly side of appellant's lot is necessary for respondent's ingress to and egress from respondent's garage. In the absence of allegation and evidence that a nine-inch-strip is necessary to plaintiff's enjoyment of her property and that such area has been used by plaintiff for five years, there is no support for the finding or of the judgment awarding respondent the nine-inch-strip from the street to the garage. There is no reason expressed in the judgment roll why respondent should require the use of any part of appellant's land with the possible exception of the area opposite the chimney. But these errors pale in contract with the judgment's violations of more serious and elemental rights as will now be demonstrated.

[2-4] An easement is an interest of a landowner in the land of another, an incorporeal right which entitles its owner to use or enjoy the other's land. Eastman v. Piper, 68 Cal.App. 554, 568, 229 P. 1002; Zlozower v. Lindenbaum, 100 Cal. App. 766, 771, 281 P. 102; Rest., Property, sec. 450. An easement appurtenant attaches to the land of the owner of the easement. An easement by prescription may be acquired by user for five years, but the following elements must be shown: open and notorious user continuous and uninterrupted; hostility to the true owner, communicated to him; and it must be exclusive and under claim of right. Thomas v. England, 71 Cal. 456, 460, 12 P. 491; Pacific Gas & Electric Co. v. Crockett Land & Cattle Co., 70 Cal.App. 283, 290, 233 P. 370; Grimmesey v. Kirtlan, 93 Cal.App. 658, 665, 270 P. 243; Bernstein v. Dodik, 129 Cal.App. 454, 458, 18 P.2d 983; 20 Cal. L.R. 432; 32 Cal.L.R. 438; 15 So.Cal.L.R. 44; Rest., Property, sec. 457 et seq.

[5] The only evidence found in the record which might be urged as supporting the finding that appellant's property was adversely used for five years, is the testimony of respondent's mother as to her daughter's automobile:

"A. Well, it went in and out, to lap over an inch or two, I presume.

"Q. How do you know it lapped over? A. Because I could see for myself," and "I know it had to lap over the side of the drive, I have seen that."

Concededly, many automobiles used respondent's driveway, but before the erection of the wall the width of the driveway was sufficient to permit its use without any trespass. Therefore, evidence of actual trespass would be necessary to a finding of adverse user. The evidence established that the wheels or tires of automobiles had not left respondent's cement driveway. Because of its narrowness the witnesses concluded that there must have been overlap by fenders or bumpers, but excepting the quoted testimony of Mrs. Cregan no witness testified that he had actually seen an automobile overhang appellant's property. She *presumed* there had been an overlap of an inch or two and that "it had to lap over," because she "could see for herself." Similarly, other witnesses testified that they had used *respondent's* driveway or had seen others use it. But no one testified that in using the driveway he had encroached upon appellant's property or had witnessed another do so. Such dearth of evidence is fatal to a finding of adverse user.

[6, 7] The judgment is subject to another fatal objection. The instant action was predicated upon the allegation that "in passing to and fro over said driveway * * * it has been necessary that portions of the running board and fender parts * * * extend over an imaginary vertical plane up from the line between the two said properties." In response thereto the court found in effect that in order to use respondent's driveway it was *necessary* that portions of automobiles trespass over appellant's property. Such a finding demonstrates the error of the judgment. No duration of the use of another's land arising from the user's necessity can ripen into an easement by prescription so long as the necessity continues. Therefore, "the time when the prescriptive right would commence to run would be not earlier than the cessation of the right by necessity." Martinelli v. Luis, 213 Cal. 183, 184, 1 P.2d 980. Since a way of necessity is by right of implied grant and not adverse, the statute of limitations will not commence to run until the necessity ceases. It follows that there was no basis for an award of the easement to respondent or for the injunctive relief or for damages.

The judgment is reversed with instructions to enter a decree in favor of defendant.

McCOMB and WILSON, JJ., concur.

Hearing denied; CARTER, J., dissenting.

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90 Cal.App.2d 495

PEOPLE v. INES.

Cr. 4284.

District Court of Appeal, Second District,
Division 1, California.
March 10, 1949.

1. Gaming ⚷98(5)

Evidence warranted conviction of occupying premises with paraphernalia for recording bets on horse races. Pen.Code, § 337a, subd. 2.

2. Gaming ⚷98(5)

To warrant conviction of using or occupying place with paraphernalia for recording bets on horse races, purpose for which place was being used or occupied by accused need not be established by direct evidence, but may be gathered from all surrounding circumstances shown by evidence. Pen.Code, § 337a, subd. 2.

3. Gaming ⚷96

To warrant conviction of occupying premises with paraphernalia for recording bets on horse races, prosecution need not prove that primary purpose of maintaining premises was to register bets, nor that accused was owner, lessee or employee on premises. Pen.Code, § 337a, subd. 2.

4. Criminal law ⚷317

In prosecution for occupying place with paraphernalia for recording bets on horse races, defendant's failure to take witness stand to explain or deny under oath police officers' testimony against him was potent fact for consideration by trial judge and afforded additional support for judgment of conviction. Pen.Code, § 337a, subd. 2; Const. art. 1, § 13.

5. Criminal law ⚷386, 419(11)

In prosecution for occupying place with paraphernalia for recording bets on horse races, evidence of telephone conversations between arresting officers and persons calling accused at such place with reference to placing bets was inadmissible as hearsay except for limited purpose of establishing that place was being occupied for such purpose. Pen.Code, § 337a, subd. 2.

6. Criminal law ⚷698(1)

Hearsay evidence, adduced without objection, may properly be considered in support of judgment of conviction.

7. Criminal law ⚷1036(5)

Error in admitting hearsay evidence of telephone conversations between police officers and persons calling defendant for purpose of placing bets on horse races is unavailable on appeal from conviction of occupying place for purpose of recording such bets, in absence of objection thereto by defendant. Pen.Code, § 337a, subd. 2.

◆

Appeal from Superior Court, Los Angeles County; C. C. McDonald, Judge.

Johnny B. Ines was convicted of occupying premises with paraphernalia for recording bets on horse races, and he appeals.

Affirmed.

Max Solomon, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen. and William E. James, Deputy Atty. Gen., for respondent.

WHITE, Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was charged with a violation of subdivision 2 of section 337a of the Penal Code, which denounces as a crime, among other things, the keeping or occupancy for any period of time whatsoever, of any room, tenement, etc., with books, papers or other devices or paraphernalia for the purposes of recording or registering bets or wagers upon the result of any horse race. When the case was called for trial a jury was waived, and by stipulation the cause was submitted to the trial judge upon the transcript of the testimony adduced at the preliminary examination and the exhibits introduced thereat, coupled with the right of either the people or the defendant to offer such further testimony as they might desire. Defendant was adjudged guilty. From the judgment pronounced against him and from the order denying his motion for a new trial, defendant prosecutes this appeal.

The factual background which gave rise to this prosecution as reflected by the record may be thus epitomized:

At about 2 o'clock on the afternoon of May 4, 1948, Officers Melby and Canfield, of the Los Angeles Police Department, entered a cafe located at 113 East First Street in the City of Los Angeles. The cafe is approximately 60 feet in length, the front portion of which is occupied by a beer and wine concession which is operated by one DeVera. A telephone is located behind the counter of the cafe, approximately ten or twelve feet from the concession owned by DeVera, and which telephone admittedly belonged to him. Upon entering the cafe, Officer Melby walked to the extreme rear portion of the building, through swinging doors into the kitchen where he encountered the defendant writing on several pieces of paper. When the officer reached a point within about two feet of the defendant, the latter said, "Oh!", took the pencil with which he was writing, and put it in his pocket. The officer testified that the papers upon which the defendant was writing were what is commonly known as betting markers, which the officer recovered, and they were introduced into evidence. After searching the premises in the vicinity where the defendant was standing, the officer took him to the front portion of the building where he searched him, but the search revealed nothing. This witness testified he did not see the defendant make any telephone calls nor did he hear him say anything, nor did he observe any one making a wager with the defendant. The witness testified that he observed the defendant writing upon the aforesaid papers for approximately a minute.

When Officer Canfield was called as a witness it was stipulated that he was qualified as an expert on bookmaking and the paraphernalia used in connection therewith; that he was present at the time of the arrest of the defendant. This officer testified that he searched the premises and found papers similar to the ones that had been recovered from the defendant and that under the small scale which was near the DeVera concession he found a betting marker. He also identified several slips of paper upon which there was no writing and testified that they were recovered from the back of the bar at which DeVera was seated. He also testified that he found three scratch sheets underneath the pads in the booths of the cafe, but that he did not see the defendant handle any of them.

Officer Canfield further testified that after he found the foregoing paraphernalia, the telephone, which was behind the counter of the cafe, rang on several occasions; that he answered it; that a voice asked for "Johnny", that he said, "Yes" and that the voice said, "This doesn't sound like Johnny", and then said, "This is Greco, two to win on Gold Ball in the sixth at Bay Meadows". That shortly thereafter the telephone rang again and a voice asked for "Johnny" and then said, "This is Dison, four to win on Fuego", and hung up. Again the telephone rang and again a voice asked for "Johnny" and said, "This is Eddie. Two to win on Kohu in the eighth."

The witness testified he then asked defendant how long he had been making book at this particular place, to which he replied, "I am not a bookmaker. I just hand around here because I know a lot of people. I didn't have anything to do with those pieces of paper".

It was then stipulated by counsel for the defendant and the district attorney that the officer would testify that People's Exhibits "A" and "B" were betting markers, that they contained the names of horses running on race tracks throughout the United States on the day in question; that the officer made a comparison of all of People's Exhibit "A" and a portion of People's Exhibit "B" and found them to be the names of horses, and that they corresponded to the names of horses contained on the scratch sheet, People's Exhibit "C". It was further stipulated that the names of the horses listed on the scratch sheet were horses running or purportedly running on the day in question on tracks throughout the United States. The witness further testified that on one of the occasions when the telephone rang a voice inquired for "DeVera" but did not make a wager.

The defendant did not take the witness stand to testify in his own behalf nor did he present any evidence.

As the sole ground for a reversal, appellant earnestly asserts that the evidence is insufficient to establish his guilt. He makes no claim that the corpus delicti of the crime was not established, but contends that the evidence fails to prove beyond a reasonable doubt his participation in the same. The question presented is therefore, whether the evidence revealed sufficient facts to warrant the inference of guilt or whether it may be said that upon no hypothesis whatever is there substantial evidence to support the conclusion reached by the trial judge that appellant was occupying the premises in question and was possessed of the necessary equipment used for recording bets, which constitutes the offense with which he was charged.

In People v. Roseberry, 23 Cal.App.2d 13, 14, 71 P.2d 944, the word "occupy" is defined as follows: "* * * 'To take or enter upon possession of; to hold possession of; to hold or keep for use; to possess; to tenant; to do business in.'" (Citing Webster's New International Dictionary, 1921.)

[1-3] In the instant case there is no dispute as to appellant's presence in the room, nor is there any denial of the testimony that he was in possession of and writing upon the betting markers when the arresting officers entered the premises. Added to this is the testimony concerning the telephone calls (as to the admissibility of which we shall later refer), wherein the voices of the persons calling asked for "Johnny", which is appellant's name, and after receiving assurance they were talking with "Johnny" placed their bets. We are persuaded that from the foregoing the inference could be fairly drawn by the trial judge that appellant conducted himself or did business in a manner prohibited by the Penal Code. The purpose for which the place was being used or occupied by an accused need not be established by direct evidence, but may be gathered from all the surrounding circumstances shown by the

evidence. People v. Newland, 15 Cal.2d 678, 683, 104 P.2d 778; People v. Barnhart, 66 Cal.App.2d 714, 721, 153 P.2d 214. It is not necessary to prove that the primary purpose of maintaining the place was to register bets, People v. Smith, 35 Cal.App.2d 73, 76, 94 P.2d 633, nor is it incumbent upon the prosecution to establish that appellant was the owner, lessee or an employee upon the premises. People v. Steinfeld, 38 Cal.App.2d 280, 282, 101 P.2d 89; People v. Partee, 70 Cal.App.2d 736, 739, 161 P.2d 586.

[4] Appellant's reliance upon the cases of People v. Rabalete, 28 Cal.App.2d 480, 82 P.2d 707, and People v. Fisk, 32 Cal.App.2d 26, 89 P.2d 142, can afford him no comfort because the factual situations therein present are at once distinguishable from the facts shown in the case at bar. In the cited cases the question involved was the sufficiency of the evidence to connect the particular appellant with the paraphernalia or occupancy of, rather than mere presence in, the places in question, while in the instant case the evidence heretofore narrated is ample. In the cause now engaging our attention, the evidence presented by the prosecution was without contradiction. Appellant did not take the witness stand to deny the testimony of the police officers, nor did he offer any defense whatsoever, either to the charge of occupancy of the place or as to his possession of and writing upon the aforesaid betting markers, all of which tended to show a causal connection between him and the betting paraphernalia commonly used for recording and registering bets on horse races. Such failure by him to explain or deny under oath the evidence woven about him was itself a potent fact for consideration by the trial judge and affords additional support for the judgment. People v. Brown, 71 Cal.App.2d 166, 168, 162 P.2d 300; People v. Reifenstuhl, 37 Cal.App.2d 402, 404, 99 P.2d 564; People v. McCabe, 60 Cal.App.2d 492, 498, 141 P.2d 54; Const. art. I, Sec. 13.

[5-7] We come now to a consideration of appellant's claim that the court erred in receiving into evidence conversations on the telephone between one of the arresting officers and those who called the place in question with reference to placing bets. Appellant concedes that the court may properly receive evidence of such conversations, not for the purpose of establishing the truth of what was said over the telephone, but for the limited purpose of establishing that the room or place in question was being occupied for placing bets on horse races, People v. Kelley, 22 Cal.2d 169, 137 P.2d 1; People v. Radley, 68 Cal.App.2d 607, 609, 157 P.2d 426, but he earnestly asserts that such conversations may not be relied upon to connect him with the crime.

It is true that evidence of the telephone calls was hearsay except for the limited purpose above set forth and had proper objection been made thereto it would have been inadmissible except for the foregoing limited purpose. However, in the case at bar no objection whatsoever was made at the time the now challenged evidence was proffered. Hearsay evidence which is adduced without objection may properly be considered in support of a judgment of conviction, People v. Freer, 104 Cal.App. 39, 43, 285 P. 386; People v. Magusin, 120 Cal.App. 115, 117, 7 P.2d 764; People v. Guiterez, 126 Cal.App. 526, 529, 14 P.2d 838. The record showing that this testimony was given without any objection being made on behalf of appellant, the challenge to its admissibility, as now presented, is without merit.

The judgment and order from which this appeal was taken are and each is affirmed.

DORAN, Acting P. J., concurs.

90 Cal.App.2d 667

PEOPLE v. LEACH.

Cr. 668.

District Court of Appeal, Fourth District, California.

March 17, 1949.

1. Criminal law ⚿511(2)

In determining whether testimony of admitted accomplice was corroborated, so as to sustain conviction, appellate court should first eliminate from consideration, testimony of accomplice and if there is other evidence, though slight of itself, which tends directly to connect defendant with the offense, the accomplice has been corroborated.

2. Criminal law ⚿511(1)

Evidence sufficiently corroborated testimony of an admitted accomplice, so as to sustain conviction of grand theft of jewelry and for stealing an automobile.

3. Criminal law ⚿351(3), 552(2)

Flight, standing alone, is not sufficient to establish guilt, but flight immediately after commission is a circumstance that may be considered, with other facts, as tending to show a consciousness of guilt.

4. Criminal law ⚿778(11)

Evidence justified giving of an instruction upon flight of defendant as tending to show a consciousness of guilt of grand theft of jewelry and stealing an automobile. Pen. Code, § 1127c.

5. Criminal law ⚿1023(9)

Where court exercised option under the statute to suspend the imposition of the sentence and grant probation, rather than impose sentence and suspend its execution by granting of probation, there was no "final judgment" of conviction within the statute so as to permit an appeal to be taken therefrom. Pen. Code, §§ 1203.1, 1237, subd. 1.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Final Judgment".

◆

Appeal from Superior Court, San Bernardino County; Stanley Mussell and Martin J. Coughlin, Judges.

Donald Leach was convicted of grand theft and stealing an automobile and he appeals.

Attempted appeal from alleged "judgment of conviction" dismissed.

Order denying a new trial affirmed.

C. E. Crowley, of Ontario, for appellant.

Fred N. Howser, Atty. Gen. and James A. Doherty, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant Leach and one Lawson were accused in one count of an information with the crime of grand theft of $4,000 in jewelry, and in the second count with stealing an automobile, all belonging to one Morris. Both entered pleas of not guilty. Later, Lawson changed his plea to guilty on the second count and the first count was, as to him, dismissed. He became a witness against his codefendant whom the jury convicted on both counts. The case was tried before the Honorable Stanley Mussell, then judge of the Superior Court. After his appointment to this court a motion for new trial was made before and denied by the Honorable Martin J. Coughlin, judge. Application for probation was made and conditionally granted. Apparently there was no judgment imposing sentence but there was an order that imposition of sentence on each count be "suspended for three years". On appeal, defendant's main contention is that the evidence is insufficient to support the verdict.

Morris, from whom the jewelry and automobile were claimed to have been stolen, was a salesman of jewelers' supplies. According to his recollection, which was somewhat befogged, he met the two defendants about 11 p. m. on November 8th in a cafe in Rialto, where defendants, dressed as cowboys, were charitably donating such musical talent as they possessed. After considerable drinking, about one a. m., according to Morris, the three went to a motel. Morris supplied the rental money. The next morning Lawson left in the complaining witness's car and brought back some food. The next night the three registered at another motel and

Morris went to sleep because he was feeling "about half sick". When he awakened the next morning his three suitcases, containing the jewelry, were missing from the cabin which was then locked from the outside. His car, which had been parked in the shed next to the cabin by him and Lawson the night before, was gone. The landlady unlocked the door and he later reported the theft.

The operator of the motel verified the fact that the three registered for the cabin on November 9th and their baggage was placed therein; that she, "on the evening of the 10th", about 7 p. m. saw the lights turned off and she heard someone going back and forth to the car; that the car pulled out and she saw only two people in it and they had on cowboy suits; that the next morning she discovered Morris locked in his cabin and the car had not been returned.

Lawson then testified for the People in reference to his meeting with the complaining witness and the renting of the cabins by the three for the two nights; that he, as driver, and Leach and Morris, rode around in the Buick to several drinking places; that about 11 p. m., on the second night, he and defendant took Morris's car from the cabin where it was parked; that the jewelry was in a grip in the cabin and Leach took it out to the car while he, Lawson, was giving Morris another drink of whiskey; that he locked the door of the cabin outside and went to Five Points where he opened the suitcase, in the presence of Leach, and traded two rings for a pair of boots, sold a wrist watch or two, and then they drove the car to the desert near Tecopa, and he there sold some more jewelry out of the bag while Leach was present in the car; that the money was used for the purpose of eating and buying gasoline to go to Baker, where they left the car parked a little ways out of town on an old road; that before they left San Bernardino he had Leach take the license plates off from his father's car and while near Tecopa they substituted the ones belonging to his father for the plates on the Morris car; that he and Leach talked over the question of returning to San Bernardino but feared Morris "may have turned it in as a stolen car"; that they took the grip and jewelry and caught a bus back to San Bernardino; that they stayed in an auto court near Colton and pawned more jewelry and the two of them spent the money; that two or three nights later a girl friend, now Leach's wife, drove them to Phoenix, because they decided "it was a little warm here for us"; that after they were through with the jewelry bag they threw it out on the desert.

Witnesses from Shoshone, Tecopa and San Bernardino were produced who purchased jewelry or loaned money thereon to Lawson, and some of them said they saw Lawson and another man at these several places in a car similar to that belonging to the complaining witness. One witness in San Bernardino identified defendant Leach as having endeavored to pawn an Elgin watch with him. Defendant then testified that he met Morris on the night of November 8th; that he drove his car around for him for a day or so; that Morris wanted liquor and was broke and that he gave defendant a watch to pawn or sell for $10, and that he purchased whiskey with it for the complaining witness; that he knew nothing of the other jewelry and did not go with Lawson in the car to Baker nor to Phoenix. He offered certain alibi witnesses endeavoring to substantiate his testimony.

The motion for new trial was made on all the statutory grounds. Affidavits in support of the motion were presented and argued. Defendant, by these affidavits, produced evidence of conflicting statements made by Lawson to an officer and certain testimony of his taken at the preliminary hearing. These statements were somewhat in conflict with his present testimony as to the identity of the person who was with Lawson when he went to Baker and also to Phoenix. Lawson freely admitted he told an untruth at that time but claimed his present testimony was trustworthy.

Mrs. Leach admitted driving to Phoenix in her car with the defendant shortly after the commission of this crime but claims that Lawson was not with them. She there sold her automobile and defendant Leach went on to Texas where he remained until December. Shortly after his return he was arrested.

[1] In analyzing this testimony and the question whether the testimony of the admitted accomplice was corroborated, we must keep in mind the general rule announced in People v. Reingold, 87 Cal.App. 2d 382, 197 P.2d 175, that we should first eliminate from consideration the testimony of the accomplice and if there is other evidence, though slight of itself, which tends directly and immediately to connect the defendant with the commission of the offense, the accomplice has been corroborated. See, also, People v. Trujillo, 32 Cal. 2d 105, 194 P.2d 681; and People v. Morton, 139 Cal. 719, 724, 73 P. 609.

[2] Applying that test to the facts under consideration, there can be no reasonable argument against the conclusion that the evidence set forth, independent of Lawson's testimony, raises more than a grave suspicion that defendant Leach was directly and immediately involved in the commission of the crime. Morris testified directly that he gave no permission to sell his jewelry. His two companions, which included defendant, were present when he went to bed, but absent, along with his stock in trade and his automobile, the next morning. The door to his cabin was locked from the outside and the car was seen by the landlady being driven away and apparently she was satisfied and also satisfied the jury that both Leach and Lawson were its only occupants at the time. Many of the articles of jewelry sold or pawned were identified and received in evidence. It is apparent that Morris's car was taken to Baker by Lawson and one other man. The corroboration of Lawson's testimony was sufficient and amply connected defendant Leach with the commission of the thefts with which he was charged. The credence to be given that evidence was for the jury to determine.

The only remaining point deserving consideration is the complaint that there was no foundation in the evidence for the giving of an instruction to the jury on the question of flight under section 1127c of the Penal Code. It is argued that mere departure by defendant to Phoenix and Texas without any showing of an intent to flee because of fear of prosecution, is not, of itself, evidence of intentional flight.

[3, 4] It is the rule that flight, standing alone, is not sufficient to establish guilt, but flight immediately after the commission of the offense, is a circumstance that may be considered, with other facts of the case, as tending to show a consciousness of guilt. In the instant case there was sufficient evidence produced justifying the giving of the instruction. People v. Peak, 66 Cal.App.2d 894, 910, 153 P.2d 464; People v. Gregoris, 70 Cal.App.2d 716, 720, 161 P.2d 568.

[5] Since the court exercised its option under section 1203.1 of the Penal Code, to suspend the imposition of sentence and grant probation, rather than impose sentence and suspend its execution by the granting of probation, there is no final judgment of conviction within the meaning of section 1237, paragraph one, of the Penal Code from which an appeal can be taken. In re Phillips, 17 Cal.2d 55, 109 P.2d 344, 132 A.L.R. 644; People v. Ormes, 88 Cal.App.2d 353, 198 P.2d 690.

The attempted appeal from the alleged "judgment of conviction" is dismissed. The order denying a new trial is affirmed.

BARNARD, P. J., concurs.

MUSSELL, J., being disqualified, did not participate.

90 Cal.App.2d 501

CHURCH et al. v. BAILEY et al.
CHURCH et al. v. BAILEY.

Civ. 16498.

District Court of Appeal, Second District,
Division 2, California.
March 10, 1949.

Hearing Denied May 5, 1949.

1. Trusts 🔑101, 354

An employee, misappropriating his employer's funds, is chargeable as constructive trustee for amount thereof, and a trust will be impressed on property acquired by employee with such funds.

2. Trusts 🔑95, 357(1)

One wrongfully detaining another's funds is involuntary trustee thereof for owner's benefit, and a trust will be impressed on property acquired by trustee with such funds, unless it is held by bona fide purchaser for value without notice in good faith. Civ.Code, §§ 2223, 2224, 2243.

3. Trusts 🔑352

Where trustee deposits both trust funds and his individual funds in single bank account, makes withdrawals therefrom, dissipates money withdrawn, and subsequently makes additional deposits of individual funds in account, money deposited becomes trust fund, beneficiary is entitled to hold funds so deposited, and express intent of trustee to replace trust funds need not be shown.

4. Trusts 🔑352

There is strong presumption that trustee, depositing his personal funds in trust fund bank account after partially dissipating such fund, intended to make trust fund whole.

5. Trusts 🔑354

A person whose property is stolen, embezzled or misappropriated by another should be restored to possession of property or its equivalent, if it has not passed into hands of bona fide purchaser without notice.

6. Trusts 🔑352

Where all payments on purchase price of realty were made by checks on purchaser's bank account, containing trust funds embezzled by him from his employers, as well as his personal funds, employers were entitled to recover from deceased purchaser's estate entire sum paid by him, not merely to impress lien on realty for amount of purchaser's personal funds included in payments, though purchaser deposited in account personal funds, on which he drew check to vendors, after nearly depleting account by previous payments.

7. Trusts 🔑352

An employee, depositing personal funds in his bank account, containing trust funds embezzled from his employers, after nearly depleting account by payments therefrom on purchase price of realty, is presumed to have intended restoration pro tanto of trust funds so dissipated.

◆

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Actions, consolidated for trial, by J. Warren Church and others, copartners, doing business under the fictitious firm name and style of Automatic Fire Protection Company, formerly Automatic Sprinkler Maintenance Company, against Irene Bailey, also known as Lucy Irene Bailey, individually and as administratrix of the estate of Robert A. Bailey, deceased, and others, to impress a trust on realty purchased with part of money embezzled from plaintiffs by deceased while in plaintiffs' employ, and against the administratrix alone on a rejected claim for the full amount of money taken. From so much of a judgment for plaintiffs as merely charged the realty with a lien for part of the amount embezzled, plaintiffs appeal.

Reversed with directions.

Reynolds, Painter & Cherniss, by Louis Miller, all of Los Angeles, for appellants.

Clarence M. Heublein, of Los Angeles, for respondents.

McCOMB, Justice.

Upon discovery that a deceased employee (Robert A. Bailey) over a period of several years had embezzled approximately

$45,000.00 of their funds, plaintiffs sued defendant, Irene Bailey, the wife of the employee, individually and as administratrix of his estate to impress a trust upon property purchased with part of the misappropriated money. Also an action was brought by plaintiffs against Mrs. Bailey as administratrix of her husband's estate upon a rejected claim for the full amount of the money taken. The actions were consolidated for trial. Judgment was rendered that plaintiffs recover from the administratrix the total amount of the embezzlements and to the extent of the sum of $2,620.57 included in the judgment they should have a lien upon a parcel of real property located in Orange county, title to which was vested in defendant and her deceased husband in joint tenancy. From the portion of the judgment charging said land with a lien, plaintiffs appeal, asserting that the property was purchased with the embezzled funds and therefore the trial court should have entered judgment that plaintiffs are the owners of said parcel of real property, subject only to encumbrances existing against it, if any, and to the payment by plaintiffs to defendant of such sums of money as she may have paid upon the purchase price of such property with funds of her own subsequent to her husband's death.

Facts

For approximately eight years prior to July 24, 1944, Robert A. Bailey was employed as a confidential clerk by plaintiffs who were doing business as partners under the name of Automatic Fire Protection Company. His duties included the maintenance of plaintiffs' books and records and the handling of their funds. He made deposits in their bank account and prepared checks for the payment of business expenses. Until the death of Mr. Bailey plaintiffs believed he was a faithful employee. They fully entrusted their funds to him and signed hundreds of checks which he presented to them. Immediately after his death, July 24, 1944, they discovered that for a period of over six years he had carried on a systematic course of embezzlement by means of which he had stolen from them the sum of $44,999.58. This was accomplished by Mr. Bailey's preparing a large number of checks in varying amounts some payable to third persons and some payable to himself. These were presented to plaintiffs for signature upon the statement by Mr. Bailey that they were for lawful business expenditures. To them were attached vouchers prepared by Bailey as supporting the claimed expenditures. These checks and vouchers were fraudulent and were written for fictitious purposes. However, plaintiffs believing they represented genuine expenditures signed and delivered them to Mr. Bailey, who, by forged endorsement and by raising or altering the amounts of the checks, obtained funds totaling $44,999.58, which he converted to his own use. The sum of $40,072.34 was deposited in a personal bank account at the Farmers and Merchants National Bank of Los Angeles, the balance of $4,927.24, he obtained in cash.

On August 22, 1942, Mr. Bailey entered into an agreement to purchase a parcel of real property located in Orange county for the sum of $6500.00, payable $100.00 in cash, $2000.00 on or before October 15, 1942, and $100.00 per month on the 15th of each month until the contract was paid down to an existing loan secured by a deed of trust in favor of Laguna Federal Savings and Loan Association, the balance of which at the date of the contract was $3,458.79, payable at the rate of $33.76 per month.

From the inception of the contract to the date of his death Mr. Bailey paid on the purchase price of this property the sum of $4,668.57. On the date of his death the balance due on the note and the deed of trust held by the savings and loan association was $2,319.62, upon which defendant had paid out of her own funds to the date of the trial the sum of $273.38. The $4,668.57 which Mr. Bailey paid to the sellers of the property came from his bank account at the Farmers and Merchants Bank of Los Angeles. Of this sum $2,620.57 represented funds belonging to plaintiffs, the remainder amounting to $2,048.00 came from a $3,137.00 check obtained by Mr. Bailey from an independent source and deposited in his account on October 15, 1942. At the time of this deposit he had a balance of $46.91 in his account, having at such time deposited and withdrawn embezzled money in amounts in excess of $20,000.00.

On November 19, 1943, the Orange county property was conveyed to Mr. Bailey and defendant, his wife, in joint tenancy. The reasonable market value of the property at the time of his death, July 24, 1944, was $8,000.00; in November, 1945, between $12,000.00 and $13,000.00; and at the conclusion of the trial in December, 1946, $15,000.00.

Contentions of Plaintiffs

[1, 2] First: *An employee who misappropriates funds of his employer is chargeable as a constructive trustee for the amount of the funds so received and a trust will be impressed upon property acquired by the employee with such funds.*

This proposition is tenable. One who wrongfully detains funds of another is an involuntary trustee thereof for the benefit of the owner, and a trust will be impressed upon property acquired with such funds unless the same is held by a bona fide purchaser for value without notice in good faith. Sec. 2223, 2224, 2243, Civil Code; Mazzera v. Wolf, 30 Cal.2d 531, 535, 183 P.2d 649; Airola v. Gorham, 56 Cal.App.2d 42, 46, 133 P.2d 78; Thompson v. Bank of California, 4 Cal.App. 660, 667, 88 P. 987.

[3, 4] Second: *Where a trustee deposits in a single account in a bank trust funds and his individual funds and makes withdrawals from the account, dissipates the money so withdrawn, and subsequently makes additional deposits of his individual funds in the account, the money which the trustee has deposited becomes a trust fund and the beneficiary is entitled to hold the funds so deposited, and it is unnecessary to show an express intent upon the part of the trustee to replace the trust funds.*

This proposition is likewise tenable. The rule in California is thus expressed by our Supreme Court in Mitchell v. Dunn, 211 Cal. 129, at page 134, 294 P. 386, at page 388, "Moreover, when a trust fund has been partially dissipated by the trustee, and later the trustee deposits in the depleted account personal funds, there is a strong presumption that it was the trustee's intention in making such deposits to make the trust fund whole. Garst v. Canfield, 44 R.I. 220, 116 A. 482." The following cases also support this rule: Hungerford v. Curtis, 43 R.I. 124, 110 A. 650, 654, 12 A.L.R. 1040; In re Gaul's Will, 160 Misc. 123, 289 N.Y.S. 644, 647.

[5] The rule is a sound one and is consonant with the principles of equity and justice. It needs no citation of authority to support the proposition that when a person has stolen, embezzled or misappropriated another's property the injured party should be restored to the possession of his property or its equivalent so long as it has not passed into the hands of a bona fide purchaser without notice. This result is accomplished by the quoted rule and is supported by the authorities above cited including the Supreme Court of this state.

Republic Supply Co. of California v. Richfield Oil Co., 9 Cir., 79 F.2d 375, is not of value in view of the holding of our own Supreme Court in Mitchell v. Dunn, supra.

[6, 7] Applying the principles set forth above to the facts of the instant case, it is evident that plaintiffs established that the entire sum of $4,668.57 paid by Mr. Bailey upon the purchase price of the Orange county property belonged to them and not merely the sum of $2,620.57, since every payment that he made to the sellers and upon encumbrances of the property was by way of checks drawn on his account at the Farmers and Merchants Bank of Los Angeles, which contained the trust funds. The fact that Mr. Bailey had drawn the account down to the sum of $46.91 at one time, and thereafter deposited the sum of $3,137.00 of his personal funds upon which he drew the sum of $2,048.00 in favor of the sellers, does not, in view of the second proposition stated above, change the rule that the funds were trust funds, and that when on October 15, 1942, he deposited $3,137.00 in his account he was presumed to have intended a restoration *pro tanto* of the trust funds belonging to plaintiffs which he had previously deposited in the account and subsequently dissipated.

In view of such conclusions the portion of the judgment from which the appeal is taken is reversed with directions to the trial court to modify its judgment by decreeing that plaintiffs are the owners of the parcel of real property located in Orange county and described in the complaint, subject to existing encumbrances, if any, and to the payment to defendant Irene Bailey of such sums of money as she may have paid upon the purchase price of said property with her own separate funds subsequent to her husband's death.

MOORE, P. J., and WILSON, J., concur.

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90 Cal.App.2d 662

Application of G. W. McNEAR, Inc.

Appeal of GEOPHYSICAL SERVICE, Inc.

Civ. 3753.

District Court of Appeal, Fourth District, California.

March 17, 1949.

Hearing Denied May 12, 1949.

Venue ⚷7

Action to compel appointment of arbitrator in accordance with terms of contract to ascertain amount of damage caused on land as result of geological work was properly brought in county where land was located and alleged contract was to be performed and venue could not be changed to county of principal office of corporate defendant, where it did not conclusively appear that no contract had ever existed or that it had been properly rescinded. Code Civ.Proc. § 395; Const. art. 12, § 16.

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Proceeding in the matter of the application of G. W. McNear, Inc., a corporation, for an order directing arbitration, opposed by Geophysical Service, Inc. From an order denying its motion for a change of place of trial, opponent appeals.

Affirmed.

Harvey, Johnston, Baker & Palmer, of Bakersfield, for appellant.

Dearing, Jertberg & Avery, of Fresno, for respondent.

BARNARD, Presiding Justice.

Geophysical Service, Inc., appeals from an order denying its motion to transfer this matter to the Superior Court of Los Angeles County. The proceeding was brought by G. W. McNear, Inc., to compel the appointment of an arbitrator and to require that an arbitration proceed in accordance with the provisions of a written contract. The respondent is a California corporation with principal offices in San Francisco. The appellant is a foreign corporation authorized to do business in California, with its principal California office in Los Angeles.

On Sepember 2, 1947, these parties executed an agreement which provided that the appellant might do certain geological and geophysical work on a tract of land in Fresno County owned by the respondent, on condition that it would pay for any damage done to existing water wells on the property. The work was to be begun within two weeks and completed within sixty days thereafter. It was agreed that "Food Machinery Corporation" was to inspect the wells before and after the work, and make a report with its estimate of the amount of damage, if any. This report was to be conclusive as to the fact of damage but not as to the amount. It was then provided that in the event damage was reported, and if the parties could not agree as to the amount of compensation, each of the parties should appoint an arbitrator, the two so appointed should forthwith select a third, and the decision of the majority should be binding. Attached to the contract was an agreement to make the inspections and furnish the reports mentioned, which was signed "Food Machinery Corporation by E. H. Hansen."

The petition herein set forth a copy of this contract and alleged that Food Machinery Corporation had determined on December 19, 1947, that damage from this work had resulted to a certain water well on this land; that the parties were unable to agree as to the amount of compensation therefor; that the petitioner had appointed a certain person as an arbitrator and had demanded, in accordance with the contract, that the appellant appoint an arbitrator; and that the appellant has refused so to do or to proceed with the arbitration in the manner agreed upon.

The appellant filed a demurrer and moved for an order transferring the proceeding to Los Angeles County. Its affidavit in support of the motion alleged that its principal office in California is in Los Angeles and that it has not maintained an office in the county of Fresno; that the petitioner's principal office is in San Francisco; and that the agreement set forth in the petition was signed in September, 1947, but was not entered into in Fresno County. It was then alleged that this agreement so signed was never, and is not now, a contract between the parties; that there is no written agreement to submit any controversy to arbitration; that grounds exist for the revocation of the agreement so signed; that on March 12, 1948, a written notice of rescission was served on the respondent and on Food Machinery Corporation; that E. H. Hansen, who signed the agreement on behalf of Food Machinery Corporation, was not authorized to sign the same since he was personally interested in the water well claimed to be damaged and in the recovery of damages to said well; that Hansen knew when he signed the agreement that he was acting as an agent of the respondent; that the appellant signed the agreement believing that Food Machinery Corporation was a disinterested party; and that Food Machinery Corporation, therefore, could not accept any duty under the agreement and could not make any determination as alleged in the petition.

The matter was submitted on the petition and appellant's affidavit. The motion for change of venue was denied and this appeal followed. In its opening brief the appellant contends that it clearly appears that its residence and principal place of business is in Los Angeles County; that the contract was not made in Fresno County; that the fact that the contract concerned damage to a water well in Fresno County is immaterial; that the only matter involved in a proceeding to compel the appointment of an arbitrator; that this is purely equitable and entirely transitory; that any order issued must be effective where the appellant can be found, which is in Los Angeles County; that an arbitrator may reside and may act anywhere; and that if the collection of any damages is involved there is no contractual provision that such damages be paid in Fresno County.

The respondent concedes that this matter is transitory and equitable in nature, and that the contract was not made in Fresno County. It contends that the matter of venue is here controlled by section 16, article XII of the Constitution rather than by section 395 of the Code of Civil Procedure. Section 16 provides that a corporation may be sued "in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs; or in the county where the principal place of business of such corporation is situated, * * *". It is then argued that the burden of proof is on the appellant to show that Fresno County is not a proper county for trial; that this may not be done by merely showing that appellant's residence is in Los Angeles County; that the appellant must further show that the contract was not to be performed in Fresno County, that the obligation or liability did not arise there and that the breach did not occur in that county; and that the appellant has failed in this regard. In its closing brief, the appellant contends that the appointment of an arbitrator by it was necessarily an act which was to be performed where appellant is located, and that the appointment of an arbitrator has nothing to do with the collection of damages for any alleged injury to a water well since it is to be presumed that an arbitrator, if appointed, will perform his duty. It is further contended that since no counter affidavit was filed appellant's affidavit conclusively proves that the alleged contract was rescinded for fraud on March 12, 1948, and that it follows that there was no existing contract, that no breach could have occurred in Fresno County, and that no obligation or liability to appoint an arbitrator could have arisen there.

Aside from the claim of rescission because of fraud the allegations of appellant's affidavit, which are material here, were confined to the fact that its principal place of business is in Los Angeles, and that the contract was not made in Fresno County. No direct attempt was made to allege facts relating to where the contract was to be performed, where the obligation or liability arose, or where the breach occurred. Indirectly, these matters are included in the contention that there was no existing contract at all. Disregarding for the moment the claim of rescission, we think it sufficiently appears that it was the intention of the parties that this contract was to be performed in Fresno County, and that it also appears that the obligation or liability arose there. The land was there, the contemplated work could only be done there, and any possible injury to the water wells must occur there. The entire contract relates to something to be done in Fresno County and to what shall then be done if a certain thing occurs in that county which did occur there. The agreement to pay damages was a part of the contract covering work to be done in Fresno County, as was the agreement for arbitration, and the liability for damage and the obligation to appoint an arbitrator arose directly from this contract for work which was to be performed in that county. The contract was to be performed in Fresno County and the provisions for an arbitration were incidental to and a part of that performance. The appellant did not meet the burden of proof resting upon him in this regard, and the facts in that connection were sufficient to support the court's action in denying the motion. Rawson v. J. C. Forkner Fig Gardens, Inc., 206 Cal. 4, 272 P. 1057; Konig v. Associated Almond Growers, of Paso Robles, 37 Cal.App.2d 360, 99 P.2d 678; Swartz v. Cal. Olive Growers' etc. Corp., 56 Cal.App.2d 168, 133 P.2d 20. "In a suit upon the contract of a corporation, where no place of performance is expressly stipulated, it ought to be held performable in the place where the circumstances * * * indicate that the parties expected or intended it to be performed." Bank of Yolo v. Sperry Flour Co., 141 Cal. 314, 74 P. 855, 65 L.R.A. 90.

It does not conclusively appear that no contract had ever existed, or that it had been properly rescinded. The notice of rescission was given on March 12, 1948, long after the work was completed and when no restitution could be made. The petition sufficiently alleged an existing contract. Appellant's affidavit admitted the execution of that contract but claimed that it was invalid. The most that can be said is that there was a conflict between the allegations of the petition and those contained in the affidavit. Moreover, the claim of invalidity was a matter which might be appropriate at the hearing, but which was not controlling with respect to the proper place for a hearing.

The order appealed from is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

90 Cal.App.2d 510

BEADLE v. NORTHRUP et al.

NORTHRUP v. BEADLE.

Civ. 16474.

District Court of Appeal, Second District, Division 3, California.

March 10, 1949.

Rehearing Denied April 6, 1949.

Hearing Denied May 5, 1949.

1. Evidence ⚷594

That witnesses were not contradicted did not establish truth of their testimony.

2. Fraudulent conveyances ⚷297, 300(4)

Evidence warranted setting aside parents' mortgage to daughter, executed on date of trial in action against father, on grounds that mortgage was not supported by claimed consideration of existing indebtedness, and rendered parents insolvent. Civ.Code, §§ 3439.03, 3439.04.

3. Fraudulent conveyances ⚿310

Under cross-complaint to cancel mortgage as fraudulent, finding that mortgage to daughter rendered parents insolvent was material, since note and mortgage were fraudulent if they rendered parents insolvent unless given for a fair consideration. Civ.Code, §§ 3439.03, 3439.04.

4. Fraudulent conveyances ⚿298(2), 301(3)

Evidence supported finding that parents and daughter had mutual intent to hinder, delay, and defraud parents' creditors, when parents gave mortgage to daughter.

5. Fraudulent conveyances ⚿310

Finding that mortgage was given with mutual purpose to hinder, delay, and defraud mortgagors' creditors was alone sufficient to support judgment cancelling the mortgage.

6. Fraudulent conveyances ⚿286(4)

Permitting examination of witness respecting her negotiations with mortgagor for transfer of property to witness, as bearing upon right to cancel mortgage as in fraud of creditors, was not error.

7. New trial ⚿99

Denial of motion for new trial on ground of newly discovered evidence was discretionary.

8. Appeal and error ⚿762

Points first raised in appellant's closing brief will not be considered unless required in interest of justice or unless meritorious cause is shown for failure to raise them in opening brief.

9. Appeal and error ⚿173(9)

Alleged estoppel of purchaser at execution sale to question validity of mortgage given by judgment debtor involved factual considerations that should have been presented to trial court, and would not be considered when first raised in appellant's oral argument on appeal.

◆

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Action by Mildred Beadle against Jessie Northrup and others to foreclose mortgage, wherein Jessie Northrup filed cross-complaint for cancellation of the mortgage. From a judgment for cross-complaint, plaintiff appeals.

Affirmed.

F. D. R. Moote, of Los Angeles (Lloyd E. Keiser, of Los Angeles, of counsel), for appellant.

Maurice Gordon, of Los Angeles, for respondents.

SHINN, Presiding Justice.

In June, 1942, Jessie Northrup brought suit against John and Susan Wight for $2,500. On February 9, 1943, the day the trial commenced, Wight and his wife executed a note for $7,600 in favor of their daughter, Mildred Beadle, and a mortgage securing the note on a five-unit residential property in Whittier. Mrs. Northrup recovered judgment of some $2,900, and in 1945 purchased the property at execution sale. Mrs. Beadle brought the present action to foreclose the mortgage, Mrs. Northrup answered and filed a cross complaint alleging that the note and mortgage had been given without consideration and with the mutual purpose of the Wights and Mrs. Beadle to hinder, delay and defraud the creditors of the mortgagors. After a protracted trial the court determined the issues of want of consideration and fraud in favor of Mrs. Northrup and rendered judgment declaring the note and mortgage invalid. Mrs. Beadle appeals.

John Wight, Mildred Beadle and her husband A. L. Beadle, testified that the consideration for the mortgage was an antecedent indebtedness of Wight to Mr. and Mrs. Beadle consisting of the following: Loans amounting to $600 made by Mrs. Beadle to her father during the years 1936–39; $700 loaned to him in October, 1939; $950 owing for Mrs. Beadle's services in caring for the mortgage property over a three year period; $800 expended for upkeep and repairs of the property; $982 owing for automobiles purchased from A. L. Beadle; $2,200 for gasoline, oil, tires and auto repairs, and the remainder, interest on the indebtedness. Except for a single memorandum relating to the purchase of an automobile from A. L. Beadle, the testimony of the three witnesses was not corroborated by any written agreement, book of account, statement, check, receipt or any other writing, nor by the testimony of any disinterested witness.

[1, 2] The problem of the trial court was to determine the degree of credibility of plaintiff's witnesses and the weight that should be given to their testimony. The fact that they were not contradicted by the other witnesses did not establish the truth of their testimony. Davis v. Judson, 159 Cal. 121, 128, 113 P. 147; Knapp v. Elliott, 81 Cal.App.2d 667, 184 P.2d 934; 27 Cal. Jur., Sec. 156, p. 184; 8 A.L.R. 796. The contention that there was insufficient reason for disbelieving the three witnesses is essentially a claim that the court acted arbitrarily and unreasonably or, stated otherwise, that the testimony was so logical, so consistent and straightforward as to remove all reasonable doubt as to its truthfulness. It requires no extended analysis of the 1100 pages of transcript to answer this contention. A brief summary will suffice.

The property in question was subject to a $10,000 balance of a first trust deed and a second trust deed of $3,500 in favor of Mollie Luke Freeman, given in June, 1939. There was evidence that the property was worth only $12,500. Mrs. Beadle and her husband, A. L. Beadle, had come to Whittier in December, 1935, when she was only 19 years of age, to take over a rented garage which Wight was operating with one Thomas, under the name of Quaker City Motor Co. Mr. and Mrs. Beadle testified that they then had $2,000 or $2,500. Mr. Beadle testified that his wife deposited this money in a postal savings account. Mrs. Beadle testified that she kept the money around the house and deposited none of it. There was no other evidence that they possessed any such sum of money. Mrs. Beadle also testified that in October, 1939, she received $700 as an inheritance, that she cashed a check for this amount and loaned the money to her father. It appeared from a photostat of the check that it had been cashed October 19th and it was proved by the postal savings records that on the same day Mrs. Beadle opened a savings account with a deposit of $500, that the account was maintained for several years, infrequent deposits and withdrawals were made and the balance never exceeded $500. These circumstances were sufficient to cast serious doubt upon the alleged $700 loan transaction. The $600 which Mrs. Beadle testified had been previously loaned to her father in the years 1936–38 was made up of numerous small sums advanced to him in cash. No record of the amounts or dates of these loans was produced. There was no evidence that Mr. Beadle had prospered in his business or that he and his wife were able to finance her father to the amount of five or six thousand dollars. The claimed indebtedness of $800 for repairs and upkeep of the property was explained by Mrs. Beadle. She and her husband were living in one of the units and she was managing the property. When repairs or improvements were needed she had them made and paid for them from her own funds. She did not explain what she had done with the rents she collected nor did she produce any corroborating evidence relating to the alleged expenditures. She testified that she had had a book account of the items but had destroyed it shortly after the mortgage was given. The claim that she was to be paid $25 per month, in addition to free rent, for managing the property rested upon her own testimony and that of her husband and her father. The evidence furnished no reason for believing that her services were worth more than the rental value of her apartment.

The remaining items are the $982 claimed to be the purchase price of several automobiles and $2,200 claimed for gas, oil and tires sold Wight, and charges for auto repairs. When Wight gave his deposition he listed seven cars and a trailer as having been purchased from Beadle, with their several purchase prices which totaled $5,800, and testified that he had made the purchases and still owed the money. Mr. Beadle testified that the item of $982 consisted of three sums charged Wight for two cars and a trailer, and that he had made up the account from memory. Mr. Wight then changed his testimony to conform to that of Beadle. A single memorandum was produced showing a sale of a car for $510 with a notation that "Dad" owed $252.55. It appeared that Beadle kept account books of his business but that they also had been destroyed in 1943. The testimony respecting charges for gas, oil, tires and repairs was extremely vague. Wight testified that when he gave his deposition he had forgotton this claim entirely. During the years in question Beadle maintained a small bank account. It was relatively inactive, seldom showed a balance of more than $200, and frequently stood below $100. Wight testified with reference to the cars he had acquired that Beadle had purchased them second hand, had then obtained from finance companies as much in loans as he had paid for them, had sold them to him, Wight, subject to the liens of the finance companies, and stood to lose nothing if they were never paid for. Beadle also testified that the cars were financed in this manner, although he did not admit that the financing covered the full purchase price of the cars.

There were many discrepancies and contradictions in the testimony of the principal witnesses. Even on the printed record, without the advantage of observing the witnesses, which the trial court had, we find the evidence respecting the claimed indebtedness far from satisfactory. The fact that all the alleged agreements were oral, the absence of checks, records or writings of any sort respecting any of the claims, the destruction of such records as Mr. and Mrs. Beadle may have had and the lack of corroborating testimony of any disinterested witness, were all circumstances which tended to instill doubt as to the validity of the claims. Although the testimony of the parties to the mortgage was not directly contradicted except in a few particulars, the issue depended upon the trial court's appraisal of its credibility. The record furnishes no basis whatever for disturbing the conclusion that the mortgage was not given in consideration of an antecedent indebtedness.

[3] The court also found that the execution of the note and mortgage in favor of Mrs. Beadle rendered Mr. and Mrs. Wight insolvent. It is contended that this finding is not supported by the evidence. It is a material finding for the reason that if they were thereby rendered insolvent or were already insolvent, the note and mortgage were fraudulent unless they were given for a fair consideration. Civ.Code, secs. 3439.03, 3439.04.

Wight testified that at the time he gave his daughter the note and mortgage he was of the opinion that there was an equity in the property above the first and second encumbrances, although a small one. But it is immaterial whether the mortgage had a substantial value, inasmuch as Mr. and Mrs. Wight obligated themselves to pay their daughter $7,600 in satisfaction of the claimed indebtedness. If the bona fide antecedent indebtedness was disproportionately small, as compared with the obligation of Mr. and Mrs. Wight to pay their daughter $7,600, it would not have been a fair consideration as that term is defined in section 3439.03. Since there was no consideration, it results that the note and the mortgage were given with a presumed intent to hinder, delay and defraud creditors, if Mr. and Mrs. Wight at that time were insolvent or were rendered insolvent. The evidence was sufficient to prove that they were rendered insolvent, if indeed they were not already insolvent. Aside from the Whittier property, Wight owned a 40-acre parcel in San Diego County, encumbered to its full value. He also owned stock in a Nevada corporation and a Montana corporation, both of which held oil and gas leases, either undeveloped or nonproducing. He placed a value of $40,000 on his stock in one of the corporations, and $50,000 on the other, and he mentioned some equities in land upon which he did not place a value. He testified in his deposition that on February 9, 1943, he was in debt to the extent of $200,000. He corrected this to read, "less than $50,000." Elsewhere he testified without correction that he had no way of knowing without checking, but he would say that he owed something over $100,000. In view of the highly unsatisfactory testimony as to the extent of his liabilities and in making allowance for optimism and self-interest in the appraisal of his assets, the court was justified in reaching the conclusion that Mr. and Mrs. Wight were not solvent after they had executed the note and mortgage to their daughter. This state of insolvency and the absence of a fair consideration rendered the note and mortgage fraudulent as against creditors. See Hanscome-James-Winship v. Ainger, 71 Cal.App. 735, 236 P. 325; Allee v. Shay, 92 Cal.App. 749, 268 P. 962.

[4, 5] The judgment rests also upon a finding of an actual intent to defraud, as distinguished from an intent which is presumed in law from the state of insolvency and the want of a fair consideration for the obligation. There was in our opinion sufficient evidence to support the finding that the parties to the mortgage had a mutual intent and purpose to hinder, delay and defraud the creditors of Mr. and Mrs. Wight. If it was given without consideration, the obvious purpose was to place a lien on the property that would be held by Mrs. Beadle for the use and benefit of her father and subject to his control. Whatever equity there was in the property would have been converted into an encumbrance superior to the lien of any judgment Mrs. Northrup might secure. Mrs. Beadle and her father testified that Mrs. Northrup's claim was not mentioned until some time after she had secured judgment, and that the note and mortgage were given to replace earlier ones for $6,400 given Mrs. Beadle in 1939. The testimony as to the consideration for the later mortgage related also to the earlier one. It consisted of the same alleged indebtedness, which was raised to $7,600 by the addition of interest and items alleged to have originated after the date of the first mortgage. The testimony relating to the earlier transaction was vague. Mrs. Beadle testified that she was given the note but that her father had kept possession of the mortgage. No such mortgage was of record and it was claimed that both the note and the mortgage had been lost. The finding that there was no consideration for the 1943 mortgage would apply also to the one alleged to have been given in 1939. We must assume that the court did not believe there had been a bona fide mortgage transaction in 1939, or that Mrs. Beadle was ignorant of the existence of Mrs. Northrup's suit which was going to trial the day the 1943 mortgage was given. Additional circumstances tending to show that no bona fide mortgage was given, either in 1939 or 1943, were the following: Although Wight testified that he had executed the 1939 mortgage, before the execution of the mortgage to Mrs. Freeman, he negotiated the Freeman note and mortgage to Pepperdine, representing it to be a second encumbrance, and later, after the date of the 1943 mortgage, he obligated himself in writing to Mrs. Gerry to procure the release of the property from the liens of both the Freeman trust deed and the Beadle mortgage. Wight testified he had been confident that his daughter would accept other security to replace her mortgage, although he had not discussed the matter with her. A reasonable inference would have been that there was an understanding that the mortgage was to be released upon Wight's request. The finding that the mortgage was given with a mutual purpose to hinder, delay and defraud creditors of the mortgagors is supported by the evidence and this finding alone is sufficient to support the judgment. Vogel v. Sheridan, 4 Cal.App.2d 298, 40 P.2d 946; Fross v. Wotton, 3 Cal.2d 384, 44 P.2d 350.

[6, 7] We have considered the further claim that the court erred in permitting the examination of Mrs. Gerry respecting her negotiations with Wight for the transfer of the Whittier property to her, and find it to be without merit. Neither was there abuse of discretion in denying plaintiff's motion for new trial on the ground of newly discovered evidence.

[8, 9] Upon the oral argument counsel recently employed by appellant advanced new theories of defense. The argument was made that because Mrs. Northrup purchased the property at execution sale she was precluded from questioning the validity of the Beadle mortgage. It was also contended that Wight would be estopped from attacking the mortgage, because of the fraud of himself and Mrs. Beadle, and that plaintiff as his successor would likewise be estopped; that the facts were fully stated in Mrs. Northrup's cross complaint and that it stated no cause of action for relief by way of cross complaint. It is well settled that points first raised in the closing brief of the appellant will not be considered unless required in the interest of justice,

or unless meritorious cause is shown for the failure to raise them in the opening brief. Bank of America Nat. Trust & Savings Ass'n. v. Gandolfo, 5 Cal.App.2d 704, 43 P. 2d 341; Trulsen v. Nelson, 42 Cal.App.2d 750, 755, 109 P.2d 996; Puccetti v. Girola, 63 Cal.App.2d 240, 249, 146 P.2d 714. No such exceptional circumstances are presented here. We are not satisfied that the points do not involve factual considerations that should have been presented to the trial court and which might have been decided in plaintiff's favor. The cause has been tried on the merits and justly decided, and the defenses now urged do not go to the jurisdiction of the trial court. We are well persuaded that the points mentioned should not be given further consideration.

The judgment is affirmed.

WOOD and VALLÉE, JJ., concur.

90 Cal.App.2d 518

NORTHRUP v. SECURITY TITLE INS. & GUARANTY CO. et al.

Civ. 16596.

District Court of Appeal, Second District, Division 3, California.

March 10, 1949.

Rehearing Denied April 6, 1949.

Hearing Denied May 5, 1949.

1. Mortgages 🔑109

Evidence warranted quieting title against note and trust deeds on ground that they were given solely to be used as collateral security for loans for benefit of mortgagor and mortgagee's husband, not for actual loans by mortgagee.

2. Appeal and error 🔑994(3)

Credibility of witnesses was for trial court.

3. Appeal and error 🔑842(1)

Contention that trial court should have believed testimony which was contradictory and in material respects disproved, and should have given full effect to it in deciding factual issues, did not present a question of law on appeal.

4. Appeal and error 🔑173(9)

Contention that purchaser at execution sale was precluded from questioning of validity of trust deed given by judgment debtor did not present a clear question of law, and should have been presented to trial court, and could not be considered when first advanced upon oral argument of appeal.

◆

Appeal from Superior Court, Los Angeles County; Wilbur C. Curtis, Judge.

Action by Jessie Northrup against Lincoln A. Freeman and another to quiet title. From a judgment for plaintiff, opposed by Security Title Insurance and Guarantee Company, defendants appeal.

Affirmed.

Milo V. Olson and F. D. R. Moote, both of Los Angeles, for appellants.

Maurice Gordon, of Los Angeles, for respondent.

SHINN, Presiding Justice.

Lincoln A. Freeman and Molly Luke Freeman, husband and wife, appeal from a judgment in favor of plaintiff, Jessie Northrup, declaring plaintiff to be the owner of certain real property and quieting her title against the claims of appellants Freeman under a promissory note held by Lincoln A. Freeman and a trust deed on said real property securing the same. Plaintiff acquired title by execution sale of the right, title and interest of John and Susan Wight, former owners.

The note for $3,500 which was to be repaid in four months, and the trust deed were dated June 24, 1939. On August 2, 1939, they were transferred to George Pepperdine as security for certain monies to be advanced to John Wight and Lincoln A. Freeman, for use in the development of oil leases in Montana. Pepperdine later transferred them to Consolidated Petroleum Company, which in turn delivered them up, endorsed in blank. Later, Lincoln A. Freeman was named in the assignment as the assignee and he proceeded to take steps for a sale of the property under the trust deed. The court found that the note and trust deed were given by Wight and his wife to Mrs. Freeman without consideration and for the sole purpose of using the same as security for the Pepperdine loan. It was also found that they had been "delivered up" by the holder to John Wight and in truth and in fact were owned by him.

Mr. Freeman testified that he met Wight some time in 1937 and loaned him $300 to help him retain some oil leases; he had borrowed this money from his father, this being his only source of income. From a memorandum book he read items totaling $1,063 as loans to Wight in 1938, part of it his money and the rest of it borrowed from his father, his sister, or from friends. The notations, however, were not made at the time of the supposed transactions. The evidence was that the account was made up as late as 1942. These loans, Freeman testified, were personal loans, not in connection with any business. In June, 1939, he was interested with Wight in an oil venture in Montana; his wife gave him $500 and he loaned it to Wight in cash; on January 10, 1940, his wife loaned Wight an additional $750 in cash; in the following month he loaned Wight $410 which he had received from his father, but this, he testified, might have been given to Wight to pay some of the expenses of their oil venture. He also testified that at the time the $750 was advanced in January 1940 he and his wife understood that the note and trust deed were then held by Mr. Pepperdine but would be returned to Wight after Pepperdine was paid off and would be given to them to secure all monies previously loaned; that he had had a written agreement to this effect, but he had not seen it for quite a long time—that he does not have the agreement; there was another agreement under which he was obligated to Pepperdine, but that he did not have it in his possession; he did not remember whether there was an agreement between himself, his wife, and Mr. Wight, about August 2, 1939, which provided that he and his wife had no interest in the note and trust deed, but there may have been such an agreement. He also testified that negotiations with Pepperdine were undertaken several weeks before August 2nd, when the agreement was made with Pepperdine and the note and trust deed were assigned, but he did not recall whether the discussion started before June 24, 1939; that they discussed with Pepperdine's agent trust deeds on Wight's San Diego property and the Whittier property (the property presently involved). Mrs. Freeman testified that she gave Wight $500 in cash in June, 1939, having at that time about $1,000 in cash in the house. She was given no receipt; she gave him $750 in addition in January, 1940. This was also in currency and she was given no receipt. She never advanced Wight any money by check, nor had she seen a receipt for any money advanced. Wight testified that he could not remember how much he borrowed from Freeman in 1937; that he had a faint recollection of $250 which he thinks was for living expenses; that he had no recollection of a $50 item in 1937; that all the money he got from Freeman was in cash; that he did not know whether he got any in 1938; that he had a faint recollection of items of $200 and $250 in that year; he did not recall the items testified to by Freeman; he had no understanding with Freeman that the money he borrowed in 1937 and 1938 would be secured, but that in 1939 the arrangement was that it would be secured, as well as additional sums to be advanced up to $3,500; there was no agreement as to when the balance would be advanced. He could not tell the dates or amounts when he received money from Freeman after the trust deed was executed; he had kept track of the monies he had borrowed from Freeman in a little book but no longer had the book. He testified that he received as a loan from Mr. Pepperdine some $18,000. He testified, "I thought that he [Freeman] would take other security and that I more or less had the handling of that mortgage, or could handle it more or less as I wanted to until January, 1940, * * * $500 was all he paid me on that, as I understand it; he didn't pay me the balance and therefore I didn't consider that they were really owning that trust deed at that time."

Plaintiff introduced in evidence a carbon copy of an agreement bearing date August 1, 1939, between Wight and Mr. Freeman, which recited that Freeman held the $3,500 note and trust deed on the Whittier property, that he was willing to and would assign the same to George Pepperdine as security for loans, that Wight would repay or cause to be repaid the loans to be made by Pepperdine and that when the same were paid the deed of trust would be reassigned to Freeman. Under the word "witnesses" were two typed lines. Above the upper one was a yellow smear. Clark Sellers, leading authority on questioned documents, testified that the signature of Wight appearing on the agreement was written with a ball point pen, and that no ball point pens were manufactured and sold in the United States until 1945. He also testified that a name had been written on the upper signature line and had been removed by the application of liquid chemical; he had restored the writing and made a photographic enlargement showing the signature to be "L. F. Almonson." Lucille Almonson, called as a witness, identified the signature on the photographic enlargement as her own, but had no recollection of signing the document. She testified that she had been employed in the office of the attorney for Wight, but not prior to 1945.

Much evidence was introduced respecting the business transactions between Wight and Freeman which extended back to June, 1939, when they entered into an agreement by which Freeman agreed to buy from Wight certain government oil and gas leases and equipment in Montana for the sum of $350,000. The testimony given at the trial approaches 600 pages. We have given a summary of it which is sufficient for the purpose of our decision.

[1-3] The circumstantial evidence strongly supports the finding that the note and trust deed were given to Mrs. Freeman for the sole purpose of their being used as collateral security for loans to be made by George Pepperdine for the joint benefit of Wight and Freeman. The testimony of Wight and Freeman, which they depended upon to support their claim that the note and trust deed were given to Mrs. Freeman as security for moneys that had been advanced and were to be advanced in the future, was vague and contradictory. It is altogether probable that Mr. and Mrs. Freeman advanced money to Wight from time to time, either for his personal use or to assist him in his oil ventures, but the evidence furnished good reason for doubting that the trust deed was given as security for the loans. Plaintiff acquired title under the execution sale November 5, 1945. Consolidated Petroleum Company assigned the note to Lincoln A. Freeman September 20, 1946. The contention of Wight and the Freemans that this reassignment was made pursuant to an agreement entered into when the note and trust deed were given was greatly weakened by the fabrication of the written agreement which admitted ownership of the note and trust deed by Freeman and provided for its return to him after the Pepperdine debts were paid, which agreement, although bearing date of August 1, 1939, obviously was not prepared or executed until some time in 1945. This belated attempt to impose a trust deed lien upon the property superior to plaintiff's title acquired at the execution sale failed because the court did not believe the testimony of the defendants. The credibility of the witnesses was for the trial court. Davis v. Judson, 159 Cal. 121, 128, 113 P. 147; 27 Cal.Jur., sec. 156, p. 184; 8 A.L.R 796. The testimony of Wight and Freeman was contradictory and in material respects disproved. The contention that the court should have believed it and given full effect to it in deciding the factual issues, does not present a question of law on the appeal.

[4] Upon the oral argument counsel recently employed by appellants advanced a new theory of defense. It was argued that because plaintiff purchased the property at execution sale she was precluded from questioning the validity of the Freeman trust deed and that since these facts were alleged in the complaint no cause of action was stated. We are not satisfied that this alleged defense presents a pure question of law. It should have been presented to the trial court. No reason has been advanced why the issue was not raised at

the trial, nor is any excuse offered for the failure to raise the point in the opening brief. Under these circumstances we do not feel called upon to consider them. See cases cited in Beadle v. Northrup, Cal.App., 203 P.2d 552.

The judgment is affirmed.

WOOD and VALLEE, JJ., concur.

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90 Cal.App.2d 591

GARCIA et al. v. HEATON.

Civ. 3758.

District Court of Appeal, Fourth District, California.

March 14, 1949.

1. Appeal and error 🔑1008(1)

Under the evidence, whether defendant was negligent because she was driving on a straight, level road, well lighted by headlights of her automobile, and with unimpaired visibility and ran down pedestrian properly proceeding on highway without ever seeing him, or whether defendant was exercising all due care and struck pedestrian when he suddenly jumped or staggered into her pathway, was for trier of fact. Vehicle Code, § 564.

2. Automobiles 🔑244(49)

Evidence that deceased had repeatedly run or staggered in front of automobiles on highway, the last occurrence being shortly before he was struck and killed by defendant's automobile, authorized an inference that deceased may have been guilty of similar negligent acts at time of fatal collision.

3. Appeal and error 🔑996

Where two inferences can reasonably be drawn from evidence, an appellate court is powerless to substitute its findings for that of trier of facts, and, where there is a conflict in inferences reasonably deducible from evidence, decision of trial court is as conclusive as where conflict arises directly from evidence, and appellate court must accept inference which supports the judgment.

Appeal from Superior Court, Kern County; Norman F. Main, Judge.

Action by Ramona L. Garcia and Francisco Garcia against Marjorie C. Heaton to recover for the death of plaintiffs' son when struck by an automobile driven by defendant. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Oliver & Corfman, of Los Angeles, for appellants.

Schell & Delamer, of Los Angeles, for respondent.

L. E. GRIFFIN, Justice.

On June 29, 1946, around 11 p. m. on U. S. Highway 6, which runs in a northerly and southerly direction, about four miles south of Mojave, one R. L. Garcia, a Mexican pedestrian, and son of plaintiffs, met his death when struck by an automobile driven by defendant who was then driving her coupe in a northerly direction. The trial court, sitting without a jury, found that defendant was not guilty of negligence and that deceased was guilty of contributory negligence.

The evidence shows that defendant was proceeding along the highway, the paved portion of which was wide enough for two cars but not for three. It was divided by a white center line and had graded dirt shoulders on each side thereof about the width of a car. It was a perfectly straight, level, desert highway for several miles. The night was dark and there was no rain or fog. Defendant's car was well equipped with high-beamed lights which were on, and she was able to see approximately 200 feet down the highway. The first indication she had of a collision was the impact when her car struck the deceased. She then saw his face come up over the right side of the hood of her car and he rolled off to the right of it and fell near the right edge of the pavement. She saw nothing in the highway to indicate that he was in her pathway although she was looking straight ahead at the time. The deceased was wearing dark-colored trousers (khaki), and a light or white shirt. He was a section hand, and lived at the section camp about one mile south of the scene of the accident.

Defendant produced witnesses who were driving along that highway about the same time. They encountered deceased in their travels, and described his unusual actions shortly before he was struck by defendant's car. Mr. and Mrs. Maxwell testified that they were driving north on Highway 6 at about 9:30 p. m. and at a point about two miles south of Mojave they saw a Mexican in dark clothing; that as they were proceeding about 35 miles per hour in their truck, "All of a sudden from some place * * * there was a man appeared in the road, from the right-hand side of the highway * * * who was in a staggering run, at about a 45 degree angle, across the highway * * * like he was trying to fall down"; that he (Maxwell) had to go around on the right-hand shoulder of the highway to keep from hitting him; that the Mexican then proceeded across the highway. Another truck driver following Maxwell about one-quarter mile back, corroborated Maxwell's testimony as to the movements of his truck and said that when he saw the Mexican he was then sitting on the right shoulder of the road with his "knees up, head down and his hands around his temple."

Another driver and his wife testified that they were driving in a southerly direction about two or three miles south of Mojave between 9 and 10 p. m.; that they saw a Mexican similarly dressed and staggering on the west shoulder of the highway and that this man raised his hand and opened it, allowing dirt to fall therefrom; that they concluded that he wanted a ride.

These witnesses saw deceased after the accident and identified him as the same Mexican they had previously seen.

Another witness testified that as he was proceeding southerly on that highway about two and a half miles south of Mojave at about 9:30 or 10 p. m. a Mexican pedestrian dressed in a white shirt and khaki pants was standing still on the west shoulder of the highway; that when his car was almost on top of him the man "stepped" or "jumped out" in front of it; that he swerved his car and barely missed him; that at that time the Mexican was about two or three feet from the white center line.

Still another witness said that about 10:45 p. m. he saw a Mexican pedestrian, similarly dressed, at a point about three miles south of Mojave or about one or one and a half miles north of the section house, "staggering in a southerly direction on the west one-half of the highway, three feet to the right of the center line"; that he was walking, first on the right and then on the left side of it, waving his hands; that he had to slacken his speed and cross the center line to avoid hitting him.

[1] It is plaintiff's contention that the evidence conclusively shows that defendant was guilty of negligence because she was driving on a straight, level road, well lighted by the headlights of her automobile, and with unimpaired visibility to the front and side, and that she, under those conditions, ran down a pedestrian properly proceeding on the highway under the provisions of section 564 of the Vehicle Code, without ever seeing him; that it was defendant's duty to anticipate the presence of pedestrians on the highway and keep a sharp look-out for them, citing such cases as Hatzakorzian v. Rucker-Fuller Desk Co., 197 Cal. 82, 100, 239 P. 709, 41 A.L.R. 1027; McNear v. Pacific Greyhound Lines, 63 Cal.App.2d 11, 14, 146 P.2d 34; and Eastman v. Rabbeth, 128 Cal.App. 534, 537, 17 P.2d 1009.

From the evidence produced it was well within the province of the court to believe, contrary to plaintiff's contention, that defendant was exercising all due care in the operation of her car, under the circumstances, and that deceased suddenly jumped or staggered out into her pathway. A factual question was presented for the trial court to determine, which decision may not be successfully attacked on this appeal. Gray v. Hartman, 73 Cal.App.2d 401, 166 P.2d 374.

The next argument is that it was error for the trial court to infer that the deceased was guilty of contributory negligence where there was a complete absence of evidence as to his position and actions at the moment of the accident and for some minutes prior thereto, and that assuming deceased was proved to be guilty of negligence in regard to the other cars, there was no inference that such negligence concurred in and continued up to the very time of this accident.

Plaintiffs may have been reading and, in reliance thereon, comforted by the decision of Robinson v. Pioche, 5 Cal. 460, in which case plaintiff, who had been drinking, fell into an uncovered hole dug into the sidewalk in front of defendant's premises. The court below gave an instruction that: "If at the time of the accident the plaintiff was intoxicated from the use of ardent spirits, and that was one of the causes which caused the accident, the plaintiff cannot recover." On appeal the court reversed a judgment against the plaintiff based upon the instruction given and said: "If the defendants were at fault in leaving an uncovered hole in the sidewalk of a public street, the intoxication of the plaintiff cannot excuse such gross negligence. A drunken man is as much entitled to a safe street, as a sober one, and much more in need of it."

The testimony of the witnesses produced by the defendant shows a continuous course of conduct on the part of deceased from about two miles south of Mojave up to a point about a mile to a mile and a half north of the section house. It will be recalled that the accident occurred approximately a mile north of that section house, and the last of the witnesses testifying saw him very closely in point of time to the happening of the accident.

[2, 3] It is plaintiffs' position, as we construe it, that it was error for the trial court to infer that, by reason of deceased's negligent conduct at the other points mentioned, he may have been guilty of similar negligent acts at the time of the collision. Under the circumstances of this case it was not an unreasonable inference. Barry v. Maddalena, 63 Cal.App.2d 302, 303, 146 P.2d 974. Where two inferences can reasonably be drawn from the evidence an appellate court is powerless to substitute its finding for that of the trier of facts, and where there is a conflict in the inferences reasonably deducible from the evidence, the decision of the trial court is as conclusive as where the conflict arises directly from the evidence, and on appeal we must accept the one which supports the judgment. Wright v. Delta Properties, Inc., 79 Cal.App.2d 470, 478, 180 P.2d 57; Hausfelder v. Security-First National Bank, 77 Cal.App.2d 478, 482, 176 P.2d 84; Hotaling v. Hotaling, 193 Cal. 368, 379, 224 P. 455, 56 A.L.R. 734; Mah See v. North American Accident Ins. Co., 190 Cal. 421, 426, 213 P. 42, 26 A.L.R. 123.

Not only was the finding of defendant's freedom from negligence justified but the evidence warranted the finding of contributory negligence of the deceased.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

HANNULA v. HACIENDA HOMES, Inc.

Civ. 13854.

District Court of Appeal, First District,
Division 2, California.

March 18, 1949.

Rehearing Denied April 13, 1949.

See 204 P.2d 937.*

1. Covenants 🔑49

Covenants restricting the free use of land are strictly construed.

2. Covenants 🔑51(2)

Restrictive condition, that no house or structure shall be erected in residential subdivision until plans therefor have been approved by corporation and a written permit has been issued, gave corporation power to refuse a permit for construction of house on fraction of lot remaining after portion of lot on which existing house was situated had been sold.

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* Subsequent opinion 211 P.2d 302.

3. Covenants ⚿49

Strict construction of covenants restricting free use of land does not require an unreasonable construction.

4. Covenants ⚿51(2)

Where there was a restrictive condition that no house or structure should be erected in residential subdivision until plans therefor have been approved by corporation and a written permit has been issued, no lot owner could insist on building more than one home on any lot, if the home did not comport with the design and development of the tract as a whole.

◆

Appeal from Superior Court, Contra Costa County; Homer W. Patterson, Judge.

Action by Margery Livingston Hannula against Hacienda Homes, Inc. (a corporation), for a declaratory judgment that plaintiff and her successors in interest had a right to build a dwelling house on certain realty. From an adverse judgment, the plaintiff appeals.

Affirmed.

Nathan G. Gray, of Berkeley, for appellant.

Breed, Robinson & Stewart and Edgar B. Stewart, all of Oakland, for respondent.

DOOLING, Justice.

Plaintiff appeals from a judgment in favor of defendant Hacienda Homes, Inc., in an action brought by her for declaratory relief.

Appellant is the owner of a portion of Lot 47 in Block E of Orinda Park Terrace, a subdivision in Contra Costa County established for residence purposes. As a part of the general scheme of this subdivision the lots including Lot 47 are subject to certain restrictive conditions including the following:

"1. That no building or structure to be used * * * for any purpose except that of a dwelling house or appurtenance thereto shall be erected or placed upon the above described real property * * *

"7. No dwelling house or other house or structure shall be erected until the plans and specifications with the proposed site therefor have been submitted to and approved by * * * Hacienda Homes, Inc., and a written permit issued therefor."

The only question presented on this appeal is whether respondent Hacienda Homes, Inc., acting pursuant to the restriction numbered 7 above quoted, has the power to determine that it will not permit the construction of any dwelling house upon the portion of Lot 47 owned by appellant.

The question arises in this way: At a time when the entire lot was owned by appellant's parents they constructed a dwelling house on Lot 47. They thereafter sold the part of the lot upon which the dwelling had been built and retained title to the portion of the lot now owned by appellant. Appellant brought her action for declaratory relief asking an adjudication that "plaintiff and her * * * successors in interest have a right to build and erect upon said real property a dwelling house or appurtenance thereto * * *." Faced with this action Hacienda Homes, Inc. considered the question and determined that the use of said portion of Lot 47 as a building site would be detrimental and contrary to the desired, intended and actual residential development of the Orinda area and that said portion of said Lot 47 does not constitute an adequate and acceptable building site.

On the trial respondent was prepared to introduce evidence in support of the reasonableness of this determination but counsel for the appellant stated that he did not question the reasonableness of respondent's determination if it had the power under restriction 7 to make it, counsel stating in this connection: "Our point isn't that they are unreasonable but they are acting in excess of the powers under their covenants."

[1] The question on this appeal is thereby narrowed to one of the interpretation of restriction 7. Appellant relies on the settled rule that covenants restricting the free use of land are to be strictly con-

strued, 7 Cal.Jur. 733, and upon cases like Farquharson v. Scoble, 38 Cal.App. 680, 177 P. 310 which hold that the plotting of lots upon a map and selling them by reference to the map does not create an implied covenant that no lots in the tract will be broken up or divided. The latter rule is only of indirect application to this case since the right to separate ownership of the two portions of Lot 47 is not questioned. If the ownership of a portion of the lot is burdened by the power of respondent to determine that it is not a suitable building site that burden arises by reason of the restriction on its use imposed by restriction 7 and in no sense affects its ownership or alienability. To argue that because there is no restraint on the right to subdivide Lot 47 the respondent cannot under restriction 7 determine that any fraction of it which may be separately owned is not a suitable site for a home is to beg the question whether that power is given to respondent by restriction 7.

[2-4] Construing the restriction strictly, as we must, it still appears that both the "plans and specifications" and the "proposed site" are to be approved by Hacienda Homes, Inc. Appellant would have us limit the approval of the "proposed site" to the choice of some location on the fraction of the lot owned by her. The unreasonableness of this construction becomes clear if we assume for example that a lot owner should subdivide his lot into twenty-five foot frontages. If the respondent is without power to determine that each twenty-five foot lot is not a suitable building site then we might have a row of houses on twenty-five foot lots in the midst of a restricted residence district where all other homes were on large lots with ample area on every side. Strict construction does not require unreasonable construction. Walters v. Bank of America Nat. Trust & Savings, Ass'n, 9 Cal.2d 46, 52, 69 P.2d 839, 110 A.L.R. 1259. It seems clear that each lot owner is entitled to construct at least one home somewhere on his lot on a site to be approved by the respondent since the lots were sold for that purpose. It seems equally clear that if it did not comport with the design and development of the tract as a whole no lot owner could insist on building more than one home on any lot. If that is true no lot owner should have it in his power to compel the construction of more than one home on any single lot by the device of dividing its ownership into two or more portions.

Since the reasonableness of respondent's determination is not challenged we have a case where it is not questioned that the portion of Lot 47 owned by appellant is in fact not a suitable site for a home in view of the development of the tract as a whole. This being so under the restriction that no home may be built until the "proposed site" is approved by it respondent acted properly within its powers in disapproving appellant's fraction of a lot as a building site.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.

90 Cal.App.2d 461

HANNA v. RAPHAEL WEILL & CO. et al.

Civ. 13905.

District Court of Appeal, First District, Division 2, California.

March 7, 1949.

1. False imprisonment 🔑6

The essential element in "false imprisonment" is the restraint of the person. Pen. Code, § 236.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "False Imprisonment".

2. False imprisonment 🔑5

Force is not a necessary element of "false imprisonment". Pen.Code, § 236.

3. False imprisonment 🔑31

Evidence that customer, after purchasing a pair of gloves in store, left store and was followed along public sidewalk by a woman detective and special police officer, that one of them took customer by the arm, and that special officer informed customer that she should go back to store with them, that they took her back to store, and that she was immediately released and told that whole incident was a mistake, sustained a finding of "false imprisonment". Pen.Code, § 236.

4. False imprisonment 🔑15(3)

An employer is liable for false imprisonment when acts of special police officer are in excess of his authority or are committed while in performance of his duty to the employer, such as the protection of the employer's property.

5. False imprisonment 🔑15(3)

Mere fact that one in private employment also has a commission from the public as a police officer does not protect private employer from liability to third persons for false imprisonment referable to police officer's capacity as a private employee.

6. Arrest 🔑63(1)

A police officer may not make an arrest for a misdemeanor which has not been committed in his presence. Pen.Code, § 836.

7. False imprisonment 🔑33

If special officer who makes arrest in scope of employment by a private employer continues to hold the one arrested in custody thereafter, question of authority, to that extent, bears on issue of damages for which private employer is liable. Pen. Code, § 236.

8. False imprisonment 🔑39

Where woman detective and special officer employed as store detectives followed customer suspected of shoplifting into a public street and told customer to go back into the store with them, whether they were so authorized by employer, so as to render employer liable for false imprisonment, was for jury. Pen.Code, § 236.

* * *

Appeal from Superior Court, City and County of San Francisco; Thos. M. Foley, Judge.

Action by Hazel E. Hanna against Raphael Weill & Company (a corporation), and others, to recover damages for alleged false imprisonment. From a judgment for defendants, plaintiff appeals.

Judgment reversed.

Elmer P. Delany and Wm. A. Sullivan, both of San Francisco, for appellant.

Brobeck, Phleger & Harrison, Daniel J. O'Brien, and Jerome J. Cahill, all of San Francisco, for respondent.

NOURSE, Presiding Justice.

In her action for damages for false imprisonment plaintiff alleged and proved that after purchasing a pair of gloves at a counter in the "White House" she asked the clerk for a shopping bag to carry an extra sweater she had worn on entering the store. Having placed the sweater and the gloves in this bag with her sales slip she left the store and was followed for some distance along the public sidewalk by a woman detective and a special officer who told plaintiff he was a policeman. One of these took plaintiff by the arm and the special officer told her: "You go back with us. It will be better for you if you do." They took her back to the store where she was immediately released and told the whole incident was a mistake. At the close of plaintiff's case the trial was taken from the jury when defendants' motion for a non-suit was granted.

The only question on this appeal is whether appellant proved a prima facie case of false imprisonment which should have gone to the jury.

[1, 2] Section 236 of the Penal Code defines false imprisonment as "the unlawful violation of the personal liberty of another." The essential thing in false imprisonment is the restraint of the person. Vandiveer v. Charters, 110 Cal.App. 347, 355, 294 P. 440; Ware v. Dunn, 80 Cal.App.2d 936, 943, 183 P.2d 128. This essential element was proved by competent evidence. The appellant went further and gave proof that the restraint was not made upon a complaint or warrant. And, though force is not a necessary element, appellant tendered evidence that a sufficient amount of force was used by the two employees to convince her that resistance would be unavailing.

[3] Whatever may be written about the burden of proof it is sufficient here to say that, on a motion for non-suit, the evidence of what occurred on the public street, the return of appellant to the office of respondent White, and his immediate statement to her that: "This is all a bad mistake" would have supported an inference which the jury might have drawn that the arrest and detention was without legal authority and unjustified. Thus, as to the respondents White and Methot, it was necessary to combat that inference by proof satisfactory to the jury.

[4] The respondent Raphael Weill and Company defends the judgment on these grounds: (1) That as an employer it is not responsible for the acts of the special police officer unless it is shown that such acts were in furtherance of the employer's business. Maggi v. Pompa, 105 Cal.App. 496, 498, 287 P. 982; St. John v. Reid, 17 Cal.App.2d 5, 61 P.2d 363, are cited. Neither case decides the issue involved here. Both held that a private employer was not responsible for the negligence of a special police officer appointed by public authority where the injuries were caused while the officer was "in the discharge of his police duties." St. John v. Reid, supra, 17 Cal. App.2d at page 8, 61 P.2d at page 363. And it is said that the employer is liable when such acts of the officer are "in excess of his authority" or are committed while in performance of his duty to the employer, such as the protection of his employer's property. 57 C.J.S., Master and Servant, § 565, p. 283.

[5] The lack of harmony in the decisions relating to such liability is discussed in 35 Am.Jur. p. 971, where it is said that: "there is actually little, if any, dissent from the proposition that the mere fact that one in private employment also has a commission from the public as a police officer does not protect his private employer from liability to third persons for acts which are referable to the former's capacity as private employee, although the private employer is not responsible for acts or omissions referable to his character as a public officer."

[6] Here the evidence is that the "arrest" and detention were made for the recovery of the employer's property and that they continued after the officer learned that no crime had been committed—either felony or misdemeanor. It also appears that they "suspected" the theft of a pair of gloves not worth more than two dollars. It is the settled rule that a police officer may not make an arrest for a misdemeanor which has not been committed in his presence. Penal Code, sec. 836; Ware v. Dunn, 80 Cal.App.2d 936, 943, 183 P.2d 128. Here the evidence is that the store detectives were told by a customer that appellant might have stolen a pair of gloves.

[7] Mackie v. Ambassador Hotel & Inv. Corp., 123 Cal.App. 215, 11 P.2d 3, is also cited, but in that case the arrest was clearly not made within the scope of the officer's employment either as a special police officer or as an employee. The case is not in harmony with the rule stated in 57 C.J.S., Master and Servant, § 565, p. 283, and 35 Am. Jur. p. 971 (which is supported by ample authority), but that is immaterial since the only reasonable inference to be drawn here is that White was acting in the course of his employment by the "White House" when he first made the arrest. If he continued to hold respondent in custody thereafter the question of authority to that extent would bear on the issue of damages for which the employer was liable, but it would not effect this order of non-suit.

[8] But on the general issue of the responsibility of the employer the only evidence is that White was employed as a store detective to protect the employer's property and that he followed appellant to the street for the purpose of apprehending her. It is properly inferable that the acts of both White and Methot were all done for that purpose. It thus becomes a matter of fact—and one of defense—whether they were so authorized by the employer, or whether their acts were ratified by subsequent approval. But, in so far as the employer respondent is concerned, all this discussion as to the status of White seems to be idle since the arrest was originally made by Methot who was not a special officer, but merely an employee hired to protect her employer's property.

Judgment reversed.

GOODELL and DOOLING, JJ., concur.

90 Cal.App.2d 491

PEOPLE v. THOMAS.

Cr. 717.

District Court of Appeal, Fourth District, California.

March 9, 1949.

1. Criminal law 🔑245

Where defendant admitted that order of commitment was made on June 3, which was within 15 days of date that information was filed, and it was apparent that insertion of the date May 20, by the committing magistrate in the order of commitment was a clerical error, case should have been remanded by the superior court to the committing magistrate to permit correction of commitment. Pen.Code, §§ 995, 1382, subd. 1.

2. Criminal law 🔑241

Failure of committing magistrate to endorse order of commitment upon complaint did not deprive order of its validity or affect any substantial rights of the defendant. Pen.Code, § 995.

3. Indictment and Information 🔑144

Where information was in fact filed within 15 days after defendant had been held to answer, dismissal was not authorized under statute because form of commitment printed on back of complaint erroneously showed a date of commitment more than 15 days before information was filed. Pen.Code, § 1382, subd. 1.

4. Criminal law 🔑238
Perjury 🔑34(1)

Perjury must be proved by testimony of two witnesses, or by one witness and corroborating circumstances, but in a preliminary examination, defendant need not be proved guilty beyond reasonable doubt. Pen.Code, § 1103a.

5. Criminal law 🔑238

"Reasonable or probable cause", required to uphold commitment, exists if there is sufficient proof to make it reasonable to believe that defendant is guilty of offense charged. Pen.Code, § 995.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Reasonable or Probable Cause".

6. Indictment and Information 🔑144

Where there is some evidence to support charge, courts will not inquire into its sufficiency, in determining whether information should be dismissed on the ground that defendant was committed without reasonable or probable cause. Pen.Code, § 995.

7. Criminal law 🔑238

"Probable cause" sufficient to sustain commitment is a state of facts which inclines a man of ordinary prudence conscientiously to entertain a strong suspicion that a prisoner is guilty. Pen.Code, § 995.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Probable Cause".

8. Criminal law 🔑238

Where accused had testified that one charged with burglary was asleep at his home at time of burglary, and two witnesses testified that the one charged with burglary was one of the men engaged in the burglary, there was "probable cause" to commit defendant for perjury, though such evidence might not have been sufficient to sustain conviction. Pen.Code, § 995.

◆

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Steve Christopher Thomas was charged with perjury. His motion to dismiss the information was granted, and the People appeal.

Reversed.

Fred N. Howser, Atty. Gen., Henry A. Dietz, Deputy Atty. Gen., James Don Keller, Dist. Atty., and Ronald Abernethy and John H. Barrett, Deputies Dist. Atty., all of San Diego, for appellant.

Thomas Whelan, of San Diego, for respondent.

MUSSELL, Justice.

Defendant was charged with the crime of perjury in a complaint filed in the Municipal Court in the city of San Diego. A preliminary hearing commenced on May

11, 1948, was continued four times to June 3, 1948, on which date it was concluded and the defendant held to answer to the Superior Court.

The information charging the defendant with perjury was filed in the Superior Court on June 16, 1948. The defendant was arraigned in that court on July 15, 1948, at which time a motion was made to set aside the information on grounds as set forth in section 995 of the Penal Code. The court observed that the commitment was not dated and signed by the committing magistrate and remanded the case to the Municipal Court for completion of the entry binding over the defendant to the Superior Court.

After the remand to the Municipal Court the committing magistrate completed the form of commitment printed on the back of the complaint, by filling it in, signing it, and dating it May 20, 1948. This was one of the dates on which the preliminary examination had been set for further hearing but was not the date upon which defendant was actually held to answer. The defendant was again arraigned in the Superior Court on July 29, 1948, and on that date moved to set aside the information on the same grounds as before, and on the further ground that since the commitment was now dated May 20, 1948, and the information was filed on June 16th, the information was not filed within 15 days from May 20, 1948, and that under the provisions of subdivision 1, section 1382 of the Penal Code the defendant was entitled to a dismissal of the information. The deputy district attorney present, informed the court that according to the transcript the defendant was bound over to the Superior Court on June 3, 1948, and suggested that in view of the discrepancy the case should be remanded to the Municipal Court for further proceedings. Because of the admitted error the court granted the motion to dismiss the information and this appeal by the People followed.

[1] We think the motion should have been denied and the case remanded to the lower court for further proceedings. It was admitted in open court by counsel for defendant that on June 3, 1948, there was an order committing the defendant and holding him to answer, and that on May 20, the matter was pending in the Municipal Court and was by stipulation continued to May 27, and again to June 3, 1948. It is quite apparent that the insertion of the date May 20, in the order of commitment, was a clerical error and opportunity should have been provided to correct the commitment so as to speak the truth.

[2] The failure of the committing magistrate to endorse the order of commitment upon the complaint did not deprive the order of its validity or affect any substantial rights of the defendant. As was said in People v. Wallace, 94 Cal. 497, 29 P. 950:

> "It is doubtless true that the order holding to an answer must be in writing (Ex parte Branigan, 19 Cal. 133; People v. Wilson, 93 Cal. 377, 28 P. 1061); but when, as a result of examination, such an order has in fact been made and entered upon the docket of the justice, it would seem that no further action upon his part is necessary in order to authorize the district attorney to file an information against a defendant for the offense named in the order. People v. Wilson, supra [93 Cal. 377, 28 P. 1061]. The law requires the justice to keep a docket in which must be entered each action, and all proceedings therein (Pen. Code, § 1428); and we are of opinion that an order holding a defendant to answer is in fact and in law made when it is entered upon the docket of the justice, and the failure to indorse such order upon the complaint or the depositions taken, in no manner deprives the order of its validity, or affects any substantial right of a defendant."

[3] The information was in fact filed within 15 days after defendant had been held to answer. The dismissal was not authorized under the provisions of section 1382 of the Penal Code.

Defendant argues that the order dismissing the information should not be set aside because he was committed without reasonable or probable cause.

The transcript of the evidence taken at the preliminary examination on the perjury charge shows that defendant testified in the Superior Court in San Diego County at the trial of Emory K. McLean and others there being tried on a charge of burglary and robbery alleged to have been committed on the morning of October 10, 1947; that defendant testified in part that on that date at about 6:30 or 7 o'clock A.M., McLean was asleep at defendant's home several blocks from the scene of the burglary, and that McLean had stayed at defendant's home on the nights of October 16th and 17th. To prove the falsity of the testimony of the defendant two witnesses for the prosecution testified that McLean was one of the men engaged in the burglary and robbery which occurred at about 6:30 A.M., on Oct. 19, 1947, and was seen by each of them at that time and place. A hotel clerk testified that McLean registered in the Hotel Churchill in San Diego on the night of October 16, 1947, at 7 o'clock P.M., and the registration was for two nights and the rent was paid in advance.

[4-8] While it is true, as is contended by defendant, that perjury must be proved by the testimony of two witnesses, or of one witness and corroborating circumstances, Sec. 1103a, Penal Code, in a preliminary examination, it is not necessary that a defendant be proved guilty beyond a reasonable doubt. As was said in People v. Mitchell, 27 Cal.2d 678, 681, 166 P.2d 10, 12:

> "'Reasonable or probable cause,' required to uphold the commitment of a defendant (Penal Code, § 995), exists if there is sufficient proof to make it reasonable to believe that the defendant is guilty of the offense charged. (Citing cases.)"

Where there is some evidence to support the charge the courts will not inquire into its sufficiency, and while the evidence in the instant case might not be sufficient to support a verdict of guilty, such evidence is not required at a preliminary examination. "Probable cause" is a state of facts which inclines a man of ordinary prudence conscientiously to entertain a strong suspicion that a prisoner is guilty. Curtin v. Superior Court, 83 Cal.App.2d 461, 463, 189 P.2d 288.

We conclude that reasonable and probable cause was shown to warrant holding the defendant to answer to the Superior Court on the charge of perjury.

Order of dismissal reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

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90 Cal.App.2d 506

PEOPLE v. ALESHIRE.

Cr. 4294.

District Court of Appeal, Second District, Division 2, California.
March 10, 1949.

1. Criminal law 🔑1144(13)

On appeal from a conviction, evidence would be viewed in a light most favorable to the people.

2. Infants 🔑20

Corroboration of child's testimony was not essential to a conviction of committing lewd and lascivious acts upon a female child seven years old. Pen. Code, § 288.

3. Infants 🔑20

Evidence sustained conviction of committing lewd and lascivious acts upon a female child seven years old. Pen. Code, § 288.

4. Criminal law 🔑260(11)

Conflicting evidence, uncertainties in the manner of testimony and similar matters are for the determination of the trier of fact whose conclusion supported by substantial evidence is binding upon an appellate court.

5. Criminal law 🔑260(11)

In prosecution for committing lewd and lascivious acts upon a female child seven years old, question of whether prosecuting witness was testifying as to facts of her own knowledge or on coaching by her mother was to be determined by trier of fact and where there was substantial evidence to sustain finding that prosecuting witness was telling the truth, such determination was binding upon appellate court. Pen. Code, § 288.

6. Criminal law ⚿1036(2)

If objection to the competency of a witness is not made in the trial court, any objection to the witness' competency will be deemed to have been waived and cannot be considered for the first time on appeal. Code Civ. Proc. § 1880, subd. 2.

7. Criminal law ⚿398(1), 448(2)

In prosecution for committing lewd and lascivious acts upon a female child seven years old, question to prosecuting witness' mother whether daughter had any particular name with relation to the private parts of a man or woman, was not objectionable as calling for a conclusion of the witness and not the best evidence. Code Civ. Proc. § 1937.

8. Criminal law ⚿448(2), 464

In prosecution for committing lewd and lascivious acts upon a female child seven years old, question to prosecuting witness' mother as to what word daughter used with relation to the private parts of a man or woman, asked after witness had testified that daughter had a particular name with relation to such private parts, was not objectionable on grounds that no proper foundation had been laid and did not call for a conclusion of the witness.

◆

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Robert Leroy Aleshire was convicted of violating section 288 of the Penal Code and he appeals.

Affirmed.

G. Vernon Brumbaugh, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen. and William E. James, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

This is an appeal from an order denying a motion for a new trial following a judgment of guilty of violating section 288 of the Penal Code after trial before the court without a jury.

[1] Viewing the evidence most favorable to the people (respondent) essential facts are:

In May, 1948, defendant took a female child of the age of seven years into his dark room where he developed photographic negatives. The room was dark and the child was dressed in her sleepers. He placed her on a high stool, sucked her navel and placed her hand upon his private parts.

Questions Presented for Determination

First: *Is the evidence insufficient to sustain the judgment because the testimony of the prosecutrix is inherently improbable?*

[2] This question must be answered in the negative. The law is settled that the prosecutrix' testimony in support of a charge of violating section 288 of the Penal Code need not be corroborated. (People v. Carlson, 73 Cal.App.2d 933, 935, 167 P.2d 812.)

[3, 4] In the present case the prosecuting witness gave direct evidence of each of the facts set forth above. This testimony constituted substantial evidence sufficient to sustain the judgment. Conflicting evidence, uncertainties in the manner of testimony and similar matters were for the determination of the trier of fact whose conclusion supported by substantial evidence as in the instant case is binding upon an appellate court. (People v. Pianezzi, 42 Cal.App.2d 270, 277, 108 P.2d 685.)

[5] Likewise the question of whether the prosecuting witness was testifying as to facts of her own knowledge or on coaching by her mother was to be determined by the trier of fact. In the instant case on cross-examination the prosecuting witness was asked if she had testified in a certain way at the preliminary hearing, to which she replied "no" and then answered "yes". When asked by counsel for defendant if she changed her testimony from "no" to "yes" because her mother shook her head she replied that she did. This, however, related merely to a particular portion of the testimony

previously given by the prosecuting witness at the preliminary examination which was being used by counsel for defendant for the purpose of impeaching the testimony of the prosecutrix. The prosecuting witness specifically stated upon questioning by counsel for defendant that she was told by her mother to tell the truth, and that her mother had not told her what to say in court. The trial judge's determination, with the impeaching evidence before him, that the prosecuting witness was telling the truth is binding upon an appellate court in view of the fact that there was substantial evidence to sustain such finding.

It is obvious that there is nothing inherently improbable in the story told by the prosecutrix.

Second: *Was the prosecutrix a competent witness under section 1880, subdivision 2 of the Code of Civil Procedure?**

[6] This question must be answered in the affirmative. The prosecutrix testified that she knew what it was to tell the truth, what it was to tell a lie and that she knew what it was to take an oath. She was then sworn and *testified without objection upon the part of defendant.* If objection to the competency of a witness is not made in the trial court any objection to the witness' competency will be deemed to have been waived and cannot be considered for the first time on appeal. (People v. Rulia Singh, 182 Cal. 457, 484, 188 P. 987; People v. Collins, 5 Cal.App. 654, 658, 91 P. 158; People v. Horowitz, 70 Cal.App.2d 675, 696, 161 P.2d 833; Cf. People v. Evans, 63 Cal.App. 777, 782, 220 P. 309.)

In view of the fact that defendant failed to object in the trial court to the prosecuting witness' testimony on the ground that she was not a competent witness, under the above stated rule he has waived the right to urge in this court that it was error for the trial judge to permit her to testify.

Third: *Did the trial court commit prejudical error in permitting the prosecuting witness' mother over objection to answer the following questions:*

"Q. Mrs. Zets, did your daughter have any particular name with relation to the private parts of a man or a woman? Mr. Brumbaugh: [a] To which I object as calling for a conclusion of the witness and not the best evidence. The Court: The objection will be overruled. The Witness: Yes, she does. Q. by Mr. Lucas: Please tell us what that word is. Mr. Brumbaugh: [b] I object also on the ground there is no proper foundation laid and it is calling for a conclusion of the witness. The Court: The objection will be overruled. A. She calls it 'Pudah'."

[7,8] This question must also be answered in the negative.

(a) The objection to the first question as calling for a conclusion of the witness and not the best evidence was properly overruled. The question did not call for the conclusion of the witness but for a fact, to wit, whether she knew or did not know her daughter had a particular name for the private parts of a man or woman. The "best evidence rule" is not in any way pertinent to the first question asked the witness. (See section 1937, Code of Civil Procedure; Vol. 4, Wigmore on Evidence, 3rd Ed., 1940, p. 301, sec. 1173 et seq.; 10 Cal.Jur., 1923, p. 850, sec. 132 et seq.)

(b) The objection to the second question that there was "no proper foundation laid" is clearly untenable because the witness by answering the prior question had laid a proper foundation to answer the second question. For the reason stated under (a), supra, the second question did not call for a conclusion of the witness but for a statement of fact. (See People v. Delaney, 52 Cal.App. 765, 779, 199 P. 896.)

The order is affirmed.

MOORE, P. J., and WILSON, J., concur.

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* Section 1880, subdivision 2 of the Code of Civil Procedure reads as follows: "The following persons cannot be witnesses: 2. Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly."

90 Cal.App.2d 558

PEOPLE v. LINDSEY.

Cr. 4297.

District Court of Appeal, Second District,
Division 2, California.
March 11, 1949.

As Corrected on Denial of Rehearing
March 23, 1949.
Hearing Denied April 7, 1949.

1. Robbery 🔑24(1)

In prosecution for robbery of market, its manager's testimony, not inherently improbable, was sufficient, without testimony of defendant's accomplice, to support conviction of first degree robbery.

2. Criminal law 🔑507(1)

An "accomplice" is one concerned in crime, either as aider, abettor, or actual participant.

See Words anud Phrases, Permanent Edition, for other judicial constructions and definitions of "Accomplice".

3. Criminal law 🔑510, 511(2)

Corroboration of defendant's accomplice's adverse testimony is essential to warrant conviction, but is sufficient if it creates more than suspicion of defendant's guilt and tends to connect him with crime charged. Pen.Code, § 1111.

4. Criminal law 🔑511(1)

Defendant's participation in crime charged need not be shown independently of his accomplice's testimony, but statute merely contemplates proof, other than such testimony, that defendant participated in crime. Pen.Code, § 1111.

5. Criminal law 🔑260(11)

The trial court's finding, based on belief in testimony of victim of crime charged, that accused was guilty thereof, is final and conclusive, in absence of prejudicial error.

6. Criminal law 🔑553

To be inherently improbable, testimony must be physically impossible or its falsity must be apparent without resorting to inferences or deductions.

7. Criminal law 🔑260(11)

The trial judge's finding on question of prosecuting witness' veracity, powers of observation and memory cannot be disturbed by reviewing court.

8. Criminal law 🔑260(11)

Even appellate court's conviction of accused's innocence will not outweigh trial court's determination of his guilt

9. Criminal law 🔑260(11)

The trial court's judgment of conviction will not be set aside by appellate court, unless record clearly shows that there is no sufficient substantial evidence to prove crime charged on any hypothesis.

10. Criminal law 🔑260(11)

All intendments favor trial court's judgment of conviction on appeal therefrom.

11. Criminal law 🔑260(7)

A trial judge's remarks, whether written or oral, in course of deciding criminal case, are immaterial on appeal from his judgment of conviction, as appeal is based on record, which excludes all comments made by court in deriving conclusions.

12. Criminal law 🔑406(1)

Anything said by defendant against his interest can be testified to at his trial by a witness to his admissions. Code Civ. Proc. § 1870, subd. 2.

13. Criminal law 🔑412(3)

In robbery prosecution, defendant's declaration that he wished to take his girl friend home before being taken from theatre, at which he was arrested, was admissible as justifying inference of interested friendliness between defendant and such girl and evidence from which her bias could have been reasonably inferred, to be considered with her testimony that defendant was at his home next door to that of girl in town about 550 miles from city in which crime was committed at time thereof.

14. Criminal law 🔑683(4)

Where defendant testified that he was not in city, wherein crime charged was committed, at any time during period of over one month before and fifteen days after its commission, and that he later drove through such city on his way to another city, but did not meet one of two accomplices in such city and never saw other accomplice before in his life, prosecution properly introduced evidence to disprove defendant's statements calculated to establish his absence from such city at all times during which he was known by prosecution to have been in city.

15. Criminal law 🔑1168(2)

In robbery prosecution, admission of People's witness' testimony as to defendant's visit at witness' shop with one of two accomplices and introduction to witness by such accomplice about three months after alleged crime for purpose of rebutting defendant's contrary testimony and his testimony that he never saw such accomplice before in his life was not prejudicial error, though it impeached defendant on collateral fact and tended to place him in accomplice's company three months after crime.

16. Criminal law 🔑683(1)

The prosecution is not precluded from showing falsity of defendant's testimony by evidence of his contrary statements and may rebut his testimony by witnesses who deny what he said.

17. Witnesses 🔑405(2)

In robbery prosecution, defendant's denials on cross-examination that he ever saw People's witness or visited city wherein crime was committed with accomplice positively contradicted prosecution's proof that defendant conspired therein with such accomplice and another to commit robbery, visited such witness's automobile paint shop, and with such accomplices, robbed prosecuting witness, and hence were proper foundation for impeachment by paint shop owner's testimony that defendant visited shop with, and was introduced to, witness by accomplice.

18. Criminal law 🔑1036(1), 1044

A defendant, making no objection at trial to testimony of People's witness, but developing it by cross-examination of such witness, and making no motion to strike it, cannot make objection thereto for first time on appeal from conviction.

19. Criminal law 🔑693

The precise ground of objection to evidence must be made when it is offered.

20. Criminal law 🔑958(3)

Evidence showed that new evidence, contradicting accomplice's testimony against defendant, could have been discovered with reasonable diligence before close of robbery trial and hence was not ground for new trial.

21. Criminal law 🔑958(2)

A motion for new trial on ground of newly discovered evidence was insufficient, in absence of attached affidavit by defendant or his attorney or presentation of such affidavit before argument in robbery trial.

22. Criminal law 🔑958(3)

To warrant granting of new trial on ground of newly discovered evidence, supporting evidence must show that accused did not know of existence of new evidence at time of trial or could not have discovered it by exercise of reasonable diligence.

◆

Appeal from Superior Court, Los Angeles County; William R. McKay, Judge.

Clyde Lindsey was convicted of robbery in the first degree, and he appeals.

Affirmed.

Jefferson & Jefferson, Martha Malone Jefferson, and Bernard S. Jefferson, all of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., Frank Richards, Deputy Atty. Gen., and William E. Simpson, Dist. Atty. and Robert Wheeler, Deputy Dist. Atty., both of Los Angeles, for respondents.

MOORE, Presiding Justice.

Convicted by the court of robbery in the first degree, a jury having been expressly waived, and three prior convictions for felonies having been admitted, defendant now demands a reversal of the judgment on five grounds, seriated and discussed below.

The Evidence Is Sufficient

[1] Sam Shodall was the manager of a market on Sunset Boulevard in Hollywood on September 5, 1947. About 8 a. m. as he was about to unlock the rear

door a stranger approached him, stuck a gun in his stomach and firmly declared his intention to enter with the manager. Instantly "two other fellows stepped up behind" with drawn guns and demanded to know whether Shodall "was sure the burglar alarm was turned off." Appellant was positively identified by Shodall as one of the two. They forbade him to turn on the light and commanded him to unlock the safe in a hurry. When Shodall assured them that he had no keys for its bottom compartment the bandits pushed him aside. Appellant then undertook with hammer and chisel to open the receptacle of the coveted treasure. After he had broken the hammer's handle the men tied Shodall's legs and arms with wire. At that instant Michaelis, the butcher, announced his own arrival by whistling. The men then hastily departed with about $100 which appellant had at first taken from the safe and compelled his victim to place in an empty cardboard box. Promptly upon Michaelis' announcement of his arrival a man put a gun to the butcher's face with an angry command to "stick 'em up." Instead of complying he hastily retreated in quest of a telephone wherewith he notified the police. The butcher identified Carl Friend, one of the three assailants, as the person who had thus menacingly flourished the deadly weapon. The officers promptly arrived and liberated Shodall from his metallic thongs.

The corpus delicti is not disputed. Penal Code, sec. 211. Appellant's identification as the most active participant in the robbery was established by Shodall's testimony. The latter was supported by the testimony of Friend, or if the latter be deemed the chief witness for the prosecution, he was corroborated by Shodall. The implied finding is that Friend confronted the butcher with a gun at the very moment appellant was trussing the helpless limbs of the manager. Since the testimony of the manager was not inherently improbable, standing alone it was sufficient to support the conviction which is reinforced by all intendments. People v. Lindley, 26 Cal.2d 780, 791, 161 P.2d 227.

[2, 3] But appellant persists in contending that there was no evidence of his guilt save the testimony of his accomplice and that such is not sufficient under section 1111 of the Penal Code which requires only that the "other evidence * * * shall tend to connect the defendant with the commission of the offense." An accomplice is one who has been concerned in the crime under investigation either as aider, abettor or actual participant. People v. Shaw, 17 Cal.2d 778, 800, 112 P.2d 241. While his corroboration is an essential safeguard against corrupting the stream of justice it is sufficient if it creates more than a suspicion of guilt and tends merely to connect the accused with the crime. People v. Trujillo, 32 Cal.2d 105, 111, 194 P.2d 681; People v. Tinnin, 136 Cal.App. 301, 304, 28 P.2d 951.

[4] Appellant's confusion arises out of his egregious concept that his participation is not shown independently of the testimony of the accomplice. Such is a specious deduction. The statute merely contemplates that there shall be proof other than the testimony of the accomplice that the defendant participated in the crime. The testimony of Shodall eloquently proves such participation.

[5] The authorities cited, People v. Braun, 31 Cal.App.2d 593, 88 P.2d 728; People v. Shaw, supra; People v. Kempley, 205 Cal. 441, 271 P. 478; People v. Reingold, 87 Cal.App.2d 382, 197 P.2d 175; People v. Robbins, 171 Cal. 466, 154 P. 317, do not support appellant's contention that the testimony of the accomplice was not corroborated. While Braun was shown to have been present while three men committed the offense, his active participation was not proved. Shaw's conviction was set aside because the only evidence against him was the testimony of the alleged accomplices. The Kempley case [205 Cal. 441, 271 P. 485] was reversed on the ground that there was no corroborative evidence aside from the suspicious circumstances. This was not "in accordance with the standards laid down by the courts in the interpretation of the statute." In People v. Reingold [87 Cal. App.2d 393, 197 P.2d 182] a conviction for robbery was upset because aside from the testimony of the accomplice there was no evidence sufficient to "tend directly and

immediately to connect the defendant with the offense charged * * * there must be substantial corroboration of the testimony of an accomplice." In the Robbins case the only evidence besides the testimony of the accomplice was that of the landlady who saw the accused and the boy enter the former's bathroom and the window shade drawn down. In none of the five cases was there a victim who stood at cross purposes with the accused to testify against the latter. In no sense can it be said that Shodall was an accomplice. He was a victim of appellant and if the court chose to believe his narrative of the events of the robbery its finding is final and conclusive in the absence of prejudicial error.

[6] The argument is advanced that the testimony of Shodall was inherently improbable. The facts warrant no such thesis. To be inherently improbable testimony must be such that it is physically impossible or its falsity must be apparent without resorting to inferences or deductions. People v. Huston, 21 Cal.2d 690, 693, 134 P.2d 758; People v. Braun, 14 Cal.2d 1, 3, 92 P.2d 402.

[7-10] The attack made upon the testimony of Shodall was proper before the trier of facts, but on appeal it is sterile. His veracity, his powers of observation and his memory were tried by the judge below and the finding thereon is not to be disturbed by the reviewing court. People v. Newland, 15 Cal.2d 678, 104 P.2d 778; People v. Fleming, 58 Cal.App.2d 37, 44, 136 P.2d 88. Not even the appellate court's conviction of an appellant's innocence will outweigh the determination by the trial court which is the constitutional arbiter of facts. People v. Pruitt, 55 Cal.App.2d 272, 275, 130 P.2d 767. Its judgment will not be set aside unless the record clearly shows that upon no hypothesis is there sufficient substantial evidence to prove the crime charged. People v. Lindley, 26 Cal.2d 780, 791, 161 P.2d 227. That all intendments favor the judgment has become a legalistic cliche. So deeply grounded is this rule that a conviction will not be reversed because the identifying witness can furnish no details but merely believes the accused to have been the offender. People v. Deal, 42 Cal.App.2d 33, 36, 108 P.2d 103; People v. Whitson, 25 Cal.2d 593, 602, 154 P.2d 867.

The Rule Of Reasonable Doubt Was Applied.

[11] Appellant quotes a passage from the comments of the trial judge upon the evidence and from that argues that the court applied the rule of a preponderance of the proof instead of that of reasonable doubt. In the first place he did not quote the pertinent statement of the judge. While the latter did say that he had to determine "where the greater weight in the evidence lies" he proceeded to declare that he "was convinced beyond all reasonable doubt that appellant committed the offense." But if his honor had uttered only the former quotation, appellant's argument would be futile. The remarks of a trial judge made in the course of deciding a case whether written or oral are of no concern on appeal. He might repeatedly announce contrary observations in his discussion, but that which spells triumph or defeat is the contents of the judgment entered. The appeal is based on the record which excludes all comments of the court made in deriving its conclusions. People v. Grana, 1 Cal.2d 565, 570, 36 P.2d 375; People v. Casillas, 60 Cal.App.2d 785, 793, 141 P.2d 768.

No Error In Admitting The Testimony Of Pritchard

[12, 13] Appellant's defense was an alibi. He testified that he was at his home in Vacaville* on September 5, 1947. In this he was supported by Inez Douns who testified that she lived next door to the Lindsey family; on September 5, 1947, appellant asked her to keep the baby while he and his mother attended the fair; she saw him in their yard in the afternoon; he came over with his mother to get the baby at midnight; she saw him there before September 5 "about every day." The People undertook to overcome the effect of Miss Douns' testimony by ad-

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* Vacaville is about 550 miles north of Los Angeles.

ditional proof of her social relationship with appellant. After proving that she lived next door to, and fraternized with, the Lindsey family, deputy sheriff Prichard who arrested appellant at the theater was called to prove the close proximity of the Lindsey home to that of the alibi witness and to give appellant's admissions at the time of his arrest. He testified that when he arrested appellant at the theater appellant stated he wished to take his girl friend, Inez Douns, home before he was taken from the show. To appellant's general objection to Prichard's testimony the prosecutor stated that it was offered in rebuttal of the testimony of Inez Douns "and also in rebuttal to the testimony of the defendant." Neither the objection that no foundation had been laid nor any other than the general objection was made to Prichard's testimony as to his conversation with appellant at the theater.

There was no error in such ruling. Whatever defendant says that is against his interest can be told at his trial by a witness to his admissions. Code Civ.Proc., sec. 1870, subd. 2. Appellant's declaration that he had attended a theater with Miss Douns justified an inference of an interested friendliness between them and was evidence from which her bias could have been reasonably inferred to be considered along with her testimony that appellant was at his home in Vacaville in the early morning as well as at midnight of September 5, 1947. People v. Gregory, 120 Cal. 16, 21, 52 P. 41; People v. Bartol, 24 Cal.App. 659, 665, 142 P. 510.

No Error In Admitting Jones' Testimony

[14] In an attempt to establish his alibi, appellant testified that (1) not only did he not participate in the alleged robbery but, also, that he was not in Los Angeles at any time between the first day of August and September 20, 1947; (2) that although he was in Los Angeles "in December or October," 1947, he just drove through alone on his way to San Diego; (3) but did not in Los Angeles meet Carl Friend or visit Clyde Jones' place to see about getting his car painted; (4) he was never introduced to Jones by Eddie Smith; (5) he had never seen Smith before in his life. Having encompassed all time in his zeal to emphasize his alibi it was proper for the People to disprove appellant's statements that were calculated to establish his absence from Los Angeles at all the times during which he was known by the prosecution to have been in that city. To this end the People called to the stand Mr. Clyde Jones who testified that appellant, accompanied by Eddie Smith, called at his shop about a week before Christmas, 1947. Smith introduced appellent as a former schoolmate as follows: "Clyde meet Clyde * * *" and they laughed. Appellant was in the shop for 30 minutes. Jones observed his deformed finger and heavy beard. His car was a dull green. After Jones had testified the court interrogated appellant and inspected and sympathetically made mention of appellant's deformity.

[15, 16] Nothing was contained in the Jones rebuttal testimony that implied another crime by appellant and it was not objected to on that account. The bases of appellant's criticism of the testimony is that (1) it impeaches appellant on a collateral fact; (2) it tends to place appellant in the company of Smith three months after the crime alleged, citing People v. Janssen, 74 Cal.App. 402, 240 P. 799. While the evidence did accomplish those two facts it was not for that reason prejudicial. The propriety of rebuttal evidence is determined by the doctrine of fair play. The accused may not overemphasize his claims of utter innocency by saying that he never at any time committed an offense of the kind on trial, or never met his accuser or an adversary witness in his lifetime and claim that he has thereby disproved the accusation and overwhelmed his contradictory witnesses. Having chosen to extend the scope of the inquiry by a resort to superlatives, the accused must expect to be met with contrary proof. The prosecution will not be precluded from "showing out of [the defendant's] own mouth that such statement is false", People v. Gallagher, 100 Cal. 466, 476, 35 P. 80, 83, and with equal

justice his testimony may be rebutted by witnesses who deny what he has said in his attempt to impress the sincerity of his plea by his use of extravagant language. People v. Westek, 31 Cal.2d 469, 475, 190 P.2d 9.

In his reply brief appellant asserts that "respondent thus infers that appellant had testified that he never saw Eddie Smith and that the prosecution produced Jones to rebut this testimony of appellant." He denies such implication and contends that appellant followed Jones on the stand and gave testimony in rebuttal of Jones' testimony. The record reveals that appellant on cross examination stated: "I don't remember ever seeing the gentleman." (Clyde Jones.) Thereafter, as a rebuttal witness Mr. Jones testified to appellant's call at the paint shop of the witness with Eddie Smith and narrated the conversation. The court then recalled appellant who again testified that he had never in his life visited or been introduced to Mr. Jones.

[17] Jones' testimony was admissible for another reason. On his cross-examination appellant denied (1) ever having seen Jones, (2) having visited Los Angeles with Eddie Smith, (3) having passed through Los Angeles except on the occasion of his trip to San Diego. Such denials were made to contradict the People's proof that (1) he had for days conspired with Eddie Smith and Carl Friend to rob the market manager; (2) on the fourth day of September he had with Smith and Friend visited a paint shop to see about painting appellant's automobile; and (3) with the same two companions he had robbed the witness Shodall. It is thus seen that appellant's denials on cross-examination to which no objection was made were a positive contradiction of the prosecution's case. By reason thereof they were a proper foundation for impeachment by such testimony as that given by Jones. People v. Westek, supra.

Furthermore, appellant's denials raised not only the question of his own credibility but as well that of Carl Friend who testified that he had met appellant 10 years before the trial of this action in a prison in Oklahoma; had gone with him about September 1 from Vacaville to Los Angeles; had for "several days previous" to September 5 talked about going to the market, and had with appellant in the latter's car visited the market on Sunset Boulevard on September 4, and again on the morning of September 5, 1947. Jones' testimony served to prove appellant's familiar association with Smith before, as well as after, the robbery and was a contradiction of appellant's testimony that he did not even know Eddie Smith.

[18, 19] Finally, appellant made no objection to Jones' testimony at the trial, but actually developed it by his cross-examination and made no motion to strike it. The objection cannot be made for the first time on appeal. People v. Owens, 123 Cal. 482, 490, 56 P. 251. The precise ground of objection to evidence must be made at the time of its offer. People v. Sellas, 114 Cal.App. 367, 378, 300 P. 150.

The Motion For A New Trial Was Properly Denied.

[20] The ground urged for a new trial was new evidence which appellant claims could not have been discovered with reasonable diligence prior to the close of the trial. The new evidence was the testimony of one Alice Dickey who in September, 1947, resided at 931 North Wetherly Drive, Hollywood, where she lived with one Hudgins as his wife and was known to her landlady as Mrs. Hudgins, But to others as Mrs. Dickey. Friend had testified that he was at the Hudgins house on September 2nd and 4th; that on the latter day the group discussed the proposed robbery; that Mrs. Dickey had a five-year-old daughter with her at the time; also, that after the robbery the three men returned to Hudgins' place.

That Mrs. Dickey could have been discovered prior to the close of the trial by the exercise of reasonable diligence is demonstrable. She moved into the Wetherly Drive house in July, 1947, and remained there until the following January. She then departed to other quarters and left her new mailing address. She resided in

Los Angeles in May, June and July, 1948, while this action was on trial. During that time appellant's sister visited and told Mrs. Dickey that she was in that city attending the trial. The witness told the sister that she had never seen Clyde at her house. The record shows that the case was submitted on May 20, 1948, on the transcript of the preliminary trial and other evidence. It was resumed on June 18 when, after evidence had been taken, it was continued to July 6. On July 7 defendant was found guilty. Miss Lindsey saw Mrs. Dickey before July 4, 1948.

The motion for a new trial was filed July 8, 1948, on the ground of newly discovered evidence and the other statutory grounds. No affidavit of either appellant or of his attorney was presented in support of it. The motion was argued on July 16 and decision thereon and sentence were continued from time to time until October 6, 1948. But not until September 20 did appellant present Mrs. Dickey. His excuse for not having found her in time for the trial was that her true name was not known.

But Miss Lindsey's conversation with her was before July 4th. She told Mrs. Dickey the latter's name had been brought into the case and the witness told Miss Lindsey all she knew; neither herself nor Hudgins had a child; she had never met or seen appellant and any testimony to the contrary was untrue. That conversation was about three months prior to the presentation of Mrs. Dickey to give her testimony in support of the motion. She testified that she recalled no night in September, 1947, when appellant and his two companions played poker in her home with Hudgins; that she never knew Carl Friend or Eddie Smith. She admitted her absence from home while she took a trip to San Francisco "between the 4th and the 6th of September, 1947," but testified that Hudgins was with her.

[21, 22] Not only was appellant not diligent in discovering Mrs. Dickey and in advising the court what her testimony would be but the motion was itself insufficient in that no affidavit of appellant or of his attorney was attached thereto or presented prior to the argument on July 16. To warrant the granting of a new trial on the ground of newly discovered evidence the supporting affidavit must show that the accused did not know of the existence of the "new evidence" at the time of the trial or that he could not by the exercise of reasonable diligence have discovered it. People v. Urquidas, 96 Cal. 239, 241, 31 P. 52; People v. Buck, 46 Cal.App.2d 558, 568, 116 P.2d 160; People v. Farber, 19 Cal.App.2d 189, 192, 64 P.2d 1138. No such affidavit having been attached or duly presented, there is no basis for granting a new trial unless it be founded in the testimony of Mrs. Dickey. Appellant's attorney did not talk with her until a few days prior to her appearance in court, more than two months after the submission of the motion. By reason of Miss Lindsey's efforts on behalf of her brother it was a reasonable inference that she imparted to appellant or his counsel the information obtained by her concerning Mrs. Dickey's knowledge of the persons present in the Hudgins home during the first four days of September, 1947. If she disclosed such knowledge to appellant and it was unfavorable, his counsel would not of course, make use of it. If it was favorable to appellant and no action was promptly taken, he is foreclosed by his lack of diligence.

The judgment and the order denying the motion for a new trial are affirmed.

McCOMB and WILSON, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

90 Cal.App.2d 464

PEOPLE v. OCEAN SHORE R. CO. et al.

No. 13592.

District Court of Appeal, First District,
Division 1, California.

March 8, 1949.

Hearing Denied May 5, 1949.

1. Eminent domain 🔑153

A holder of option to purchase land being condemned has no interest therein entitling him to compensation for taking thereof.

2. Vendor and purchaser 🔑3(4)

The test of whether agreement relating to purchase of land is agreement to purchase property, or mere option to purchase it, is whether agreement is capable of specific performance.

3. Vendor and purchaser 🔑3(4)

Where general intention of parties to contract was to consummate sale of land, absence of express agreement by vendee to consummate sale by paying balance of price and accepting deed does not limit contract to one of option to purchase land, but it will be held a contract of purchase and sale.

4. Specific performance 🔑58

Where stipulation for liquidated damages in case of vendee's breach of contract to purchase land constitutes security for his performance of contract, specific performance thereof may be had by vendor, but where such stipulation is intended as substitute for performance by vendee, specific performance is not available to vendor.

5. Vendor and purchaser 🔑3(4)

Whether particular instrument is option to purchase or agreement for sale of land depends on whether optionee or vendee is bound to perform contract, so that specific performance will lie if he refuses to do so, and such question must be determined, not from name given instrument by parties, but from their intention, as evidenced by its terms and the circumstances.

6. Eminent domain 🔑153
Specific performance 🔑57
Vendor and purchaser 🔑3(4)

A contract, giving option to purchase land by specified date for sum payable in installments on such date and every six months thereafter and authorizing optionors to declare agreement void and keep all moneys paid as rental, depreciation, and liquidated damages, in event of optionee's default in any payments, did not become sale contract, specifically enforceable against optionee, after his payment of first installment, in absence of provisions binding him to make further payments, so that he was not entitled to compensation for taking of land by state for highway purposes after date of such payment.

7. Vendor and purchaser 🔑18(1)

A contract for purchase of land gives mere option, of which optionee may or may not take advantage at his election, where it gives optionor no right to compel optionee to purchase property; there being no mutuality of remedy.

8. Specific performance 🔑58

Where contract for conveyance of land contains stipulation for payment of sums of money as penalties or liquidated damages for breaches of covenants therein, with sole purpose of securing performance of contract, specific performance thereof will be decreed; but where contract contains covenant or stipulation that proposed purchaser of land may either consummate purchase or pay vendor specified sum as liquidated damages for breach of contract, agreement is mere option incapable of specific enforcement.

9. Vendor and purchaser 🔑3(4)

The fact that person given option by contract to purchase land was permitted thereby to have possession of land did not change contract from option to agreement of sale.

10. Vendor and purchaser 🔑3(4)

A contract binding landowner to sell land on specified terms to one with whom contract leaves it discretionary whether to buy land or not constitutes an optional contract, not sale contract.

11. Vendor and purchaser ⚷3(4)

Provisions of contract that party given option thereby to purchase land by certain date could take possession thereof about four months later, that no interest should be charged before such date, that commission should be paid optionee as real purchasers' agent after his payment of about half of purchase price, that agreement should be binding on parties, their heirs, successors, and assigns, that contract was subject to optionor's obtaining consent of trust deed holders, and that optionors should retain all moneys paid as liquidated damages in event of optionee's default in any payments, were not inconsistent with contract being an option instead of sale contract.

12. Pleading ⚷129(2)

Defendants answering separately are not required to deny formally matters set up in other defendant's answer to the complaint.

13. Eminent domain ⚷263

Where question in condemnation actions whether one of defendants was a purchaser of realty under contract so as to be entitled to compensation for taking of realty by state for highway purposes, or whether he was merely an optionee and not entitled to compensation, was in issue in trial court, even though presented belatedly, after evidence was in, District Court of Appeal would not comply with that defendant's request to send the case back to trial court for evidence concerning the character of the contract.

◆

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

On rehearing.

Affirmed.

Prior opinion, 201 P.2d 438.

Erskine, Erskine, & Tulley, of San Francisco, Nichols & Richard, of Oakland, A. P. Black and Eli D. Langert, both of San Francisco, and Edwin H. Williams, of San Jose, for appellants.

Elliott M. Epsteen and Chas. C. Boynton, both of San Francisco, for respondents.

BRAY, Justice.

For the reasons hereafter set forth, we adopt as the opinion on this rehearing the opinion previously filed. It reads:

"Appeal by defendants Ocean Shore Railroad Company, a corporation, Harry W. Cole and George Middleton, individually and as surviving partners of that certain partnership known as 'Selah Chamberlain Associates' from a judgment awarding defendants Lillian A. Krobitzsch et al., as executrices of the will of R. W. Krobitzsch, deceased (hereinafter referred to as the Krobitzsch estate), damages in a condemnation action brought by plaintiff. Two condemnation actions were consolidated for trial.

"The controversy arises out of a certain written agreement and two supplements thereof executed between defendant Middleton and Lillian Krobitzsch and her now deceased husband, R. W. Krobitzsch. Defendant Middleton at all times was acting as agent for defendants Ocean Shore Railroad Company, a corporation, and the partnership known as Selah Chamberlain Associates. For brevity Middleton alone will be referred to throughout this opinion. The actions were brought by plaintiff to condemn land for highway purposes. The Krobitzsch estate on the one hand, and Middleton, on the other, claimed the right to the award of compensation for the parcel of real property in question here, which the court ordered condemned.

"At the trial, the Krobitzsch estate stipulated with plaintiff that the amount which plaintiff should pay for the property condemned was $5750. Middleton offered to prove that the amount which should be awarded was actually $73,000. The court sustained an objection to this offer on the ground that Middleton had no interest in the property. Obviously, if Middleton has any interest in it, he will be entitled to make his proof. In its findings, the court found that all rights of Middleton under the agreement hereafter discussed had ended and he had no interest in the property.

"On June 6, 1937, R. W. Krobitzsch, the decedent, was the owner of the property. On that date he and his wife, as first parties, entered into a certain agreement, headed 'Option,' with the defendant Middleton as second party. The terms of that agreement and the two supplements thereto, so far as relevant to the questions before us, follow: In consideration of $500 then paid, the 'first parties hereby give to second party the exclusive right and option to purchase on or before July 6, 1937, all of' the property in question 'for the sum of Fifty Thousand ($50,000.00) Dollars, payable as follows: The further sum of $4500. on or before July 6, 1937, and $2500. every six months thereafter until the full purchase price is paid, together with interest at the rate of six per cent per annum on the unpaid balance, interest payable semiannually. * * *

"'8. When $22,500. shall have been paid on the principal of the purchase price, a commission of five per cent of the total purchase price shall be payable from first parties to second party, without interest.

"'9. In the event of default of any of the payments due hereunder on the dates and in the manner herein provided for, first parties may at their option declare this agreement null and void and of no effect, and shall keep and retain as rental, depreciation and liquidated damages, any and all monies paid under the terms hereof, and provided further first parties shall have no right or claim against second party, except to the retention of such monies so paid, and to declare this agreement null and void as aforesaid. Sixty days notice of any such default shall be given to second party by registered mail * * *

"'10. Time is of the essence of this agreement and in each and every part thereof.'

"On February 15, 1940, the parties entered into a 'Supplemental Agreement Between R. W. Krobitzsch and Lillian A. Krobitzsch with George E. Middleton.' This referred to the original agreement, and then provided:

"'Under the option agreement of June 1937, Middleton is in default in payment due July 6, 1939; and further in default of payment due January 6, 1940, plus interest. Under said agreement Krobitzsch has the right to serve notice of default and take advantage of the provisions of paragraph 9.

"'In consideration of Krobitzsch's forbearance to serve such notice of default and take advantage of the forfeiture provisions of said paragraph 9, and at Middleton's instance and request, this agreement, termed "Supplemental Agreement", is made. The consideration is Krobitzsch's forbearance to take advantage of said provisions of paragraph 9.

"'On or before February 21, 1940, all current taxes and back taxes on the property described in the June 1937 agreement, together with all penalties due to date, shall be paid by Middleton.

"'On or before April 5, 1940, all taxes then due on said property shall be paid by Middleton at the place and places where due. * * *

"'Upon payment by Middleton of all taxes and insurance as above provided on or before the dates particularly specified, then Middleton is granted an extension of 60 days from and after January 6, 1940, in which to make the payments now in default and due July 6, 1939, and January 6, 1940, respectively.

"'The waiver by Krobitzsch of any breach of any term, covenant or condition herein contained or of the original agreement of June 1939, shall not be deemed to be a waiver of any subsequent breach * * *

"'Time is of the essence hereof and if Middleton, for any reason, fails to comply with any of the terms, or conditions in this Supplemental Agreement contained, then it is expressly agreed between the parties that the notice of default provided in paragraph 9 of said June 1937 agreement becomes immediately operative in the same manner and to the same extent as though the same were personally served and received by said Middleton.

"'If Middleton fully and faithfully complies with all the terms and conditions hereof and on the precise dates herein agreed upon, then he shall be relieved of the automatic notice of default provision herein provided for.

"'It is understood that certain engineering expenses and costs of litigation, etc., may be incurred in the determination of the damage done to the property by reason of the state highway built across the same. Middleton agrees to personally pay all expenses incurred by reason thereof and in the event that Krobitzsch retakes the said property and cancels all agreements by virtue of any default of Middleton, then Middleton agrees to pay for all such legal, engineering and other expenses which may have been incurred to the time of said taking over * * *

"'All moneys received from the State of California, Joint Highway District or any County arising out of the road now or hereafter to be built, whether for damages or otherwise, shall be paid to Krobitzsch and applied on the last amounts due in point of time by Middleton under the original agreement * * *'

"Later, on June 4, 1940, the parties entered into 'Supplemental Agreement (No. 2).' After referring to the previous agreements and stating that there is due from G. Quilicy (a tenant mentioned in the original agreement) $650 as rental, it provides:

"'Whereas, it is the desire of the parties hereto that such rentals be delivered to the parties of the first part without in any manner affecting the status between the parties hereto, except as a reduction in the amount due from second party to first parties;

"'Now Therefore, in consideration of the premises and as an additional consideration for the execution of the Supplemental Agreement dated February 15, 1940, the said parties agree that the first parties hereto may collect and receipt for the rentals aforesaid; and that the acceptance thereof shall not operate nor be deemed to waive any breach of any covenant or covenants by said second party to be done or performed in any of his agreements relating to the aforesaid property and in particular, that Supplemental Agreement between the same parties hereto dated February 15, 1940; nor shall the same operate nor be deemed nor considered as a release, estoppel nor waive any default or defaults on the part of the second party, it being distinctly understood that the sole and only effect of the receipt by the first parties of the aforesaid rentals shall be to reduce the amount due from second party to first parties and in no manner to release second party of any of his obligations to first parties, nor to affect in any particular the rights of the first parties, except as to the remaining balance due, as hereinbefore set forth.'

"Prior to July 6, 1937, Middleton paid the $4500 as provided in the agreement, and thereafter paid several installments, the last one on April 5, 1939. In addition he was entitled to credit for certain rentals mentioned in the ageements. In all, his payments and credits amounted to $19,525.

"On December 15, 1939, plaintiff applied for and was granted the right to take immediate possession of the proposed right of way. Just when the state actually entered into possession is in dispute, but as pointed out hereafter, that question becomes unimportant.

"On August 5, 1941, the Krobitzschs notified Middleton that for failing to comply with the terms of the agreements of June 6, 1937, and February 15, 1940, they declared the contract null and void and all his rights terminated. On July 14, 1942, the Krobitzschs commenced an action in the superior court of San Mateo County against Middleton to quiet title to the property. In that action Middleton contended that he was not in default. The trial court found adversely to him and quieted title in the Krobitzschs. On appeal to this court, the decree was affrmed. Krobitzsch v. Middleton, 72 Cal.App.2d 804, 165 P.2d 729.

[1] "The primary question here is the nature and extent of Middleton's interest in the property at the time of the taking by the state. If the agreements here constituted merely an option to purchase, then the exact date of the taking by the state becomes unimporant, as 'The holder of an option to purchase land being condemned has no interest in the land which will entitle him to compensation * * *'. 29 C.J.S., Eminent Domain, § 196, page 1101; East Bay Municipal Utility Dist. v. Kieffer, 99 Cal.App. 240, 278 P. 476, 279 P. 178.

If, however, the agreement constituted in law an agreement of sale and purchase, Middleton became the equitable owner of the property, and the question of whether the 'taking' occurred before he had legally forfeited his right to the property becomes highly important.

"Option or Agreement of Sale?

[2] "The test of whether an instrument is an option or a contract of sale is whether there is such an obligation on the part of the holder to buy that it can be enforced by specific performance. In 6 Cal.Jur., p. 49, it is said that an option '* * * is a contract to keep the offer open. The test determinative of the question whether a given agreement relating to the sale and purchase of land is an agreement to purchase and sell the property or a mere option to purchase, is: Is the agreement capable of specific performance?' 'The nature of a contract as an option or obligation to purchase is to be determined not by the name which the parties have given it, but by the nature of the obligations which it imposes. The distinguishing characteristic of an option contract is that it imposes no binding obligation upon the person holding the option; and where there is not merely the right but the obligation to buy, the contract is not one of option, but of sale.' 12 Am.Jur. 525-6. 'If an instrument contains a direct agreement to buy it is a contract rather than a mere option, although it * * * provides that if the optionee fails to consummate the agreement his deposit shall be forfeited, or that in case of breach by the optionee the optionor may re-enter and treat all payments made as compensation for use of the premises, *unless it also provides that the optionee shall be relieved from any further liability.*' 25 Cal.Jur. 508-9; emphasis added.

[3, 4] "As said in Asia Investment Co. v. Levin, 118 Wash. 620, 204 P. 808, 809, 32 A.L.R. 578: 'It is difficult to lay down a hard and fast rule which will properly classify a given contract. But the law seems to be that, although the contract does not expressly provide that the vendee agrees to consummate the sale by paying the balance and accepting the deed, yet, where it appears that the general intention was to consummate a sale the absence of an express agreement does not limit the contract merely to one of option, but that it will be held to be a contract of purchase and sale. * * * Or, stated in the language of the decisions, where the stipulation in regard to liquidated damages is to be regarded as security for the performance of the contract by the vendee, then specific performance may be had by the vendor, but where the stipulation was intended as a substitute for performance—where the vendee might comply with the contract or pay liquidated damages in lieu thereof—then specific performance is not available.' 32 A.L.R. pp. 581, 583. 'Though the intention of the parties to create, on the one hand, an alternative or substitutionary obligation, which will preclude enforcement of specific performance of the main obligation, or, on the other hand, to provide a security for the performance of the main obligation, which will not preclude such relief, does not depend solely upon the phraseology of the provision in respect of payment or forfeiture, but is to be determined in view of the contract as a whole and in the light of surrounding circumstances, nevertheless that phraseology is important in ascertaining intention; and serves to illustrate the practical application of the rule and criterion above stated; and for that reason has been indicated in the two following subdivisions.' 32 A.L.R. pp. 599, 600. See also 87 A.L.R. 564.

[5, 6] "The test, then, as to whether a particular instrument is an option or an agreement of sale is whether the second party is bound to perform so that specific performance will lie, in the event he refuses so to do, and that question is to be determined, not from the name given the instrument, but from the intention of the parties as evidenced by its terms and the circumstances. With that test in mind, we will examine the three instruments in question here. It becomes apparent at once throughout them that a studious effort was made to avoid committing Middleton to any promise to pay any portion of the purchase price. While the first instrument gives him the 'option to purchase on or before July 6, 1937,' it nowhere binds him to make any further payments in case he makes the

$4500 payment on or before that date. Not only does the agreement provide that in the event of default, the seller's remedy is to declare it void and keep all moneys paid, but it goes further and provides that they 'shall have no right or claim against second party.'

[7] "Then the first supplemental agreement shows even more clearly that Middleton was still not binding himself in any way to pay the purchase price. Middleton is now in default under the first agreement, having failed to continue to make payments thereon. In order that the sellers will not foreclose his rights, this agreement provides that certain taxes 'shall be paid' by him—(not that he will pay them)—by a certain date. If they are paid, Middleton's time to make the then due payments on the purchase price will be extended. A significant feature of this agreement is that Middleton does agree to one thing—he agrees to pay personally all expenses, legal, engineering, costs of litigation, etc., in the determination of the damage done by the state highway, even though the first parties terminate and cancel all agreements because of Middleton's default. This is the only place in the three agreements where Middleton agrees to pay anything. This situation is a complete answer to Middleton's claim that the first agreement was an option up to the time Middleton paid the $4500, and from there on it became an agreement of sale under which he could have been compelled to continue paying the balance of the purchase price. The conduct of the parties and the express terms of the agreements show that at no time was Middleton bound to continue on with the purchase of the property. He could quit at any time without any liability, other than the loss of the moneys theretofore paid in. There never was, and by the express terms of the contract, even up to the time when the last payment should be made, could there be, a time when the Krobitzschs could have forced Middleton to continue with the purchase, or could have brought specific performance; and as said in Compton Land Co. v. Vaughan, 33 Cal.App. 130, 164 P. 610, without the right to compel the purchaser to purchase the property, 'then, as there was no mutuality of remedy, the contract is at once given the impression of being an option merely, the benefits of which Vaughan [the purchaser] might or might not, at his election, take advantage of.' 33 Cal.App. at page 134, 164 P. at page 611.

"A situation similar to the one in our case is found in Bradford v. Sunset Land & Water Co., 30 Cal.App. 87, 157 P. 20, 21. There the question was whether the instrument was an option or agreement of purchase. It acknowledged receipt from Bradford of the sum of $500 as part payment of the purchase price of certain real property. 'Said property having this day been sold to said S. P. Bradford for the sum of forty-five thousand seven hundred and fifty dollars ($45,750);' the balance being payable $500 on or before May 1, $500 on or before June 1, and $44,250 on or before August 1. It then provided that if the buyer failed to make any payment as specified, the agreement would terminate, the seller would be freed from all obligations thereunder, 'and the seller may retain all sums theretofore paid hereon, the same being fixed as the consideration and *in full compensation* for the option hereby granted. * * *' (Emphasis added.) Bradford, in addition to the deposit, paid the $500 due May 1 and June 1 respectively, making a total payment of $1500. He did not pay the balance due August 1. He then sued the seller for a return of the $1500, contending that as the seller was a corporation the attempted sale to him was void under the then section 361a of the Civil Code, because the stockholders of the corporation had not consented to the sale. The court held that the instrument was an option to purchase and not a sale, and until Bradford paid, or offered to pay, the full purchase price, he could not complain of the failure of the corporation to get the consent of its stockholders.

"In Cailfornia Land Security Co. v. Ritchie, 40 Cal.App. 246, 180 P. 625, 626, the contract stated that the buyer 'agrees to purchase' certain real property, and that if he 'refuses to complete and carry out this contract,' the moneys paid by him were to be forfeited and belong to the sellers as liquidated damages and the contract would become null and void. The court held this to be an option and not an agreement of sale.

" 'The test determinative of the question whether the said agreement, containing as it does the foregoing covenant, is an agreement to purchase and sell the property described therein or a mere option to purchase the same, is: Is said agreement capable of specific enforcement?

[8] " 'There are two classes of contracts for the conveyance of lands, in which penalties are annexed for the breach of the covenants thereof, and in one of which classes specific performance will be decreed and in the other denied, viz.:

" '(1) Where the contract contains a stipulation for the payment of sums of money, called "penalties" or "liquidated damages," the sole purpose of which stipulation is to secure the performance of the contract or the acts specified therein to be performed. * * *

" '(2) Where there is inserted in the contract a covenant or stipulation that the party who is to perform the contract may at his election do one of two things—that is, where the stipulation is that the proposed purchaser may either consummate the purchase or, in default thereof, pay to the seller a certain specified sum as liquidated damages for the breach or the failure to purchase— in which case the agreement is to be construed as a mere option whose terms are incapable of specific enforcement.' 40 Cal.App. at pages 255-556, 180 P. at page 629.

[9, 10] "Middleton contends that the fact that he was to be permitted to have possession of the property changes the instrument from an option to an agreement of sale. This contention is answered in Johnson v. Clark, 174 Cal. 582, at page 586, 163 P. 1004, at page 1006, where the court said: Plaintiff, contends, first, that the agreement between himself and Clark was more than a mere option for the purchase of these mining claims, but that, even if it was not, the subsequent acts of Clark and Grant in entering into possession of the property with the consent of plaintiff and working it constituted an acceptance which changed the optional contract into a contract of sale between plaintiff and Clark subject to specific performance as such. But it is quite clear that under any fair consideration of the terms of the agreement between plaintiff and Clark it was simply an optional agreement. When by the terms of an agreement the owner of property binds himself to sell on specified terms and leaves it discretionary with the other party to the contract whether he will or will not buy, it constitutes simply an optional contract. This was all the contract involved here amounted to.'

"Los Angeles County Flood Control District v. Andrews, 52 Cal.App. 788, 205 P. 1085, like our case, was one in condemnation. There, as here, the optionee claimed that he was the equitable owner of the land sought to be condemned, because of a contract which he contended was not an option but an agreement of sale. The court held it to be merely an option, because there, as here, 'he covenanted to do nothing.' 52 Cal.App. at page 791, 205 P. at page 1086. Although in that case there were no installment payments to be made, as there were here, that distinction is of no importance.

"Another California case holding that an agreement in which the first parties agreed to sell and convey certain real property to the second party, and providing that on default the payments made thereunder should be forfeited, constituted an option and not an agreement of sale, is Beckwith-Anderson Land Co. v. Allison, 26 Cal.App. 473, 147 P. 482.

[11] "Middleton emphasizes seven provisions of the contract, which he contends are inconsistent with its being an option. They are: (1) the right of Middleton to take possession about November 1; (2) the fact that no interest is charged prior to July 6; (3) the commission to be paid Middleton after he has paid in approximately half of the purchase price; (4) the clause making the agreement 'binding upon the parties hereto, their heirs, successors and assigns;' (5) the fact that the words 'in default' are used; (6) the paragraph providing that the contract is subject to the Krobitzschs obtaining the consent of the deed of trust holders; and (7) the clause for liquidated damages. None of these is in-

consistent with an option, and none of them obviates the clause that there shall be no right or claim of first parties against second party.

"The apparent studied effort to keep from committing Middleton to pay any portion of the purchase price and the provision that he, as buyer, was to receive a commission, make the agreement somewhat unusual. Perhaps these are explained by the fact that Middleton was not acting for himself, but for his principal, the Ocean Shore Railroad. Apparently he did not want to be bound to take the property at any stage of the proceedings, unless the railroad wanted it.

"The cases cited by Middleton do not contradict the rule that the type of contract here, because there is no personal liability under it, cannot be specifically enforced, and that the test of an option or an agreement of sale lies mainly in the question of whether the contract can be specifically performed against the buyer.

"Wells v. Flynn, 191 Iowa 1322, 184 N.W. 389, 391, 17 A.L.R. 710, actually confirms the fact that specific performance would not lie as against Middleton, for although there was a provision in the contract under consideration there, that the seller, in case of default, could bring an action against the buyer for the amount due, the court held that such right was 'carefully guarded by adding thereto the words, "but only to the extent to which the secured parties are personally liable under this contract" ', and reversed a judgment in favor of the seller.

"In the cases mentioned in 3 A.L.R. 585 et seq., referred to in Middleton's brief, which held that an agreement may be considered one of sale rather than of option which provides that in case of default the contract shall terminate and be void, there were additional circumstances. Thus in Cross v. Snakenberg, 126 Iowa 636, 102 N.W. 508, the buyer 'executed the notes for the purchase money, and it was evident that the parties intended the contract to be binding on both.' 3 A.L.R. 585. In Williams v. Osage County, 84 Kan. 508, 114 P. 858, the court said that the second party, under the terms of the agreement, became 'inferentially liable.' 3 A.L.R. p. 585. In Wright v. Suydam, 72 Wash. 587, 131 P. 239, the court found that there was a definite agreement on the part of the buyer to buy, which modified the provision that in the event of default the deposit should be retained as liquidated damages.

"Karr v. Stevens, Tex.Civ.App., 297 S.W. 287, 288, is easily distinguished from the case at bar. The agreement there provided: 'Second parties agree to purchase'. There is no such provision in our case. Middleton cites many cases such as Cushing v. Levi, 117 Cal.App. 94, 3 P.2d 958, and Flickinger v. Heck, 187 Cal. 111, 200 P. 1045, to the effect that once the option is exercised and the purchaser agrees to purchase, the agreement becomes one of sale, and is no longer an option. There can be no quarrel with this principle of law. It is not applicable here, for, as pointed out before, this was a continuing option.

"Brickell v. Atlas Assurance Co., Ltd., 10 Cal.App. 17, 101 P. 16, is not in point, for there not only did the buyer agree to buy, but the agreement provided that in the event of default the seller was to retain the part of the purchase price already paid, or 'to bring an action to enforce payment of the remainder of the purchase price'. 10 Cal.App. at page 20, 101 P. at page 17. McHenry v. Mitchell, 219 Pa. 297, 68 A. 729, 730, cited by Middleton, confirms our construction of the contract here. In that case, the court pointed out that the buyer had agreed to pay a certain sum per acre for certain coal lands. It then said: 'If the parties had stopped after these covenants had been agreed upon, there could be no doubt that their agreement would be construed to be an absolute contract to convey, binding on both parties. They, however, did not stop here, nor was it their intention to do so, because the clause which follows these covenants clearly shows that neither party considered it an absolute conveyance at that time. This clause provided "that, in case payment is not made as hereinbefore stipulated, then this agreement to be null and void and of no effect whatever, and all parties hereto to be released from all liability hereunder." When the parties wrote that clause into their agreement, they intended, and thus declared it to be their intention, that the instrument should be considered an option to purchase, and not a binding contract of sale.'

"In Harris v. Seattle Land & Imp. Co., 122 Wash. 323, 211 P. 282, not only did the buyer expressly 'accept all of the provisions, terms and conditions' set forth in the contract, but, while it provided in case of default for the payments made by the buyer thereunder to be forfeited to the seller, it did not provide, as in our case, that that was to be the exclusive remedy of the seller.

"In Marquez v. Cave, 134 Kan. 374, 5 P.2d 1081, 1082, the contract is not set forth. However, in holding it to be an agreement of sale rather than an option, the court said that while it was headed 'Option Agreement' and contained 'many words and phrases suitable or common in pure option agreements, * * * these do not destroy the obvious purpose and nature of the contract' and that these expressions were 'foreign to the real purpose of the parties'. In Ditzen v. Given, 139 Kan. 506, 32 P.2d 448, the agreement contained a promise to pay. The court held that it was plainly an agreement of sale although 'The contract is clearly an attempt to so confuse the language used in an instrument that it will appear to be something other than what it is.' 32 P.2d at page 449.

"Reference is made to testimony in the case of Krobitzsch v. Middleton, supra, 72 Cal.App.2d 804, 165 P.2d 729, wherein a witness testified that Krobitzsch stated to him that he had told the chief highway engineer that Middleton had entered into a binding agreement with him, Krobitzsch. The fact that Krobitzsch thought the agreement was binding on Middleton (if that is what he meant, rather than that it was binding on himself) would not have helped, had Krobitzsch tried specifically to enforce the agreement. The question as to when the state actually entered on the property, and other questions raised on this appeal, become immaterial in view of our holding that Middleton held only an option on the property. He held no interest therein which survived the quiet title action of Krobitzsch v. Middleton, supra, and thus is not entitled to participate in the award in this proceeding."

The rehearing was granted because of the strenuous contention of Middleton that the question of option or ageement of purchase and sale was not raised in the court below, and that the case was tried on the theory that the agreement was one of purchase. An examination of the record discloses that these claims were raised for the first time in the petition for rehearing.

In the transcript in the first Krobitzsch case there is no discussion or mention of this question. In the record in our case, the only mention is a statement at the beginning of the trial by counsel for the Krobitzschs, which, under the circumstances of the case, is equally consistent with a claim that the agreement in question was a unilateral one as with one that it was a bilateral agreement. Krobitzschs' counsel filed in this court an affidavit which shows that in his brief in the lower court, Point V made the contention that the agreement was an option. Middleton concedes that he presented his position on the subject in his reply brief. Krobitzschs' counsel then in a letter to the trial judge argued the matter further. Thereafter, Krobitzschs' counsel asked the trial court to adopt a certain finding on the ground that the agreement was nothing but an option. Middleton resisted this request. The court did not find on this question. It merely found that Krobitzsch and Middleton had entered into an agreement which "gave to said defendant George Middleton the right to purchase" the property. In Middleton's opening brief in this court, Middleton took over two pages to contend that "the exact title of the vendee at any time during the life of the contract was not an issue" in the Krobitzsch decision, quoting from the portion where the opinion states that it was not necessary to determine whether the agreement was an option or an agreement of sale, and hence it was not res judicata in this case. Again, in Middleton's closing brief, he stated that there was nothing in the pleadings in the Krobitzsch case which put in issue the character of Middleton's title at the time of the taking by the state, that the judgment in that case cannot be held to be an adjudication of Middleton's title at that time, and that the only matter in issue was the validity of the agreement and the questions concerning the notices of default. He even stated that had the court determined the extent and character of Middleton's title, such determination would not be binding upon the parties, as it was not an issue. He again referred to the contention in his opening brief that the District Court of Appeal refused to pass upon the question important here. He is now contending that the court did pass on it, and that our decision is contrary to the decision in the Krobitzsch case on the same point.

[12] At the oral argument counsel admitted that at no time before this court until the petition for rehearing was it contended that the case was tried on the theory that the agreement was one of purchase, and that, in fact, at all times it was agreed that the nature of the agreement was one of the basic points at issue. Also he contended that the pleadings in our case admit the agreement to be one of purchase and sale. This contention is based on the fact that in the answer to plaintiff's complaint Middleton alleged that he held an agreement of purchase, which allegation he contends Krobitzschs did not deny. However, the Krobitzschs filed a separate answer to the complaint, and we know of no requirement that defendants answering separately must formally deny matter set up in the other defendant's answer to the complaint. Moreover, Krobitzschs' counsel assert that no service of the Middleton answer was made on the Krobitzschs or their counsel.

[13] As this matter was an issue in the lower court, even though, as Middleton contends, presented belatedly, after the evidence was in, we see no good reason for complying with his request and sending the case back to the trial court for evidence concerning the character of the agreement, nor do we see any good reason for changing our previous opinion in this matter.

The petition to make additional findings is denied, and the judgment is affirmed.

PETERS, P. J., and WARD, J., concur.

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90 Cal.App.2d 672

MELNY v. MELNY.

Civ. 13877.

District Court of Appeal, First District,
Division 1, California.
March 18, 1949.

1. Divorce 🔑130

Evidence warranted granting of divorce to wife on ground of husband's extreme cruelty.

2. Divorce 🔑150(2)

In action by wife for divorce on ground of extreme cruelty, trial court's finding that all allegations contained in amended complaint were true, was a sufficient finding of extreme cruelty. Code Civ.Proc. § 426b.

3. Husband and wife 🔑264

In divorce action, evidence sustained finding that store and lots which had been purchased by husband with community funds, and which had been conveyed to a son who had allegedly paid the husband therefor, had not been paid for by son and were community property.

4. Divorce 🔑249(1), 255

In divorce action, wherein son of the parties was not made a party, trial court had jurisdiction as between husband and wife to adjudge that realty which stood in name of son of the parties was community property of husband and wife, though such adjudication would not affect the son's rights, in the realty.

5. Divorce 🔑286

Where husband failed to make his son who held legal title to certain realty, a party in wife's divorce action in which it was adjudged that such realty was community property as contended by wife, the husband could not complain on appeal because son was not a party.

6. Husband and wife 🔑262(1)

Where property is acquired after marriage, there is a strong presumption that it is community property.

7. Husband and wife 🔑264

In divorce action, evidence sustained finding that realty was community property because purchased during marriage by husband with money that came from husband's business, rather than with bonus and pension money received by husband as an injured war veteran from the government.

8. Divorce ⚿240(2), 252, 308

Evidence that husband's income from his business was at least $500 a month and that he received a monthly pension of $82.-50 for disability, sustained award to wife, who had been granted a divorce on ground of husband's extreme cruelty, of half of the community property and $205 a month for her support, and $100 a month for support of 15 year old daughter, though husband was required to pay wife $16,000 within a reasonable time as a condition of retaining his business property which was community property. Civ.Code, § 139.

9. Divorce ⚿235, 286

The allowance of alimony rests within the discretion of the trial court, and an appellate court will interfere only where there is an abuse of discretion. Civ.Code, § 139.

◆

Appeal from Superior Court, San Francisco County; Edmund P. Mogan, Judge.

Action for divorce by Sophia Melny against Mathew Melny, wherein the defendant filed a cross-action for divorce. From a judgment for the plaintiff, the defendant appeals.

Judgment affirmed.

McGuire & Lahanier and F. B. Blum, all of San Francisco, for appellant.

Roger Anderson, of San Francisco, for respondent.

PETERS, Presiding Justice.

Cross-actions for a divorce were filed by Sophia and Mat Melny. The trial court granted the wife an interlocutory decree of divorce, awarded her the custody of a minor child of the parties, found that all of the property described in the pleadings was community property, awarded the wife the home and furniture and $16,000 as her share of such property, and awarded her $205 per month alimony and $100 a month for the support of the minor child. The husband appeals.

[1] No contention is or could be made on this appeal that the evidence is insufficient to support the findings and judgment granting the wife the divorce. The evidence shows that the parties were married in 1923, and separated in 1946; that they have three children, two of whom are over 21 and one of whom was 15 at the time of trial in 1947; that all during the marriage the husband has been guilty of many acts of extreme cruelty; that he was frequently drunk in and about the home, and, when drinking, was quarrelsome and abusive; that he frequently swore at his wife in the presence of their children and friends; that on occasions he struck his wife; that on two occasions the wife was hospitalized because of his abuse. The evidence also shows that at all times during the marriage the respondent has been a dutiful wife and a good and proper mother to the children.

The appellant makes three major contentions—(1) that the findings in reference to extreme cruelty are insufficient; (2) that as to two pieces of real property the trial court erroneously found they were community property; and (3) that the evidence is insufficient to show that appellant has the ability to pay the amounts awarded to respondent as alimony and support.

It is urged that the trial court failed to make a specific finding that respondent suffered grievous bodily injury or grievous bodily suffering. The amended complaint of respondent charged: "That during the period of the marriage of the parties herein, defendant Mat Melny has been guilty of acts of extreme physical and mental cruelty toward plaintiff, which said cruelty has caused plaintiff great and grievous mental and physical pain and suffering, whereby the marriage is rendered intolerable to plaintiff." This allegation was followed by the specification that, on occasions too numerous to mention, appellant had struck respondent, cursed and swore at her, constantly humiliated her in the presence of third parties, been intoxicated and abusive toward respondent, addressed her and their children in an obscene manner, and denied her money except for bare necessities. The only specific date set forth in the amended complaint as to these charges is that appellant "in or about 1935 did break three ribs necessitating plaintiff to enter Lane Hospital for treatment."

[2] The trial court found on this issue that "all the allegations contained in plaintiff's and cross-defendant's amended complaint are true." This general finding is sufficient. Since 1939, when § 426b was added to the Code of Civil Procedure, it has not been necessary to make specific findings on cruelty. A general finding will suffice. LaMar v. LaMar, 30 Cal.2d 898, 186 P.2d 678; Ungemach v. Ungemach, 61 Cal.App.2d 29, 142 P.2d 99; Johnson v. Marr, 8 Cal.App.2d 312, 47 P.2d 489.

It is next urged that the trial court erroneously found that two parcels of the real properties involved are community property. These two parcels are referred to as the Novato property and the Van Ness Avenue property.

As to the Novato property, it appears that it stands of record in the name of Harry Melny, the son of the parties here involved. The trial court found: "That the store and lots located at Novato, California, * * * and standing in the name of Harry Melny is the community property of Sophia Melny and Mat Melny." This property was valued, by the trial court, at $6,500, and was awarded to the appellant.

[3] The oldest daughter of the parties, Rosemarie, testified that in December, 1945, her father was confined to the hospital as a result of an automobile accident; that during this period she worked in the businesses then being conducted by him; that he instructed her to buy the Novato property; that he told her to prepare a check for his signature in the sum of $3,000 for a partial payment; that she prepared such a check and appellant signed it; that pursuant to his instructions she took this check, plus $3,500 in cash from a safe in one of her father's stores, to the bank and secured a cashier's check for $6,500; that pursuant to his instructions she bought the property in question with this cashier's check and took title in her own name; that about a month later, pursuant to the directions of her father, she deeded the property to her brother, Harry. The appellant admitted that he had signed the $3,000 check and that the account upon which it was drawn was community property, but contended that he had instructed Rosemarie to buy the property for Harry. He admitted that he told Rosemarie that if she needed more money to take it out of the safe, but he testified that he had no idea how much she took from the safe. He further admitted that the entire purchase price for the property was paid for from his general community property funds, but he contends, and Harry likewise so testified, that Harry paid him back for the property. Apparently, however, even according to appellant, Harry paid him back but $3,000. The testimony on this subject is most confused and evasive. Appellant admits that neither he nor Harry ever kept a written account of such payments, testifying that he kept the amount of such payments in his head. Harry corroborated his father, but could not produce any written evidence of such claimed payments. Appellant testified that when his son joined the Navy, he, the father, had a few hundred dollars belonging to his son; that Harry sent him money while he was in the service; that after he got out of the service Harry worked for and paid him about $125 a month in payment for the Novato property. The respondent and Rosemarie testified, however, that Harry had no money at all saved up when he went into the Navy, and sent home no money during his time in the service except in payment of a few prior loans. Harry was unable to produce any evidence, except his word and that of his father, that he had paid for the property, and was a most unsatisfactory, combative and evasive witness. Admittedly, the appellant operated a veterans' salvage shop on the Novato premises. He testified, however, that he pays his son $50 per month for the use of the Novato premises, although no written evidence of such payments was ever produced.

It is quite apparent that the finding that the property was community property of the parties, it having been purchased with community funds, is amply supported, if the issue was properly before the trial court. But, says appellant, the property stands in the name of Harry Melny, and Harry, although a witness, was not made a party to this action. Under such circumstances, it is urged that the trial court was without jurisdiction to determine the character of the property. The appellant states his contention as follows: "It is evident, without the citation of any authorities, that it is contrary to the very fundamentals of our system of justice that one, not a party to the action, should have his title to property adjudicated."

[4, 5] The obvious answer to this contention, and it is one heretofore expressed by the courts, is that the judgment of the trial court, when and if it becomes final, is a binding adjudication only as to the rights of appellant and respondent in the property, and in no way affects the rights of Harry, if any, in the property. Of course, the trial court could make no adjudication that would be binding on Harry without making him a party to the proceeding. Towne v. Towne, 6 Cal.App. 697, 92 P. 1050; Moffitt v. Moffitt, 128 Cal.App. 676, 18 P.2d 387. It would have been much better practice for either the appellant or respondent, or the trial court, to have brought in Harry Melny as a party, and all rights in the property could then have been adjudicated. Elms v. Elms, 4 Cal.2d 681, 52 P.2d 223, 102 A.L.R. 811; Callnon v. Callnon, 7 Cal.App.2d 676, 46 P.2d 988. But Harry was not an indispensable party. The complaint alleged, and the answer denied, that the property in question was community. The trial court had jurisdiction as between the husband and wife to adjudge the character of any property claimed to be community. Scarpa v. Scarpa, 40 Cal.App. 345, 180 P. 637. The fact that a third party claimed an interest in the property is a false factor. Hiltscher v. Wagner, 96 Cal.App. 66, 273 P. 590. It is true that appellant may be adversely affected by the decree if it should ultimately be held in an action between appellant and his son that his son is the owner of the property, because the value of the Novato property was considered in dividing the community property and undoubtedly the value of this property influenced the court in determining the appellant's ability to pay alimony. But appellant has no one but himself to blame. He had it within his power to join his son as a party, but elected not to do so. He cannot now be heard to complain. Long v. Long, 88 Cal.App.2d 544, 199 P.2d 47.

Appellant next attacks the finding that the Van Ness Avenue property, valued by the trial court at $13,500, is community property, contending that the evidence shows that it is his separate property. An examination of the lengthy record discloses that this was purely an evidentiary question, and that there is ample evidence to support the questioned finding.

The contention of appellant is built up around the following facts: Appellant was injured in the First World War and has received government disability benefits since that time. He was not married when he received the injuries. He contends, and respondent does not contend to the contrary, that all disability benefits received by him are his separate property. He testified that he always cashed the government checks and kept the cash so received in a separate compartment in his safe at his place of business. He further testified that he purchased the Van Ness Avenue property with these moneys. Title to this property was taken in his name, but both the husband and wife signed the deed of trust. The respondent positively testified that the $10,000 used to pay for this property came from the secondhand and salvage business operated by appellant. She was positive that bonus and pension moneys had not been used in its purchase, and accounted for the expenditure of such moneys in other ways. The records show that the property was purchased after marriage, and that $4,500 was paid as a down payment. The balance, secured by a deed of trust signed by both appellant and respondent, was to be paid off at the rate of $75 a month. It was actually paid off within six months of the date of purchase.

In addition to his own testimony, the appellant produced several of his employees who stated that they had overheard or participated in conversations in which both the husband and wife took part, in which the husband had stated that he was buying the Van Ness Avenue property with his pension money, and that the wife had acquiesced in these statements. The respondent denied participating in such conversations. She testified that, until the very time of trial, she had always believed the property was in both their names, and that when the property was purchased the appellant told her that "We" have bought the property and that she would have to go to the notary's office and sign the papers, which she did.

[6, 7] It is apparent that there is a direct conflict as to the source of the funds used to purchase this property. In addition, the property having been acquired after marriage, there is a strong presumption that it is community. 3 Cal.Jur. 10 Yr.Supp. p. 553, § 61. Moreover, it is quite apparent from a reading of the transcript that the trial judge did not believe appellant on this and the other issues involved, and that this implied finding was justified. Most of appellant's testimony was argumentative, unresponsive and evasive. Under such circumstances, the challenged finding must be held to be amply supported.

The last contention of appellant is also evidentiary in nature, it being contended that the evidence is insufficient to show that he has the ability to pay the amount of alimony and support money fixed by the trial court. If it be assumed that present ability to pay is an indispensable factor to be considered, nevertheless the evidence shows such ability. The total value of all community property was found by the trial court to be $50,000. The house and furniture valued at $9,000 were set aside to the wife. All the other properties, being business properties, were awarded the husband subject to his paying to his wife $16,000 within a reasonable time. Thus both parties were awarded $25,000, or half the community property, but the various businesses operated by appellant were awarded to him so as not to interfere with his earning power. In addition, appellant was ordered to pay to his wife $205 a month for her support and maintenance and $100 for the support of their fifteen-year-old daughter. Appellant contends that he cannot possibly pay the $16,000, plus $305 a month, and that the record so shows. The evidence shows that appellant operates three salvage stores in San Mateo, San Francisco and Novato, for the Disabled Veterans. He testified that from such stores he makes an income of about $200 a month, and that this was his sole income. It appears that the public donates to the veterans all of the goods sold in such salvage stores, and that appellant manages the stores. It also appears that, as to the San Mateo store, appellant pays the Disabled Veterans 5% of his gross sales, and retains 95% for himself. As to the Novato and San Francisco stores, he testified that he pays the Disabled Veterans $125 a month for the privilege of operating those stores and keeps the balance for himself, and for operating expenses. The Disabled Veterans also pay him a total of $195 rent for the three stores. No adequate books were produced to show his total income from these stores. Appellant's disability check now amounts to $82.50 monthly. He produced his income tax returns for 1942 through 1946 and they show, for those years, an average reported annual net income of about $2,500.

The trial court obviously disbelieved appellant as to the amount of his income, and the record shows that this disbelief was well-founded. Appellant testified that during the period when his income was but $200 a month he gave respondent $120 to $160 a month to run the house, and that, in addition, he bought most of the groceries and all of the important items of clothing. This would obviously have consumed most of his claimed $200 a month income. Prior to this time he had earned less money. Yet the record shows that during the past seven years appellant has paid out $10,000 in cash for the San Mateo property, $10,000 in cash for the Van Ness Avenue property and $6,500 in cash for the Novato property —a total of $26,500. During this period his net income at $200 a month would have been $16,800. No reasonable explanation of how or where he secured this money could be obtained from appellant. It is true that he testified that the Van Ness Avenue property was purchased with his bonus and disability money, but, for reasons already stated, the finding to the contrary is amply supported. Respondent testified that appellant's average income was at least $500 a month.

[8, 9] On this evidence the trial court, after fixing the amount of alimony and support payments, found that appellant "is regularly employed and engaged in business and is financially well able to pay said sums aforementioned." When the proper rules of law are applied it is quite clear that the above-summarized evidence supports this finding. It must be remembered that this divorce was granted because of offenses against the marital relationship committed by the husband. It is he who has broken the marital contract. Section 139 of the Civil Code authorizes the trial court, in such cases, to compel the erring husband to contribute to the support of his wife and minor child. The respondent testified as to her needs, and they are certainly not exorbitant. The allowance of alimony rests within the discretion of the trial court, and the appellate courts will interfere only where there is an abuse of discretion. Wolff v. Wolff, 102 Cal. 433, 36 P. 767, 1037; Baldwin v. Baldwin, 28 Cal.2d 406, 170 P.2d 670; Bowman v. Bowman, 29 Cal.2d 808, 178 P.2d 751, 170 A.L.R. 246. The proper rule was thus expressed by this court in Scheibe v. Scheibe, 57 Cal.App.2d 336, 342, 134 P.2d 835, 839:

"As pointed out in some of the earlier decisions, * * * the award made under said section 139, properly speaking, is not alimony, nor is it merely a substitute for the wife's interest in the community or separate property of the husband. It is an allowance authorized to be made by way of compensation for a wrong done to the wife, and in that sense is regarded as a penalty imposed upon the husband. '"It proceeds upon the theory that the husband entered upon an obligation which, among other things, bound him to support the wife during the period of their joint lives, and gave to her a right to share in the fruits and accumulations of his skill; that by his own wrong he has forced her to sever the relation which enabled her to enforce this obligation, and for the wrong which thus deprived her of the benefit of the obligation, he must make her compensation. The court is to fix the measure of that compensation by 'having regard to the circumstances of the parties respectively'; those circumstances furnishing the best means for determining the extent of her loss. * * * This allowance may be entirely independent of the property then in esse."' Honey v. Honey, supra [60 Cal. App. 759, 214 P. 250]. * * * The power to grant such an award is incidental to the determination of a divorce action, the same as is the right of a trial court to award the custody of children * * *, and the award may be made in the absence of allegations or evidence showing that the husband then owned either separate or community property to which resort may be had to enforce its payment, or that he has the ability to pay."

The judgment appealed from is affirmed.

WARD and BRAY, JJ., concur.

33 Cal.2d 596

CITY OF COMPTON et al. v. ADAMS.

L. A. 20928.

Supreme Court of California, in Bank.
March 14, 1949.

1. Census ⚷**1**

A "census" is an official enumeration of the population of a country or a city or other administrative district, and generally contains classified information relating to social and economic conditions.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Census".

2. Courts ⚷**41**

Under constitutional provision authorizing a chartered city to establish a municipal court when it contains a population of more than 40,000 inhabitants, as ascertained by last preceding census taken under authority of Congress, express statutory authority by Congress for the taking of a census is not essential. Const. art. 6, § 11.

3. Courts ⚷**41**
Municipal corporations ⚷**259**

Census taken in 1948 by United States at request of municipality certifying that municipality had over 40,000 inhabitants was sufficient under constitutional provision authorizing a chartered city to establish a municipal court when its population reached 40,000 inhabitants, as ascertained by "last preceding census taken under authority of Congress," and treasurer of municipality was required to pay costs of publishing ordinance calling for special election to determine whether municipal court should be established. 5 U.S.C.A. § 604; Const. art. 6, § 11.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Last Preceding Census".

EDMONDS, J., dissenting.

◆

Original proceeding for a writ of mandate by the City of Compton, a municipal corporation, and the Herald Publishing Company, a California corporation, to compel Roy L. O. Adams, as City Treasurer of the City of Compton, to pay costs of publishing a certain ordinance.

Writ issued.

Ralph K. Pierson, City Atty. and Samuel P. Block, both of Compton, for petitioners.

Bernard Lawler, of El Segundo, for respondent.

GIBSON, Chief Justice.

This proceeding was brought to compel payment of the costs of publishing an ordinance calling for a special election to determine whether a municipal court should be established in the city of Compton. Respondent city treasurer refused to pay the publication charges on the ground that the city council had no authority to call the special election because the population of the city as shown by the decennial census of 1940 was less than that required for the establishment of a municipal court. Section 11 of article VI of the Constitution provides that such a court may be established in a chartered city "containing a population of more than forty thousand inhabitants, as ascertained by the last preceding census taken under the authority of the Congress of the United States".

In 1948, the city of Compton requested the taking of a census of the city, the Secretary of Commerce of the United States directed that such a census be taken, and the city entered into an agreement to pay the costs thereof. The enumeration was made by the Bureau of the Census upon official schedules of the Department of Commerce, entitled "Special Population Census Schedule," which listed the name, address, sex, color, and age of each person, with his relationship to the head of the house and the number in the household. On December 14, 1948, the Director of the Bureau officially announced the result of the census and certified that the city had a population of 42,789 inhabitants. Thereafter the city council passed an ordinance calling for the special election, the ordinance was published as required by the city charter, and the city treasurer refused to pay the cost of publication. The matter has been submitted on a general demurrer to the petition which alleges the foregoing facts.

The question presented is whether the 1948 census is "the last preceding census taken under the authority of the Congress of the United States" within the meaning of section 11 of article VI.

[1] A census has been defined as "an official enumeration of the population of a country or of a city or other administrative district, generally with classified information relating to social and economic conditions." Webster's New International Dictionary, 2d Ed., 1941; see In re Cleveland's Claim, 72 Okl. 279, 180 P. 852, 855. No objection is raised as to the accuracy of the special census of 1948, which appears to have been taken by a house-to-house canvass in a manner similar to that employed in taking a decennial census, but the city treasurer contends that the 1948 census was not taken "under the authority of the Congress" since it was not authorized by specific legislation.

[2] It is not essential, however, that there be express statutory authority when the power is necessarily implied and included in the authority which is expressly granted. See Southern Pac. Co. v. Olympian Dredging Co., 260 U.S. 205, 208, 43 S.Ct. 26, 67 L.Ed. 213; Bank of Italy v. Johnson, 200 Cal. 1, 20, 251 P. 784; Penrose v. Ventnor City, 80 N.J.L. 547, 77 A. 1061, 1062. And it appears that for many years the Bureau of the Census has taken special censuses of various regional areas. See In re Cleveland's Claim, 72 Okl. 279, 180 P. 852; World Almanac, 1948, p. 240. The Secretary of Commerce is authorized by statute to make such investigations and reports as he "may deem necessary and urgent", 5 U.S.C.A. § 604, and special censuses are taken pursuant to this authority. In 1947 the Secretary instructed the Director of the Bureau of the Census to collect, compile and publish statistical information on the population, housing, and agriculture of the United States, and in addition, as we have seen, he specifically directed the taking of the special census of 1948. No reason appears or is suggested why such authorization does not come within the meaning of the phrase "under the authority of the Congress of the United States" as used in section 11 of article VI. The requirement that the population of a city be ascertained by reference to a United States census was apparently adopted so that it could be definitely established, by reference to an official report, whether a city could establish a municipal court, and the 1948 census fulfills this purpose, since it was officially taken and the result was officially announced and certified by the Director of the Bureau.

[3] Section 11 of article VI does not require that the census taken under authority of Congress be the decennial census, and it is significant that in other provisions of the Constitution, where the intent is to restrict the meaning and require reference to the national decennial census to ascertain population, the Constitution expressly so provides. For example, section 6 of article IV, relating to reapportionment of assembly districts, expressly refers to the "decennial Federal census." Cf. Const. art. XI, §§ 7½a, 8. It appears therefore that the census in the present case, having been officially taken by the Bureau of the Census under the authority of Congress, comes within the provisions of section 11 of article VI. Accordingly, the city treasurer was under a duty to pay the costs of publishing the ordinance calling for the special election.

Let a peremptory writ of mandate issue as prayed.

SHENK, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

EDMONDS, Justice (dissenting).

This proceeding, brought by the city against one of its officers, may be properly characterized as a collusive one. It is significant that on the same day the alternative writ of mandate issued, counsel for the city treasurer filed a demurrer to the petition and a stipulation that the matter might be submitted without argument. I cannot condone the practice of rendering what amount to advisory opinions in litigation which has the form but not the substance of adversary presentation. See dissent in City of Whittier v. Dixon, 24 Cal.2d 664, 668, 151 P.2d 5, 153 A.L.R. 956.

TRAVELERS INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

S. F. 17800.

Supreme Court of California, in Bank.
March 23, 1949.
Rehearing Denied April 21, 1949.

1. Workmen's compensation ⚿1420

Compensation award based solely upon evidence tending to prove only a possibility of industrial causation is conjectural and cannot be sustained.

2. Workmen's compensation ⚿1420

Where symptoms of last illness of employee were as characteristic of meningitis, of which employee died, as of lead poisoning, testimony of physician as to whether lead poisoning contributed to employee's death was sufficient to sustain award for death from injury "arising out of and in course of the employment."

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Arising Out of and in Course of the Employment".

◆

Proceeding for a writ of review by the Travelers Insurance Company against Industrial Accident Commission of the State of California, Jennie Odello and Robert James Odello, a minor, by his guardian ad litem and trustee, James Odello, to annul an award of the commission for the death of John Anthony Odello.

Award affirmed.

Prior opinion 195 P.2d 48.

Leonard, Hanna & Brophy and Edmund D. Leonard, all of San Francisco, for petitioner.

T. Groezinger and John A. Rowe, Jr., both of San Francisco, for respondents.

EDMONDS, Justice.

John Anthony Odello was a lead burner by trade. According to undisputed evidence, his death was immediately caused by Fibrinopurulent meningitis. A claim was filed by his wife with the Industrial Accident Commission and she was awarded $6300 upon the basis of a finding of fact, made by a referee, that Odello "sustained injury arising out of and occurring in the course of his employment, consisting of lead poisoning which proximately resulted in his death." By a writ of review, the insurer seeks to have the award annulled.

The controversy centers upon the evidence concerning meningitis and lead poisoning and their relation to each other. As stated by the physicians, meningitis is a disease caused by a variety of organisms of varying virulence. In some forms of it, total fatality is expected, regardless of the condition of the infected person; in others there may be a recovery if certain weakening conditions do not exist. Lead poisoning, that is, where lead exists free in the blood stream, may cause an anemia which facilitates the fatal effectiveness of meningitis.

The autopsy disclosed considerable deposits of lead in Odello's bones and kidneys, but, as his body had been embalmed before the examination of it, no determination could be made regarding the exact organism which caused death. Also because of the embalming, it was impossible to ascertain whether there was any lead in the blood stream at the time of death. A blood check taken at the time Odello was received in the hospital, which was just prior to his death, showed normal blood count, tending to indicate lack of anemia. However, there is also the testimony of a medical expert that this test is not conclusive since dehydration of the patient because of his illness might have caused this "normal" blood count.

The physicians who testified in regard to the cause of death were unable to state definitely that Odello had lead poisoning, but said it could not be ruled out as a possibility. At one point, Dr. Duggan, the medical expert most favorable to the applicant, declared that "there is a probability that he was suffering from lead poisoning." Under rather detailed cross-examination, the doctor later admitted that perhaps it was merely a "possibility" and not necessarily a "probability." The symptoms related by Mrs. Odello in describing her husband's condition immediately preceding his fatal illness were interpreted by the autopsy surgeon as being those of lead poisoning. However, it appears that they could be equally attributable as symptoms of meningitis in the absence of lead poisoning.

The petitioner argues that (1) inasmuch as the evidence shows at most a "possibility" of lead poisoning, the Commission's finding and award is based on speculation and conjecture; and (2) the question is one controlled by opinions of experts and the Commission may not substitute its judgment based on speculation where experts are unable to state an unqualified opinion. The Commission's position is that the medical testimony reasonably supports an award based upon lead poisoning as the accelerating cause of Odello's death.

[1, 2] An award based solely upon evidence tending to prove only a possibility of industrial causation is conjectural and cannot be sustained. Brown v. Industrial Accident Com., 44 Cal.App.2d 6, 12, 13, 111 P.2d 931; Hartford Accident & Indemnity Co. v. Industrial Accident Com., 140 Cal.App. 482, 35 P.2d 366. Dr. Duggan first stated that lead poisoning of Odello was probable. Under cross-examination he said that perhaps there was only a "possibility" of such poisoning. Candor and intellectual integrity often compel an honest physician to state that his diagnosis does not rest upon scientific certainty. Reading the physician's testimony as a whole, it clearly appears that as a scientist, in view of the impossibility of testing the blood at the autopsy, he was unwilling to state as a certainty that Odello had lead poisoning; on the other hand, in view of the evidence of lead deposits in Odello's body and the symptoms related by his wife, it was the doctor's opinion that lead poisoning could not be ruled out as a contributing cause of death. His testimony reasonably tends to support a finding of industrial causation, and the use of the word "possible" under cross-examination after his expression of opinion that the disease was probable does not require the rejection of such testimony as supporting, with other evidence, the award. Considering the testimony of Dr. Duggan as a whole the trier of fact reasonably could find that in the physician's opinion Odello probably was suffering from lead poisoning at the time he contracted meningitis and such poisoning was a material contributing cause of death.

There being adequate medical evidence to support the challenged finding, the award is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

33 Cal.2d 688

PEOPLE v. NIXON et al.

Cr. 4955.

Supreme Court of California, in Bank.

March 23, 1949.

Rehearing Denied April 21, 1949.

1. Homicide 🔑253(6)

Evidence established that deceased was killed in the commission of the crimes of robbery so as to make it the offense of murder in the first degree. Pen.Code, § 189.

2. Homicide 🔑18(5)

Where homicide is committed in the perpetration of robbery, it is murder in the first degree though there be no intent to kill. Pen.Code, § 189.

3. Homicide 🔑28

Where one motive for robbery of deceased was to obtain money with which to purchase additional wine, alleged intoxication of defendants preventing them from deliberating or premeditating was insufficient to prevent homicide from being murder in the first degree.

4. Homicide 🔑234(5)

Evidence sustained conviction of defendants of murder in the first degree as against claim that deceased died solely as result of kick from a co-defendant who did not appeal.

Appeal from Superior Court, Fresno County; Arthur C. Shepard, Judge.

Albert E. Nixon and Jesse A. Murphey and another pleaded guilty to the crime of murder and charges of robbery, named defendants were sentenced to death and the appeal is before the Supreme Court under Penal Code, § 1239(b).

Affirmed.

Ernest Spagnoli, of San Francisco, for appellants.

Fred N. Howser, Atty. Gen. and Clarence A. Linn, Deputy Atty. Gen., for respondent.

EDMONDS, Justice.

By information, Albert E. Nixon and Jesse A. Murphey were accused of having murdered William R. Reynolds. In five other counts they were charged with robbery committed while armed with a deadly weapon. Harold C. Rye was named as a codefendant. All three men pleaded guilty to the crime of murder and to two of the charges of robbery; the remaining counts were dismissed on motion of the district attorney. Upon a hearing to fix the degree of the crimes, the homicide was found to be murder in the first degree and the robberies also were determined to be of the first degree. As the penalty for the crime of murder, Nixon and Murphey were sentenced to death, and the judgment in that regard is before this court under the provisions of section 1239(b) of the Penal Code. There is no appeal by them from the judgments of conviction upon the two counts of robbery. Rye was sentenced to life imprisonment and did not appeal.

At the time the three defendants were arraigned, they waived counsel and each of them expressed his intention to plead guilty. The trial judge then stated: "This case is of such a nature that I do not feel justified in proceeding to receive the plea of the defendants without their having the opportunity of discussing the matter with counsel. And regardless of the statements of the defendants that they do not wish attorneys, I am going to appoint counsel in any event, because the gravity of the matter is such that I do not want to accept the plea until you and each of you have had an opportunity to talk the matter over with competent counsel." An attorney was appointed to represent each of the defendants and the matter was continued. Later, at the request of counsel, a medical expert was appointed by the court to aid the defendants in analyzing the autopsy report, and a continuance was granted, first for five and then for an additional two, days.

When the case again came on for hearing, the three defendants, in the presence of their counsel, entered pleas of guilty and a time was set to take evidence for the purpose of determining the degrees of the crimes with which they were charged. Witnesses were heard on four days and each defendant testified at length under examination by their counsel. The record also shows full and exceedingly competent cross-examination of each witness who testified for the People. Throughout the entire proceeding, there was scrupulous regard for the defendants' rights. For example, at one point the trial judge stated: "Because the condition of the record is such that the lives of these defendants are in jeopardy, I don't want to permit any testimony to come in that could possibly in the slightest way be improper * * *" And again: "I do not want to handle this case hastily. I don't want any act connected with it to be hasty."

The transcript of the proceedings discloses the following: All of the defendants were migrant camp workers. Nixon and Rye had known each other for about two months prior to the homicide. In Watsonville they met Murphey. Because all three of them had been drinking quite heavily, they were arrested and placed in jail. The next day they were released and given an hour to leave town. With the intention of going to Firebaugh to pick cotton, they traveled by train to Tracy. That night, they had a "party" and drank a considerable amount of wine. The following morning they drank the remaining quart of wine and then went to work picking tomatoes. They drank more wine while they worked and by four o'clock in the afternoon, when they quit and prepared to continue their journey to Firebaugh, they had consumed six fifths of Tokay wine.

Varney R. Hargett, a witness for the prosecution, was with the defendants in Watsonville when "[t]he law walked up and carried us in". He accompanied them to Tracy. The four men got on the freight train and found a place to ride on a flat car situated between two box cars. There were a caterpillar tractor and a bulldozer on the car and four other men. The other four were Bedford Lee, an 81 year old Negro; Louis Bauer, a machinist who had been on the train from the time it left Stockton; Cruz Certantez, a one-armed Mexican; and William R. Reynolds, the victim of the homicide.

Before boarding the train, Nixon, Murphey and Rye purchased one-half gallon of wine for the trip. After the train pulled out of Tracy, the wine was passed around and all of the men drank some of it, although the largest part was consumed by the defendants. They testified that at this time they were "feeling pretty good" but that they knew what they were doing.

The train passed Firebaugh without stopping and went on to Los Banos. Although there is a conflict in the testimony, it shows that some time before arriving at Los Banos, the defendants took out their knives and proceeded to take money and clothing from the others. Lee's wallet and $7.44 in cash were taken from him. Certantez gave up a leather jacket. Rye "traded" shoes with Reynolds and took his overcoat.

When the train reached Los Banos, Nixon left the flat car after directing Murphey and Rye to see that no one else did so. The latter pulled out their knives and everyone remained on board. Nixon asked a man named Smith where he could buy some liquor. Nixon went to a store to which he was directed by Smith and purchased a gallon of wine. They then returned to the train. When Smith climbed onto the flat car he noticed that something was wrong and started to leave but the defendants told him to remain.

It was after sundown and becoming dark when the train pulled out of Los Banos toward Fresno. The testimony of the defendants about this part of the trip is very vague. They all remembered, in varying degree, that the wine was passed around, that there was some scuffling, and that the deceased got "roughed up" a bit. The testimony of the other men was considerably more detailed although, to a certain extent, contradictory. Everyone admitted that it was getting dark and visibility was restricted.

While the defendants walked around the car all of the other occupants remained seated. Lee, Certantez, Bauer, and Reynolds, in that order, sat on the floor with their backs against the bulldozer. Smith and Hargett, apparently in the good graces of the defendants, sat by themselves and were unmolested.

According to Rye, Reynolds called him a "tramp robber" and a "fruit thief". Rye thereupon slapped Reynolds with a pair of gloves, previously taken from him, and kicked him in the hip. Nixon and Murphey then came up and struck and kicked Reynolds. There is considerable testimony as to "stomping" on Reynold's head and shoulders. Although pleading for mercy in the early stages of the attack, it appears that Reynolds soon lost consciousness. One or both of the other defendants also kicked and beat Bauer, Certantez and Lee, to a lesser degree, but because of the darkness there is a lack of positive identification of the assailants at various times.

After the beating was concluded, Rye took a Bible which one of the defendants carried and, holding the Bible in one hand and a knife in the other, "made the rounds having these guys to swear that they hadn't seen anything". The defendants then climbed on the adjoining box car, where they remained until they left the train at Fresno. They were arrested after they had made their way to Madera.

Reynold's body was embalmed in Fresno and, enroute to New Jersey, an autopsy was performed by the coroner of Los Angeles County. Because of the embalming, it was impossible to make a blood test but the cause of death was found to be acute coronary insufficiency due to traumatic shock. Although the heart condition alone could have caused death at any time, the testimony of the deputy assistant coroner and of an expert appointed by the court was that the physical difficulty was aggravated by the trauma.

Nixon and Murphey now make three main contentions: (1) the homicide did not occur in the perpetration of robbery within the meaning of section 189 of the Penal Code; (2) the drunken condition of the defendants was sufficient to negate any malice, premeditation or deliberation, therefore the crime was at most manslaughter; and (3) the evidence as to the heart condition of Reynolds was sufficient to establish that death was caused by the slapping and kicking of Rye, before either of the other defendants attacked the unfortunate victim.

[1] But there is substantial and almost overwhelming evidence that Reynolds was killed in the commission of the crimes of robbery within the meaning of section 189 of the Penal Code. After each of the defendants drew a knife, they took from the other riders on the train "by means of force or fear", property they had on their persons. Reynolds was directed to "trade" shoes with one of the defendants, while the latter held an open knife. Although the robberies took place a considerable time before the beating which led to the death of Reynolds, it was a part of the perpetration of those crimes. To protect themselves against discovery, the defendants held everyone on the flat car at Los Banos, and when Smith joined them they refused to let him leave. Nixon testified on cross-examination that he struck Reynolds to keep him from attracting attention. When asked if he had "done anything to him up to then", Nixon replied: "Well, no. But we would have been implicated in this robbery." To the following question, "And so you wanted to quiet him down so that he wouldn't report a robbery to anybody?" the witness answered, "That is right".

All of the defendants' acts, from the time when they took the money and clothing of their companions until they left the car, were one continuous integrated attempt to successfully escape after the perpetration of the robberies. Everyone on the train was kept under constant threats and the purpose, at least in part, of beating Reynolds was to prevent discovery of their criminal acts. Under these circumstances, the trial court was fully justified in concluding that unquestionably the homicide was a murder of the first degree. As this court has said: "* * * [T]he continuation of the use of arms which was necessary to aid the felon in reducing the property to possession is necessary to protect him in its possession and in making good his escape. Robbery, unlike burglary, is not confined to a fixed locus, but is frequently spread over considerable distance and varying periods of time. The escape of the robbers with the loot, by means of arms, necessarily is as important to the execution of the plan as gaining possession of the property." People v. Boss, 210 Cal. 245, 251, 290 P. 881, 883; People v. Doyell, 204 Cal. 109, 266 P. 807.

[2, 3] At the time of the robbery the defendants were "feeling pretty good" but admittedly they "could get around" and knew what they were doing. Clearly, one motive for the robbery was to obtain money with which to purchase wine in Los Banos. It is, therefore, of no consequence, as argued by the appellants, that at the time of the attack on Reynolds they were too drunk to deliberate or premeditate. Inasmuch as the homicide was committed in the perpetration of the robbery, it is not even necessary that there be an intent to kill. People v. Kaye, 43 Cal.App.2d 802, 111 P.2d 679. Further there was direct testimony that at the time the appellants beat Reynolds they were not drunk and, in answer to pleas of Reynolds that he did not want to die, one of the defendants said, "Well you are going to die, anyway".

[4] The appellants' third contention is wholly without merit. The supposition that Reynolds died solely as a result of the kick from Rye is contrary to the testimony of two medical experts and all of the wit-

nesses, including the defendants, who agreed that he was alive and protesting when the appellants beat and "stomped" him.

The judgments are affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

33 Cal.2d 599

UMBSEN v. CROCKER FIRST NAT. BANK OF SAN FRANCISCO et al.

S. F. 17646.

Supreme Court of California, in Bank.

March 15, 1949.

Rehearing Denied April 11, 1949.

1. Escheat 🔑6

In action by one who succeeded to corporation's assets, against bank to recover fund which was earmarked by bank about 40 years before when bank certified check which was drawn by corporation in favor of unknown payee, and which had never been presented to bank for payment, wherein state intervened claiming fund as abandoned property, plaintiff had burden under Abandoned Property Act of showing that she owned fund. Code Civ.Proc. §§ 1268, 1274.1 et seq., 1274.3, 1274.6, 1274.9, 1274.10.

2. Banks and banking 🔑145

Certification of a check by a bank constitutes an acceptance by the bank and transfers drawer's claim against bank to payee or holder of check, and its effect, like that of the acceptance of a bill of exchange, is to impose a primary liability on bank to pay amount of check on demand to payee or holder. Civ.Code, §§ 3143, 3265c.

3. Banks and banking 🔑145

If certification of check is procured at instance of payee to whom check has been delivered, transfer of drawer's claim to payee or holder of check occurs at time of certification, but if certification is procured at instance of drawer, transfer does not occur until check is delivered to payee, and at any time before delivery, drawer may have check canceled and his account recredited with amount of check. Civ. Code, §§ 3097, 3143, 3265c.

4. Banks and banking 🔑145

In action by one who succeeded to corporation's assets, against bank to recover fund which was earmarked by bank about 40 years before when bank certified check which was drawn by corporation in favor of unknown payee, and which had never been presented to bank for payment, plaintiff was entitled to recover if check was never delivered by corporation. Code Civ.Proc. §§ 1268, 1274.1 et seq., 1274.3, 1274.6, 1274.9, 1274.10; Civ.Code, §§ 3143, 3265c.

5. Bills and notes 🔑492

Statutory provision that where negotiable instrument is no longer in possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until contrary is proved, applies only in favor of a party who has possession of an instrument at time of trial. Civ.Code, § 3097.

6. Banks and banking 🔑154(6)

In action by one who succeeded to corporation's assets, against bank to recover fund which was earmarked by bank about 40 years before when bank certified check which was drawn by corporation in favor of unknown payee, and which had never been presented to bank for payment, statutory provision that where negotiable instrument is no longer in possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until contrary is proved, did not give rise to presumption that check was delivered by corporation, where the whereabouts of the check was unknown. Code Civ.Proc. §§ 1274.1 et seq.; Civ.Code, § 3097.

7. Escheat 🔑3

Where corporation drew a check in favor of an unknown payee, and check was presented to bank for certification by some one and was certified by bank, but check was never presented to bank for payment, and whereabouts of the check was unknown, one who succeeded to corporation's assets about 40 years after certification of the check, was entitled to fund which had been earmarked by bank for payment of the check, and state was not entitled to the fund as abandoned property under the Abandoned Property Act. Code Civ.Proc. §§ 1268, 1274.1 et seq., 1274.3, 1274.6, 1274.9, 1274.10; Civ.Code, §§ 3143, 3265c.

8. Escheat ⚿6

When a claimant appears and makes a reasonable showing of a legitimate claim to property claimed by the state under the Abandoned Property Act, a declaration of abandonment will run counter to the purpose of the act. Code Civ.Proc. § 1274.1 et seq.

◆

Appeal from Superior Court, San Francisco County; Robert L. McWilliams, Judge.

Action by Helen D. Umbsen against the Crocker First National Bank of San Francisco and the State of California to recover a fund earmarked by defendant more than 40 years before on defendant's certification of a check drawn by a corporation to whose assets plaintiff had succeeded, wherein the State of California intervened seeking payment of the fund as abandoned property. From a judgment in favor of the State of California, the plaintiff appeals.

Judgment reversed.

Prior opinion, 196 P.2d 58.

Heller, Ehrman, White & McAuliffe, Lawrence C. Baker and Richard E. Guggenhime, all of San Francisco, for appellant.

Fred N. Howser, Atty. Gen. and E. G. Benard and William J. Power, Deputy Attys. Gen., for respondents.

TRAYNOR, Justice.

In November 1905, G. H. Umbsen & Co., a corporation engaged in the real estate business, drew a check for $6,600 against its commercial account in the Crocker First National Bank of San Francisco. The bank records disclose that the check was certified on November 8, 1905. The name of the payee is not known, and it is not known at whose behest the bank certified the check. The check has never been presented for payment and its whereabouts is unknown. The $6,600 (hereinafter referred to as the fund), which was earmarked by the bank upon the certification of the check, remained unclaimed until the commencement of this action by plaintiff, the successor in interest to all the assets of G. H. Umbsen & Co.

On February 27, 1946 the bank, following the provisions of the Abandoned Property Act, Code Civ.Proc. § 1274.1 et seq., reported the unclaimed fund to the State Controller, who published notice thereof as provided by the Act. Before the time specified by the Act for the delivery of the unclaimed fund to the State Treasurer, plaintiff commenced this action against the bank, claiming to be the rightful owner of the fund. Plaintiff stipulated that she would furnish an adequate surety bond to protect the bank against any contingent liability in the event judgment was entered in her favor. The State of California intervened, contending that the fund was abandoned property, that plaintiff was not its owner, and that the bank was therefore required to deliver the fund to the State Treasurer. Pending final judgment the bank has withheld payment to the State Treasurer. The trial court entered judgment against plaintiff and ordered the bank to deliver the $6,600 to the State Treasurer. Plaintiff appeals.

Under the provisions of the Abandoned Property Act there is a presumption that a bank deposit unclaimed for more than twenty years has been abandoned, Code Civ.Proc. § 1274.3, and the holder thereof is required to report it to the State Controller and subsequently deliver it to the State Treasurer. Code Civ.Proc. § 1274.6. It is then held by the State Treasurer subject to recovery by the rightful owner.

[1] A claimant may establish that he is the rightful owner of abandoned property either before or after its delivery to the State Treasurer, Code Civ.Proc. §§ 1274.6, 1274.10, and may assert his claim within five years from the time judgment

has been obtained in an escheat proceeding commenced by the attorney-general, provided he is not a party to such proceeding. Code Civ.Proc. §§ 1274.9, 1268. If the claim of the owner is not established within the time prescribed, his rights are forever barred. Under the Act, therefore, plaintiff as a claimant of presumptively abandoned property has the burden of showing that she is the owner of the fund.

[2-4] The certification of a check constitutes an acceptance by the bank, Civ. Code, § 3265c, and its effect, like that of the acceptance of a bill of exchange, is to impose a primary liability on the acceptor to pay the amount of the check on demand to the payee or holder. Civ.Code, § 3143; Wells Fargo Bank & Union Trust Co. v. Bank of Italy, 214 Cal. 156, 159, 160, 4 P.2d 781; Conner v. Bank of Bakersfield, 174 Cal. 400, 402, 163 P. 353; see Britton, Bills and Notes, 832; Beutel's Brannan, Negotiable Instruments Law, 7th Ed., 1305. It transfers the drawer's claim against the bank to the payee or holder of the check. The transfer occurs at the time of certification, if the check is certified at the instance of the payee to whom the check has been delivered. If certification is procured at the instance of the drawer, however, the transfer does not occur until the check is delivered to the payee, Buehler v. Galt, 35 Ill.App. 225, 227; Anglo-South American Bank v. National City Bank, 161 App.Div. 268, 274, 146 N.Y.S. 457; In re Williamson's Will, 264 App.Div. 615, 616, 35 N.Y.S. 2d 1016, 1018; Ogden, Negotiable Instruments, 5th Ed., 524; see section 3097, Civil Code, so that at any time before delivery the drawer may have the check cancelled and his account recredited with the amount of the check. Thus, whether certification is procured by the drawer or the payee, delivery of the check is essential to the transfer to another of the drawer's claim against the bank. Plaintiff is entitled to recover, therefore, if the certified check was not delivered by G. H. Umbsen & Co.

Since there is no evidence of delivery or non-delivery, this case must be decided on the basis of inferences that may be drawn from the evidence. The only evidence in this case is that G. H. Umbsen & Co. had a commercial account with the bank, that it drew a check against that account which was certified by the bank, that the check was never presented for payment, and that its whereabouts is unknown. There is no evidence that G. H. Umbsen & Co.'s claim against the bank was ever transferred to anyone. Checks that are delivered are customarily presented for payment. Since the check in this case was never presented for payment, it is more probable than not that it was never delivered.

[5, 6] The state contends that according to section 3097 of the Civil Code there is a presumption that the certified check was delivered. That section provides: "And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved." This provision, however, applies only in favor of a party who has possession of an instrument at the time of the trial. Hockett v. Pacific States Auxiliary Corporation, 218 Cal. 382, 383, 23 P.2d 512; Molloy v. Pierson, 37 Cal.App. 486, 488, 174 P. 98; Shain v. Sullivan, 106 Cal. 208, 210, 39 P. 606; Pastene v. Pardini, 135 Cal. 431, 433, 67 P. 681; Linder Hardware Co. v. Pacific Sugar Corp., 17 Cal.App. 81, 92, 118 P. 785, 789; see Brannan, supra, 391, 392. No such situation is presented herein, for no one has produced the instrument.

[7, 8] We conclude, therefore, that plaintiff, the successor to the last known owner of the claim, has established her right to the fund. This conclusion is consistent with the purpose of the Abandoned Property Act. That Act is not like a statute that requires the forfeiture of property for some wrongful conduct. It prescribes the transfer of ownership to the state only of property held by a person with no claim of title when the true owner cannot be discovered despite the most careful inquiry. Ordinarily a proceeding would be brought and the property in due course declared abandoned if no legitimate claimant appeared. See Taylor v. Western States Land & Mortgage Co., 77 Cal.App. 2d 869, 874, 176 P.2d 975. When a claim-

ant does appear and makes a reasonable showing of a legitimate claim, a declaration of abandonment would run counter to the purpose of the Act.

The judgment is reversed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE JJ., concur.

33 Cal.2d 649

LACEY v. BERTONE.

S. F. 17621, 17715, 17722.

Supreme Court of California, in Bank.
March 22, 1949.

1. Appearance 🔑20

Personal service of process is waived by voluntary appearance.

2. Appearance 🔑17, 20

A person requesting relief which can be given only on hypothesis that he is properly before trial court thereby submits to jurisdiction of court and waives failure to serve summons or to give notice required to bring him before court originally or to give proper notice of subsequent pleadings after his appearance in action.

3. Appearance 🔑20

The statute authorizing application to dissolve or modify an injunction granted without notice to person injured does not affect rules governing special and general appearances, and does not permit party to rely on special defense or lack of notice and at same time to request additional relief on merits. Code Civ.Proc. § 532.

4. Appearance 🔑20

Plaintiff waived objection that injunction pendente lite was granted without notice required by law by making general appearance and moving to dissolve injunction on ground not only that notice was insufficient but also on grounds that there was no sufficient ground for injunction and that extent of injunction was too great and that no written undertaking was given as required by statute, and by seeking and obtaining additional relief which was inconsistent with any claim that plaintiff was merely making a special appearance. Code Civ.Proc. §§ 528, 529, 532, 1005, 1014, 1015.

5. Appeal and error 🔑80(4)

The rule that judgment fixing rights and liabilities of parties and directing reference to master or subordinate tribunal for accounting is not final, but is interlocutory and hence nonappealable, is based on desirability of putting parties to but one appeal at determination of entire controversy between them.

6. Appeal and error 🔑80(4)

Where court orders party to render accounting without reference to master, judicial act of approving account to be rendered remains to be done, and hence judgment is not final and is nonappealable even though judgment does not expressly state that a later final judgment is to follow. Code Civ.Proc. § 963.

7. Appeal and error 🔑80(4)

A judgment ordering accounting was interlocutory and not final and appealable, even though finding of trial court may have made the ordering of an accounting unnecessary and therefore erroneous. Code Civ.Proc. § 963.

8. Appeal and error 🔑119, 870(2)

An order denying motion to tax costs is appealable if made after final judgment, and is not appealable if made before entry of final judgment, in which event order may be reviewed on appeal from the judgment.

◆

Appeal from Superior Court, City and County of San Francisco; Herbert C. Kaufman, Pat R. Parker (assigned), and Thomas M. Foley, Judges.

Action for specific performance of contract for sale of apartment houses and for declaratory relief by E. V. Lacey, also known as Edward V. Lacey, against S. Bertone, also known as Stefano Bertone, who filed a cross-complaint. From an order granting an injunction pendente lite and from an order denying motion to dissolve or modify such injunction and from the judgment and from an order denying motion to tax costs, the plaintiff appeals.

Appeals from judgment and from order denying motion to tax costs dismissed and orders granting injunction pendente lite and denying motion to dissolve such injunction affirmed.

Prior opinion 195 P.2d 853.

Phil F. Garvey, James A. Himmel, and Julia M. Easley, all of San Francisco, for appellant.

Louis Ferrari and Allen Spivock, both of San Francisco, for respondent.

GIBSON, Chief Justice.

Lacey entered into a contract to purchase four apartment houses from Bertone. Numerous disputes arose between the parties as to the terms and performance of the agreement, and Lacey brought this action for specific performance and declaratory relief. Bertone filed a cross-complaint seeking cancellation of the contract together with damages and an accounting of rents collected by Lacey while he was in possession. After trial and submission of the action, but before judgment, Bertone obtained an injunction pendente lite restraining Lacey from collecting rentals and from interfering with Bertone's access to the premises in controversy. Lacey has appealed from the order granting the injunction and from an order denying his motion to dissolve or modify the injunction. Bertone was also given a judgment which terminated the contract, awarded damages, and ordered an accounting, and Lacey has filed separate notices of appeal from the judgment and from an order denying a motion to tax costs.

The questions presented on these appeals are: (1) Whether the orders granting the injunction and refusing to dissolve it should be reversed because of defective notice of hearing; (2) whether the judgment which ordered an accounting is interlocutory or is final and appealable; and (3) whether the order denying the motion to tax costs is appealable.

An order to show cause why an injunction pendente lite should not issue, made returnable on June 2, 1947, was served on Lacey on May 29, but no service was made on his attorney of record, and no appearance was made on his behalf when the matter came on for hearing. A temporary restraining order was granted, and thereafter, on June 10, the court signed and filed an order granting the injunction. On June 13, Lacey served a notice of motion to dissolve the injunction on the following grounds: (1) That the injunction was granted without the notice required by law; (2) that there was no sufficient ground for the injunction; (3) that the extent of the injunction was too great; and (4) that no written undertaking was given as required by section 529 of the Code of Civil Procedure. On the hearing of the motion, the court ordered the matter submitted upon filing of briefs, and the motion was subsequently denied.

Bertone had filed an undertaking with personal sureties, and on June 13, the same day that Lacey served his motion to dissolve the injunction, he also served a notice of exception to the sureties. The justification of the sureties was set for hearing at the same time as the motion to dissolve the injunction, and the court then made an order permitting a deposit of cash in lieu of a bond.

Lacey contends that the order granting the injunction should be reversed for failure to give proper notice of the hearing because the only notice was that served on him four days before the hearing, and that the order denying his motion to dissolve the injunction should be reversed for the same reason. He relies on section 528 of the Code of Civil Procedure, which provides that an injunction cannot be allowed after the defendant has answered, unless upon notice, or upon an order to show cause. He also asserts that an order to show cause is a notice of motion which is defective if not served five days prior to the hearing as required by section 1005 of the Code of Civil Procedure, and that such an order is a pleading which should be served on counsel of record pursuant to sections 1014 and 1015. We are of the opinion, however, that he is in no position to raise these objections and that he waived the lack of proper notice by making a general appearance on the motion to dissolve the injunction.

[1, 2] It is well settled that personal service of process may be waived and that where a person voluntarily appears generally he will be held to have waived the objection even though there was no service upon him. Raps v. Raps, 20 Cal.2d 382, 384, 125 P.2d 826; Olcese v. Justice's Court, 156 Cal. 82, 87, 103 P. 317; Security Loan & Trust Co. v. Boston S. R. Fruit Co., 126 Cal. 418, 421–423, 58 P. 941, 59 P. 296; Remillard Brick Co. v. Dandini, 47 Cal.App.2d 63, 65, 66, 117 P.2d 432. If he requests any relief that can be given only on the hypothesis that he is properly before the court, he thereby submits to the jurisdiction of the court and must necessarily be held to have waived the irregularity of his summons. This rule is ordinarily applied when the defect consists in a failure to serve summons or give the notice required to bring the party before the court originally. Farmers & Merchants Nat. Bank v. Superior Court, 25 Cal.2d 842, 846–847, 155 P.2d 823; Judson v. Superior Court, 21 Cal.2d 11, 129 P.2d 361; Olcese v. Justice's Court, supra; Raps v. Raps, supra. It likewise applies when there is a failure to give proper notice of subsequent proceedings to a party who has appeared in the action. Thomas v. San Diego College Co., 111 Cal. 358, 365, 43 P. 965; Miller v. Miller, 57 Cal.App.2d 354, 359–360, 134 P.2d 292; Goble v. Appellate Department of Superior Court, 130 Cal.App. 737, 738, 20 P.2d 345.

[3, 4] In the present case, if Lacey wished to make a special appearance, he should have relied solely on the lack of proper notice as specified in the first ground of his motion. Instead, he also asked for other relief which could properly be given only if the court had jurisdiction of his person, namely, that there was no sufficient ground for the injunction and that it was too broad in scope. The rules governing special and general appearances are in no wise affected by section 532 of the Code of Civil Procedure, which provides that if an injunction is granted without notice the person enjoined may apply to the court to dissolve or modify the same. The statute does not purport to permit a party to rely on the special defense of lack of notice and at the same time to request additional relief on the merits, and, as we have seen, if he requests such additional relief he waives the special objection that there was a lack of proper notice. On Lacey's motion to dissolve or modify the injunction he had ample opportunity to litigate the merits of the matter and, having made a general appearance, cannot now be heard to complain of defects in the service of the order to show cause. Moreover, by taking exceptions to the sureties and obtaining a cash deposit in lieu of the undertaking with personal sureties, Lacey sought and obtained additional relief which was inconsistent with any claim that he was making merely a special appearance.

The trial court found that Lacey was entitled to no relief on his complaint and decided in favor of Bertone on the cross-complaint. The judgment awarded Bertone possession of the premises, damages, and three unliquidated items, as follows: all installments of the purchase prise remaining unpaid at the date of the decree, the amount of any installment of taxes required by the contract to be paid by plaintiff and remaining unpaid at the date of the decree, and any other demands that may be allowable to Bertone by reason of Lacey's failure to perform the terms of the contract for which Bertone has not been compensated by the provisions of the decree. As to those three items the judgment provided: "That said E. V. Lacey is hereby ordered to render to said S. Bertone an account of all said sums; that in the event said E. V. Lacey fails to render such account, or in the event that the court finds such account unsatisfactory, incomplete or otherwise objectionable, the Court will fix a time and place for a hearing to be held before the above entitled Court upon such notice as the Court may designate and fix, to determine the amount due said S. Bertone from said E. V. Lacey pursuant to the terms of the contract of August 1, 1945, to the date of this decree." Lacey filed notice of appeal from this judgment before rendering the required accounting, and Bertone has moved to dismiss the appeal on the ground that no final judgment has been entered in the court below.

[5, 6] Under section 963 of the Code of Civil Procedure, an appeal lies only from

a final judgment except in certain cases not involved here. Where a judgment fixes the rights and liabilities of the parties and directs a reference to a master or subordinate tribunal for an accounting, the judgment is not final but is interlocutory and, hence, nonappealable. Hollar v. Saline Products, Inc., 3 Cal.2d 80, 43 P.2d 273; Gunder v. Gunder, 208 Cal. 559, 561, 282 P. 794. The rule is based on the desirability of subjecting the parties to but one appeal at the determination of the entire controversy between them, Gunder v. Gunder, supra, 208 Cal. 559, at page 561, 282 P. 794; Heck v. Heck Bros., 57 Cal.App.2d 599, 605, 134 P.2d 853, and the reason for the rule applies to a case, such as the present, where the court orders a party to render an accounting instead of referring the matter to a master for that purpose. Heck v. Heck Bros., supra; cf. Learned v. Board of Education, 37 Cal.App.2d 561, 99 P.2d 1100. Since there remains a judicial act to be done, i.e., approval of the account to be rendered, the judgment is not final, and this is true even though the judgment does not expressly state that a later final judgment is to follow. See Hollar v. Saline Products, Inc., supra.

[7] Lacey nevertheless contends that the judgment was a final judgment for the reason that the direction for an accounting was improper and mere surplusage in view of the finding of the trial court that the monthly installments on purchase price, taxes and other expenses had been paid. Stated in other words, the contention is that, because the court found that these items had been paid, there was no basis for ordering an accounting and that the erroneous direction to give an accounting must be disregarded as improper and surplusage. The cross-complaint, however, sought an accounting, and the case was one in which the court had jurisdiction to grant this relief. Since the judgment ordered an accounting, whether properly or erroneously, it was interlocutory, and even assuming that the finding made the ordering of an accounting unnecessary and therefore erroneous, the propriety of the order cannot be reviewed at this time because there has been, as yet, no final appealable judgment. See Heck v. Heck Bros., 57 Cal.App.2d 599, 605, 134 P.2d 853.

[8] Bertone has also moved to dismiss the separate appeal taken by Lacey from an order denying his motion to tax costs. Such an order is appealable only when it is an order made after final judgment; when made before entry of final judgment it is not appealable but may be reviewed on appeal from the judgment. Empire Gold Min. Co. v. Bonanza Gold Min. Co., 67 Cal. 406, 411, 7 P. 810; Levy v. Getleson, 27 Cal. 685, 688; People v. California Protective Corporation, 76 Cal.App. 354, 358, 244 P. 1089. Here, as we have seen, there has been no final judgment, and the order, therefore, is not appealable.

The appeals from the judgment and from the order denying the motion to tax costs are dismissed. The orders granting an injunction pendente lite and denying a motion to dissolve the injunction are affirmed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

33 Cal.2d 564

CARTER v. SEABOARD FINANCE CO.

L. A. 20189.

Supreme Court of California, in Bank.

March 11, 1949.

1. Fraud 🔑14

In action by buyer of truck against finance company which had financed the purchase, for alleged fraud in connection with the purchase, evidence that company's agent stated that the truck should be in good condition, in view of fact that company had recently spent nearly $3,000 in having it repaired, was insufficient to establish actionable fraud.

2. Fraud 🔑17

Failure of agent of finance company, which financed purchase of truck by buyer, to inform buyer that the truck had been in a wreck, did not constitute actionable fraud, in absence of a fiduciary relationship, since company was not bound to volunteer such information.

3. Fraud 🔑13(2), 20, 28

Fact that serial number of truck motor had been changed to make it appear to be a later model was not actionable fraud on part of finance company which financed the purchase of the truck for buyer, where no evidence was offered by buyer to prove that company's agent knew of the change in the serial number, that change was not permitted by Motor Vehicle Department, or that buyer relied on the serial number in deciding to purchase the truck.

4. Fraud 🔑20

Where a buyer does not rely on statements of fact or opinion made by a seller, but instead makes an independent examination which satisfies him, no actionable fraud is shown.

5. Sales 🔑450

Statutory provision defining as a "conditional sale" any contract for sale of a motor vehicle, with or without accessories, under which possession is to be delivered to the buyer, and a lien on the vehicle is to vest in the seller as security for payment of part or all of the price or for performance of any other condition, applies to transactions where a chattel mortgage is taken by a seller of a motor vehicle. Civ. Code, § 2981(a) 1, 3.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Conditional Sale".

6. Sales 🔑452

Where finance company had merely a lien on trucks, but its interest was tantamount to complete ownership so far as its power to deal with the trucks was concerned, and it had the power to make a binding sale of the trucks which would pass title to buyer, company was a "seller" of the trucks within meaning of Conditional Sales Law. Civ.Code, §§ 2981(a, b, g, h), 2982(a, c).

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Seller".

7. Usury 🔑42

Contract charge of $2,480.22 by finance company on initial balance of $15,658.41 for truck and trailer on basis of 19 months did not violate provision of the Conditional Sales Law that amount of time differential in any conditional sale contract for sale of a motor vehicle shall not exceed one per cent. of the unpaid balance multiplied by the number of months elapsing between due date of last installment. Civ.Code, § 2982(c).

8. Sales 🔑461

The purpose of provision of the Conditional Sales Law that every contract of conditional sale shall recite cash sale price, buyer's down payment and whether made in cash or by trade-in, amount of cash price, cost to buyer of insurance, itemization of fees to be paid by seller or buyer to any public officer, amount of unpaid balance, time price differential, contract balance, and number, amount, and due date of installment payments, is to protect buyers of motor vehicles against excessive charges by requiring full disclosure of all items of cost. Civ.Code, 2982(a).

9. Statutes 🔑227

The word "shall" in a statute may sometimes be directory only, whereas the word "may", seemingly much less forceful, may be mandatory.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "May" and "Shall".

10. Sales 🔑461

Provision of the Conditional Sales Law that every contract of conditional sale shall recite cash sale price, buyer's down payment and whether made in cash or by trade-in, amount of cash price, cost to buyer of insurance, itemization of fees to be paid by seller or buyer to any public officer, amount of unpaid balance, time price differential, contract balance, and number, amount, and due date of installment payments, is mandatory. Civ.Code, § 2981(a).

11. Chattel mortgages 🔑43

A chattel mortgage is required to follow the form demanded by the Conditional Sales Law only when the seller sells the motor vehicle on which he takes a mortgage. Civ.Code, §§ 1599, 2982(a).

12. Usury 🔑137

Provision of Conditional Sales Law that, if a seller of motor vehicle shall violate requirement that price differential in conditional sale contract of a motor vehicle shall not exceed one per cent. of unpaid balance multiplied by number of months elapsing between date of contract and due date of last installment, buyer may recover from seller three times total amount paid on contract by buyer, applies only to a violation of that section. Civ.Code, § 2982(c).

13. Action 🔑4

A member of a class for whose protection a statute was enacted is ordinarily not considered in pari delicto with those who violate the statute.

14. Usury 🔑140

Buyer of truck and trailer was not precluded from recovering penalty from finance company for allegedly usurious interest charges, on ground that the parties were in pari delicto. Civ.Code, § 2982(c).

15. Usury 🔑6

Purpose of constitutional amendment providing that no person, association, copartnership, or corporation shall receive from a borrower more than 10 per cent. interest, but that restriction shall not apply to industrial loan companies, etc., was to abolish the inflexible, inadequate, and unworkable provisions of the usury law and to re-establish in the Legislature the power to enact laws affecting the business of lending money. Const. art. 20, § 22.

16. Pawnbrokers and money lenders 🔑6.2

The words "above restrictions", in third paragraph of constitutional amendment providing that "above restrictions" relating to usury shall not apply to any industrial loan companies, etc., are applicable to the first and second paragraphs of the constitutional amendment. Const. art. 20, § 22.

17. Constitutional law 🔑16

In resolving uncertainty in constitutional amendment, recourse could be had, as an aid to interpretation, to summary prepared by Attorney General pursuant to his authority and duty to give a true and impartial statement of the purpose of the measure, and to the arguments for and against the measure sent to the voters and set forth in pamphlets accompanying sample ballots and appearing immediately following Attorney General's summary. Pol. Code, § 1197; Const. art. 20, § 22.

18. Usury 🔑6

Purpose of constitutional amendment dealing with rate of interest to be charged, and providing that Legislature might from time to time prescribe maximum rate of interest which exempted classes of persons might charge or receive from a borrower, was to free the Legislature from restraints imposed by inflexible usury provisions so that interest and charges more appropriate to business conditions peculiar to each of the exempted classes could be established. Const. art. 20, § 22.

19. Constitutional law 🔑30

Until the Legislature exercises power granted to it by constitutional amendment providing that the Legislature may from time to time prescribe maximum rate of interest which exempted classes, such as industrial loan companies, may charge or receive from a borrower, exempted class not so governed by legislation is subject to no restriction on interest rates or charges. Const. art. 20, § 22.

20. Pawnbrokers and money lenders 🔑6.2

The Commissioner of Corporations has no power under the Personal Property Brokers Act to limit the interest on or to regulate the charge with respect to loans by personal property brokers. Gen.Laws, Act 5825, §§ 8, 17, 20, 22; Pol.Code, § 470; Const. art. 20, § 22.

21. Pawnbrokers and money lenders 🔑6.2

The power to regulate the business of personal property brokers, including the fixing of interest and charges on their loans, is, under the Constitution, vested in the Legislature, and at the present time there is no legislation affecting interest and charges on such loans in excess of $300. Gen.Laws, Act 5825, §§ 8, 17, 20, 22; Const. art. 20, § 22.

22. Pawnbrokers and money lenders 🔑9

In action by buyer of trucks against finance company which financed the purchase of the trucks, evidence sustained trial court's findings that company committed no violation of the Personal Property Brokers Act. Gen.Laws, Act 5825, §§ 8, 17, 20, 22.

23. Constitutional law 🔑240(1)
Pawnbrokers and money lenders 🔑2

Constitutional amendment exempting personal property brokers from interest restrictions and the Personal Property Brokers Act permitting personal property brokers to charge a higher rate of interest are not in violation of the equal protection clause of the Fourteenth Amendment. Gen. Laws, Act 5825, §§ 8, 17, 20, 22; Const. Cal. art. 20, § 22; U.S.C.A.Const. Amend. 14.

CARTER, J., dissenting.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Austin Carter against the Seaboard Finance Company, a Delaware corporation, on three separate causes of action based on alleged fraud in sale of a truck, a violation of the Conditional Sales Law allegedly rendering contract void, and on usury. From an adverse judgment, the plaintiff appeals.

Judgment on first and third causes of action affirmed, and judgment on second cause of action reversed with directions.

Prior opinion 193 P.2d 985.

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Fred N. Howser, Atty. Gen., and Edward Sumner and B. Abbott Goldberg, Deputy Attys. Gen., amici curiae.

Bromley, Ritter & Lindersmith and H. E. Lindersmith, all of Los Angeles, for respondent.

O'Melveny & Myers, Louis W. Myers, Sheppard, Mullin, Richter & Balthis, and George R. Richter, Jr., all of Los Angeles, and Brobeck, Phleger & Harrison, of San Francisco, amici curiae on behalf of respondent.

SHENK, Justice.

This is an appeal by the plaintiff from a judgment for the defendant on three causes of action attacking the validity of a transaction for the purchase of two trucks and two trailers.

In 1946, the plaintiff and a former business associate Spurgeon decided to engage in the trucking business. The plaintiff negotiated with Brace, local truck manager for the defendant finance company. On March 11, 1946, he entered in to the transaction with the defendant by which he acquired a GMC truck and Weber trailer and a Sterling truck and Fruehauf trailer, and executed to the defendant a note and mortgage covering the purchase price and other items.

The defendant had previously repossessed the Sterling truck and Fruehauf trailer under the terms of a chattel mortgage held by it after the mortgagor Houston had defaulted. The defendant had given Houston five days' notice of its election to sell as required by the terms of the mortgage.

The Weber trailer was owned by Northern Transportation Company and the GMC truck by one Moose, subject to a chattel mortgage held by the Bank of America.

The total purchase price including items for registration fees, insurance premiums, tires and certain repairs was $20,358.41. The plaintiff made a down payment of $4,700 to the defendant and executed a promissory note for $15,658.41 and a chattel mortgage on all four vehicles as security for the balance. The principal was to be repaid in 17 monthly installments of $1,000 which were to include charges at the rate of 1½ per cent per month on the unpaid principal and a final installment covering any unpaid balances.

Under the terms of a "Statement of Loan" executed at the same time, the defendant was directed to disburse the amount of the loan plus the cash received.

The defendant did so disburse the amounts as follows: (1) $7,685.72 to defendant in satisfaction of the Houston mortgage on the Sterling and Fruehauf; (2) $1,947.50 to Northern Transportation Company for the Weber; (3) $6,918.75 to the Bank of America for release of the GMC from the Moose chattel mortgage; (4) $3,806.44 to various other persons and the Department of Motor Vehicles for sales taxes, repairs, insurance, and fees.

Subsequently additional disbursements for tires, insurance and repairs were made by the defendant at the plaintiff's request increasing the principal sum to $18,955.74. Payments in varying amounts totalling $1,776.23 had been made when at the beginning of July, 1946, Spurgeon notified Brace that neither he nor the plaintiff could make the payments. He followed Brace's instructions to deliver the equipment to a dealer's lot. When Brace gave the plaintiff notice that the equipment would be sold unless within five days the plaintiff paid the entire unpaid balance, the plaintiff commenced the present action.

The first cause of action charges that Brace, defendant's agent, fraudulently misrepresented that the Sterling truck was in good mechanical condition, whereas shortly after plaintiff took possession he learned that the motor was not suitable for the operation of the truck. The alleged fraud is predicated upon the following contentions: (1) That Brace made express representations as to the condition of the truck; (2) that Brace fraudulently concealed from the plaintiff the fact that the Sterling had been involved in a wreck only a short time before; and (3) that the serial number of the motor had been changed to make it appear to be a later model.

[1] Ample evidence was offered which supports the judgment for the defendant on the first cause of action. There was testimony that the only statement of Brace as to the truck's condition was that "it should be in good condition" in view of the fact that the defendant had recently spent nearly $3,000 in having it repaired. This was merely Brace's opinion, based upon his expenditures for repairs, and did not form a basis for a cause of action.

[2] Nor did the failure of Brace to inform the plaintiff that the truck had been in a wreck charge the defendant with fraud, for, in the absence of a fiduciary relationship, the defendant was not bound to volunteer that information. Rest., Contracts, sec. 472. Furthermore, the $3,000 repair bill listing items which indicated that major repairs had been made on the truck should have placed Carter on inquiry as to the reason therefor.

[3] No evidence was offered to prove that Brace knew of the change in the serial number, that the change was not permitted by the Motor Vehicle Department, or that the plaintiff relied upon the serial number in deciding to purchase. It appears that the discrepancy between the number and motor model was not discovered until a month after the sale was consummated.

[4] There was no evidence of reliance upon any representations of the defendant's agent. The plaintiff had formerly engaged in the trucking business and was familiar with trucks and motors. Before consummating the transaction he inspected the truck several times and drove it for about half an hour. He took the further precaution of calling in a mechanic who had previously worked on the motor and who advised him that it was all right. Where the plaintiff does not rely upon the statements of fact or opinion made by the defendant but instead makes an independent examination which satisfies him, no actionable fraud is shown. Nielsen v. McKenna, 8 Cal.2d 690, 67 P.2d 1044; Yates v. Eudemiller, 213 Cal. 26, 1 P.2d 434. The findings and judgment as to the first cause of action are supported by the evidence.

The second cause of action is based upon alleged violations of section 2981 and 2982 of the Civil Code added in 1945, Stats. 1945, ch. 1030, p. 1991, regulating conditional sales of motor vehicles. By section 2981(a) a conditional sale contract is defined as:

"1. Any contract for the sale of a motor vehicle, with or without accessories, under which possession is delivered to the buyer but the title vests in the buyer thereafter only upon the payment of all or part of the price, or upon the performance of any other condition.

* * * * * *

"3. Any contract for the sale of a motor vehicle, with or without accessories, under which possession is delivered to the buyer, and a lien on the property is to vest in the seller as security for the payment of part or all of the price, or for the performance of any other condition."

Subdivision (b) of section 2981 defines "seller" as "the person who sells or leases the property under a conditional sale contract."

Subdivision (h) declares the "time price differential" to be "any amount which the buyer agrees to pay to the seller in excess of the unpaid balance" which is defined in subdivision (g) as the difference between the cash price and down payment plus insurance premiums and fees paid public officers.

Section 2982(a) requires that every contract of conditional sale shall recite the cash sale price, the buyer's down payment and whether made in cash or by trade-in, the amount of the cash price, the cost to the buyer of insurance, an itemization of fees to be paid by the seller or buyer to any public officer, the amount of the unpaid balance, the time price differential, the contract balance, and the number, amount and due date of installment payments.

It is further provided in section 2982 that "(c) The amount of the time price differential in any conditional sale contract for the sale of a motor vehicle, with or without accessories, shall not exceed 1 per cent of the unpaid balance multiplied by the number of months, including any excess fraction thereof as one month, elapsing between the date of such contract and the due date of the last installment, or twenty-five dollars ($25), whichever is greater, provided that such contract may provide for interest on any delinquent installment from and after the date of delinquency, and for reasonable collection costs and fees in the event of delinquency. If the seller, except as the result of an accidental and bona fide error in computation, shall violate any provision of this subsection (c), the conditional sale contract shall not be enforceable except by a purchaser for value, and the buyer may recover from the seller in a civil action three times the total amount paid on the contract balance by the buyer to the seller or his assignee pursuant to the terms of such contract."

[5] It is contended that section 2981(a) 3 discloses a legislative purpose to include in the definition of a "conditional sale contract" those transactions which are conventionally regarded as chattel mortgages in order to thwart evasions of the act by the use of the chattel mortgage form rather than the conditional sale contract. The phrasing of the section appears to support the contention, and the statute should be held to apply to transactions where a chattel mortgage is taken by a seller of a motor vehicle. The present case then presents the problem whether, in exercising its power of sale after repossessing the Sterling truck and Fruehauf trailer under the terms of the Houston mortgage, the defendant was a "seller" within the meaning of the conditional sale act.

[6] It is undoubtedly true that a "seller" need not be the owner of the property sold. Since this defendant had the power to make a binding sale which would pass title to the Sterling and Fruehauf to the plaintiff it may be said to be a seller of those two vehicles within the meaning of the act, despite the fact that it had only a lien on the vehicles. Its interest was tantamount to complete ownership as far as its power to deal with the vehicles was concerned. Houston the mortgagor was not involved. He received no money, did not participate in the sale and had no knowledge of or any apparent interest in the transaction. The defendant's agent Brace handled it and made all necessary arrangements.

The plaintiff contends that he was also entitled to regard the defendant as seller of the Weber and GMC because, so it is claimed, the defendant was an undisclosed agent in the sale. The evidence clearly points to the conclusion impliedly reached by the trial court that the defendant was neither agent nor principal in the sale of that truck and trailer, but merely financed the purchase thereof by the plaintiff.

[7] The plaintiff contends that the contract charge of 1½ per cent per month was more than the maximum time price differential allowed by section 2982(c). However, he concedes that if he had paid all of the installments when due the time price differential would have amounted to $2,480.22 on the initial balance of $15,658.41. Under section 2982(c) the time price differential may not exceed 1 per cent of the unpaid balance multiplied by the number of months, including any excess fraction thereof as one month, elapsing between the date of the contract and the due date of the last installment. The period from March 11, 1946, the date of the contract, to September 22, 1947, the due date of the last installment, spanned 18 months, 11 days. Permissible charges are to be computed on the basis of 19 months. The allowable time price differential would therefore be $2,975.10, a sum greater than that called for by the contract. The plaintiff's assertions of violation of this subdivision are without merit.

Although the defendant has not exceeded the charge limitation of section 2982(c), it is apparent that it has not complied with the form and requisites of conditional sale contracts set forth in section 2982(a). The contract did not recite the full cash price of each of the trucks and trailers, nor the amount of the down payment credited toward each, the total cost of insurance to the buyer, itemization of fees to be paid to the Motor Vehicle Department, the correct time price differential, nor the amount of the final installment.

[8] The effect of this failure to comply with the statutory requirements depends on whether the provisions are directory or mandatory. The obvious purpose of the statute is to protect purchasers of motor vehicles against excessive charges by requiring full disclosure of all items of cost. If the statute be construed as mandatory the contract was unenforceable with respect to the Sterling and Fruehauf, for the reason that it was in violation of the statute. This is so notwithstanding the fact that the statute does not expressly pronounce it so. Civ.Code, sec. 1667(2); Smith v. Bach, 183 Cal. 259, 191 P. 14; Levinson v. Boas, 150 Cal. 185, 88 P. 825, 12 L.R.A.,N.S., 575, 11 Ann.Cas. 661; Kreamer v. Earl, 91 Cal. 112, 27 P. 735; Jacks v. Taylor, 24 Cal.App. 667, 142 P. 121; 50 Am.Jur. sec. 20.

[9, 10] Whether the statute was meant to be mandatory or directory may not be determined merely from the fact that it provided that certain formalities "shall" be followed. The word "shall" in a statute may sometimes be directory only, whereas the word "may," seemingly much less forceful, may be mandatory. Pulcifer v. County of Alameda, 29 Cal.2d 258, 262, 175 P.2d 1; In re Estate of Mitchell, 20 Cal.2d 48, 123 P.2d 503. The entire statute may be resorted to in order to ascertain its proper meaning. If to construe it as directory would render it ineffective and meaningless it should not receive that construction. To to construe it would indicate that the prescribed form and requisites are merely desirable matter which the seller could include or would not be bound to include, at his option. Such a construction certainly would not afford the protection to purchasers which was intended. The form and requisites must therefore be held to be required and the statute in these respects to be mandatory.

[11] The defendant contends that the result we reach wrongly considers a single chattel mortgage as two distinct instruments, a chattel mortgage not under the act (as to the GMC and Weber) and a conditional sale contract (as to the Sterling and Fruehauf). The answer is that a chattel mortgagee is required to follow the form demanded by the conditional sale act only when he sells the vehicle on which he takes a mortgage. The effect is to make this contract unenforceable only in part. Civ.Code, sec. 1599.

[12] Since section 2982(c) limiting the time price differential provides that a contract in violation thereof shall be unenforceable and that the buyer may recover three times the amount paid by him on the contract balance, it follows that the additional penalty applies to a violation of that subdivision only. The conclusion that a violation of other provisions renders the contract merely unenforceable is therefore not inconsistent.

[13, 14] On equitable grounds the plaintiff is not prevented frrom recovering the proportion of the payments applicable to the Sterling and Fruehauf. A member of the class for whose protection the statute was enacted is ordinarily not considered in pari delicto with those who violate the statute. McAllister v. Drapeau, 14 Cal.2d 102, 112, 92 P.2d 911, 125 A.L.R. 800; Miller v. California Roofing Co., 55 Cal.App.2d 136, 143, 130 P.2d 740; 3 Pomeroy's Equity Jurisprudence, 5th Ed. 1941, secs. 942, 942c, pp. 738, 745.

The defendant was acting as a licensed personal property broker in respect to the loan secured by the chattel mortgage. It is therefore necessary to determine whether it was guilty of usury, as alleged in plaintiff's third cause of action in charging 1½ per cent per month on the unpaid balance of the loan.

The submission of this case was set aside at the request of amici curiae in behalf of the plaintiff. Upon reargument they have urged a re-examination of the usury law of this state to the end that the decisions of this court contrary to their contentions be overruled and that it be decided that the public officers charged with the duty of enforcing the law have, at least since 1934, been laboring under a misapprehension of its requirements, especially as applied to personal property brokers. Numerous other briefs amici curiae have been filed representing viewpoints both public and private on the question of usury.

In view of the course that the case has taken it is deemed advisable to review somewhat at length the statutory law and the decisions in this state on the subject. To discuss all of the points set forth in the briefs would take us far beyond the requirements of the case. Sufficient will be said to resolve the conflicting contentions presented by the parties and the friends of the court with reference to the issues in this particular case.

The practice of usury is of long standing. We find it condemned even in the ancient Holy Writings, "Neither shalt thou lay upon [my people] usury." Exodus 22:25. When California assumed statehood it was a live question, some advocating that the law of Mexico limiting interest to 6 per cent per annum should be continued. Fowler v. Smith, 2 Cal. 39; on rehearing 2 Cal. 568, 569. During the controversy the first session of the legislature took notice of it and provided that it should be competent for persons to "agree in writing for the payment of any rate of interest whatever on money due or to become due on any contract;" and permitting the compounding of interest. Stats. 1850, p. 92, secs. 2 and 3. Thirty-eight years later this court said, "The illegality of usury is wholly the creature of legislation, and in this state nothing has been prescribed by the legislature to relieve parties from contracts providing for exorbitant rates of interest." Coleman v. Commins, 1888, 77 Cal. 548, 554, 20 P. 77, 80. In 1872 the legislature enacted sec. 1918 of the Civil Code which contained in substance the provisions of the Act of 1850. This remained the law generally until the adoption of the initiative usury law at the state election of November 5, 1918. Stats. 1919, p. lxxxiii, hereinafter called the usury law, Gen.Laws, Act 3757. Thus, this state was without a general usury statute for the first sixty-eight years of its existence. During that period the state had increased some 3600 per cent in population with a corresponding increase in business transactions and productivity; and although no general usury law was then in force acute problems of the necessitous borrower versus the rapacious money lender received frequent legislative treatment.

As early as 1861 the legislature enacted a measure, Stats. 1861, p. 184, regulating the activities of pawnbrokers and limiting interest on loans of over $20 to 4 per cent per month in advance. This statute was held valid against the objection that it was not uniform in its operation as required by Article I, Section 11, of the State Constitution then in force. Jackson v. Shawl, 1865, 29 Cal. 267. In 1881, section 340 of the Penal Code provided that the rate of interest which might be received by pawnbrokers should not exceed 2 per cent per month. In 1885 this court held that this legislation was valid as against an objection that it violated section 25 of Article IV of the Constitution which in effect prevented the legislature from passing any special law regulating the rate of interest on money. It was declared that pawnbrokers were a sufficiently distinct class to justify a constitutional classification. Ex parte Lichtenstein, 67 Cal. 359, 7 P. 728, 56 Am.Rep. 713.

In 1905 two statutes were enacted one day apart. The first, Stats.1905, p. 422, endeavored to regulate the interest and charges of loans secured by chattel mortgages on certain classes of property and permitting an additional charge in connection with loans of $300 or less. The second, Stats.1905, p. 711, provided for the incorporation of associations to loan money in sums not exceeding $300 on the security of personal property and also purported to limit rates and charges of lenders not incorporated under the act on loans of $300 or less. Both of these statutes were held unconstitutional. Ex parte Sohncke, 1905, 148 Cal. 262, 82 P. 956, 2 L.R.A.,N.S., 813, 113 Am.St.Rep. 236, 7 Ann.Cas. 475. In the light of that decision the legislature in 1909, Stats.1909, p. 969, attempted to regulate the business of making small loans secured by personal property. This was the first Personal Property Brokers Act, Gen.Laws, Act 5825. That statute defined a personal property broker as one engaged in the business of loaning money on the security of personal property the possession of which is retained by the borrower, or on the security of wages. That act permitted a maximum charge of 5 per cent per month on loans of this kind. A statute of 1911, Stats.1911, p. 978, reduced the rate to 2 per cent per month on loans covered by the statute of 1909. The Personal Property Brokers Act was attacked upon the same grounds urged successfully in Ex parte Sohncke, supra, 148 Cal. 262, 82 P. 956, 2 L.R.A.,N.S., 813, 113 Am.St.Rep. 236, 7 Ann.Cas. 475, but the statute was sustained as based on a reasonable classification. In the Matter of the Application of Stephan, 1915, 170 Cal. 48, 148 P. 196, Ann.Cas.1916E, 617; Eaker v. Bryant, 1914, 24 Cal.App. 87, 140 P. 310.

In 1917, Stats.1917, p. 658, Gen.Laws, Act 3603, the legislature provided for the incorporation of industrial loan companies with authority to make loans on personal security or otherwise with certain restrictions and regulations.

The foregoing enactments do not constitute all of the laws passed by the legislature in the period between statehood and the adoption of the usury law but a reference to them and others that might be mentioned serves to show that usury problems, especially as applied to small loans (which were quite uniformly considered as loans of $300 or less), were of frequent legislative cognizance. The usury law set a limit of 12 per cent per annum on all classes of loans and lenders. A portion of this statute which attempted to curtail charges of loan brokers was declared unconstitutional because it discriminated against certain groups of brokers, and because the subject was not included in the title. Wallace v. Zinman, 1927, 200 Cal. 585, 254 P. 946, 62 A.L.R. 1341. Furthermore the statute did not prevent the lender himself from making additional charges for services and expenses in connection with a loan. Haines v. Commercial Mortgage Co., 1927, 200 Cal. 609, 616, 617, 254 P. 956, 255 P. 805, 53 A.L.R. 725. After the adoption of the usury law and during its operation the legislature undoubtedly recognized the inadequacy, from a business and economic standpoint, of the fixed rate of 12 per cent per annum as applied to small loans and likewise concluded that the initiative measure was inadequate in that it did not prevent charges in addition to the interest which might be exacted from the borrower. The result was possible unconscionable and usurious interest and charges. Numerous attempts were made to change the rates of interest and to prescribe rates and regulations different from or inconsistent with the provisions of the usury law. Of particular significance was the adoption in 1931, Stats. 1931, p. 558, of a law based on the Uniform Small Loan Law advocated by the Russell Sage Foundation which had been adopted in many states. The 1931 statute was a practical revision of the personal Property Brokers Act of 1909. It established a comprehensive plan of regulation under the Commissioner of Corporations. Among other provisions it purported to permit personal property brokers to charge 3½ per cent per month on the unpaid balance of loans of $300 or less. This statute was held inoperative in Beneficial Loan

Society, Ltd. v. Haight, 215 Cal. 506, 11 P.2d 857, on the ground that it constituted an attempt to amend or change the provisions of the usury law relating to interest and that such a revision could not be accomplished except by a vote of the people. The regulatory provisions of the 1931 act, however, were held not to be inconsistent with the usury law. In re Halck, 215 Cal. 500, 11 P.2d 389. These cases were decided in 1932.

The 1933 session of the legislature submitted to the people of the state a proposed constitutional amendment known as Assembly Constitutional Amendment No. 79, St. 1931, p. 3159. At the same session the Personal Property Brokers Act was amended by striking out the invalid provisions relating to interest and by strengthening its regulatory features. Stats.1933, p. 1496. Also at that session the Assembly appointed an Interim Committee to investigate "all problems in connection with the making of small loans" and to submit recommendations for legislation to the 1935 session of the legislature.

The proposed constitutional amendment was adopted at the general election held November 6, 1934, Sec. 22 of Art. XX, the pertinent provisions of which are as follows:

"The rate of interest upon the loan or forbearance of any money, goods or things in action, or on accounts after demand or judgment rendered in any court of the State, shall be 7 per cent per annum but it shall be competent for the parties to any loan or forbearance of any money, goods or things in action to contract in writing for a rate of interest not exceeding 10 per cent per annum.

"No person, association, copartnership or corporation shall by charging any fee, bonus, commission, discount or other compensation receive from a borrower more than 10 per cent per annum upon any loan or forbearance of any money, goods or things in action.

"However, none of the above restrictions shall apply to any building and loan association" or to industrial loan companies or to credit unions or to "any duly licensed pawnbroker or personal property broker," or to any bank operating under state or federal laws or to any nonprofit cooperative association or to any agricultural cooperative or to any corporations securing money or credit from any Federal intermediate credit bank under the Agricultural Credits Act of 1923, "nor shall any such charge of any said exempted classes of persons be considered in any action or for any purpose as increasing or affecting or as connected with the rate of interest hereinbefore fixed. The Legislature may from time to time prescribe the maximum rate per annum of, or provide for the supervision, or the filing of a schedule of, or in any manner fix, regulate or limit, the fees, bonus, commissions, discounts or other compensation which all or any of the said exempted classes of persons may charge or receive from a borrower in connection with any loan or forbearance of any money, goods or things in action.

"The provisions of this section shall supersede all provisions of this Constitution and laws enacted thereunder in conflict therewith."

As stated it is the contention of the plaintiff, and by amici curiae in his behalf, that the defendant as a licensed personal property broker is guilty of usury with respect to the loan secured by the chattel mortgage as set forth in the third cause of action. It is their position that all of the lenders, including personal property brokers, specified in the third paragraph of the constitutional amendment as being exempt from the "above restrictions," are nevertheless subject to the 10 per cent overall limitation on interest referred to in the first paragraph until the legislature sees fit to provide a different interest rate under the power given it by the last sentence of the paragraph. The argument is that taken as a whole the amendment evidences an intention to confine the words "above restrictions" appearing in the first line of the third paragraph solely to the prohibitive language of the second paragraph; that they do not apply to limitations on interest laid down in the first paragraph, and that therefore the 10 per cent limitation applies even to exempt lenders as long as the legislature has not established a different limitation to govern their class.

[15] That the contention is without merit may be shown by the history attending the submission of the constitutional amendment to the voters of the state and by the judicial decisions on the subject. It may be said without question that the objective of the amendment was to abolish the inflexible, inadequate and unworkable provisions of the usury law and to reestablish in the legislature the power to enact laws affecting the business of lending money in this state. This change could be brought about only by amending or repealing the usury law by vote of the people or by a constitutional amendment. The latter course was followed and as all statutes enacted either by the legislature or under the reserved initiative power of the people must be in conformity with and be governed by the constitution the amendment of 1934 became the supreme law of the state on the subjects to which it relates.

In determining its objectives the language of the amendment must be applied by the courts as it is written. In the case of uncertain or doubtful meaning recourse may be had to various methods for the determination of the purpose and intent of the framers and adopters of the law.

The language of the first and second paragraphs has no uncertain meaning. The first pargraph fixes the legal rate of interest upon loans at 7 per cent but authorizes agreements in writing calling for a rate of interest of not more than 10 per cent. This represents a change from the usury law only in that the authorized contract rate of interest was reduced from 12 to 10 per cent per annum. The unmistakable purpose of the second paragraph was to prevent lenders from circumventing the limits on interest established in the preceding paragraph by forbidding any charges whereby the borrower is required to pay more than the ten per cent.

[16] It is also clear that the limitations specified in both the first and second paragraphs fall within the general classification of "restrictions" as that word is used in the first line of the third paragraph. The word "restrictions" is defined by Webster's New International Dictionary, as well as other standard authorities as "that which restricts; a limitation; a restraint; as restrictions on trade." We discover no good reason why the words "above restrictions" used in the third paragraph should not apply equally to both the first and second paragraphs. The rational construction of the language demands that they be read as applicable to both. See Wholesale Tobacco Dealers Bureau of Southern California, Inc. v. National Candy & Tobacco Co., 11 Cal.2d 634, 659, 82 P.2d 3, 118 A.L.R. 486.

Furthermore the transfer to the legislature of the power to legislate on the subject of rates of interest and charges of the exempted classes by the last sentence of the third paragraph is entirely inconsistent with the idea that the inflexible percentages fixed in the first paragraph are to be applied to the exempted classes. However, it is contended that a contrary intent is shown by the following language appearing at the end of the first sentence of the third paragraph after the enumeration of the exempted classes: "nor shall any such charge of any said exempted classes of persons be considered in any action or for any purpose as increasing or affecting or as connected with the rate of interest hereinbefore fixed." It is urged that this provision is evidence of an intention to exempt the special classes solely from the second paragraph's prohibition against added charges, and indicates that such charges are not to be considered in computing the interest received by those classes. It must be conceded that the purpose of the quoted language is ambiguous; but a less abstruse and more reasonable interpretation must be given to those words. It would seem not unlikely that their purpose was to assure that no charges which might in the future be established by the legislature respecting any of the exempt classes, and that no charges made by exempt lenders prior to the establishment of charges by the legislature, would affect or be connected with rates of interest fixed in the first and second paragraphs as to non-exempt lenders. It is quite certain that that language was not intended to so affect the specifically exempt classes as to make them subject to the over-all percentage rates of the first paragraph.

[17] In resolving the uncertainty caused by the inclusion of the last-quoted language of the third paragraph, recourse may be had, as an aid to interpretation, first to the summary prepared by the Attorney General pursuant to his authority and duty to "give a true and impartial statement of the purpose of the measure," Political Code, sec. 1197, and then to the arguments for and against the measure sent to the voters and set forth in the pamphlets accompanying the sample ballots and appearing immediately following the Attorney General's summary. In this case there was no printed argument against the measure. The summary of the Attorney-General also appears on the ballot with a space to the right for a "Yes" or "No" vote Section 3827, Elections Code. We find in this summary and in the argument what the electors of the state were told the proposed constitutional amendment was designed to accomplish. The complete text of the Attorney General's summary as so included in the pamphlet and placed on the ballot is as follows:

"Interest Rates. Assembly Constitutional Amendment 79. Prescribes seven per cent per annum as interest rate upon loan or forbearance of money, goods or things in action, accounts after demand and judgments; permits written contract for rate not exceeding ten per cent per annum, but forbids any charges whereby borrower pays over ten per cent. *Exempts from such restrictions building and loan associations, industrial loan companies, credit unions, pawnbrokers, personal property brokers, banks, and various non-profit co-operative associations, and others, of character therein mentioned. Permits Legislature to regulate said exempted classes, prescribe their maximum interest rate per annum and regulate their charges on loans.*"

The words which we have italicized are a clear and positive representation that the amendment if adopted would not fix the interest rates and charges for the exempted classes and would vest in the legislature the power to regulate the business of those classes including the power to fix such rates of interest and charges. The summary and ballot statement appear to be a correct representation of the purposes of the measure.

The argument to the voters in favor of the proposed amendment—and as stated there was none against it—emphasized the fact that the inflexible provisions of the usury law of 1918 had been proved unsatisfactory as a curb on unscrupulous exactions of money lenders and that the specifically named exempted classes "have distinctive and individual problems peculiar to their respective classes of business. The needs of one are by no means common to all; each class meets with variable conditions and circumstances unlike those met by the others. An inflexible law, designed to embrace all of them, is at once unjust and impractical. The Usury Law attempted to cover all classes, and has failed miserably." It was also stated that supervisory control of all of the exempted classes would be subject to the vigilant attention of the legislature.

The Interim Committee appointed by the Assembly in 1933 to investigate the problems attending the regulation of the business of commercial loans and to recommend legislation made its report to the legislature in 1935, Assembly Journal, March 22, 1935, p. 1297, and recommended legislation. It reported that prior to the constitutional amendment of 1934 the legislature was powerless to do anything to overcome such difficulties; that the legislature had in 1933 submitted the constitutional amendment for the express purpose of giving to the legislature the power to legislate as to the classes exempted from the general provisions of the amendment; that by virtue of this amendment the money lenders specifically named, including personal property brokers, are exempt from the maximum rate of interest therein fixed, and that the legislature has the right to regulate their rates and charges.

[18, 19] The foregoing history is a demonstration that it was the purpose of the constitutional amendment of 1934 to free the legislature from the restraints imposed by inflexible usury provisions so that interest and charges more appropriate to business conditions peculiar to each of the

exempted classes could be established. Those who voted for the 1934 amendment had reason to expect that the exempt classes would not remain unregulated indefinitely. But until the legislature exercises the power granted to it by the amendment to regulate the business of lenders in a manner appropriate to each exempted class, the class not so governed by legislation is subject to no restriction on interest rates or charges.

Likewise from the foregoing it was readily to be anticipated that this court would decide as it did in the case of Matulich v. Marlo Investment Company in 1936, 7 Cal. 2d 374, 60 P.2d 842, 843, that since the adoption of the constitutional amendment in 1934 there was "no law of this state which limits the rate of interest which may be charged by personal property brokers." This holding was followed in 1937 in Wolf v. Pacific Southwest Discount Corporation, 10 Cal.2d 183, at page 184, 74 P.2d 263, at page 264, where this court said: "The third paragraph of said section of the Constitution [sec. 22 of Article XX, Amendment 1934] designated certain organizations and individuals which are exempt from the general provisions of the usury law, and the legislature was given power to prescribe the maximum rate of interest to be charged in connection with loans made by them. Personal property brokers were included in the exempted classes. While the legislature has acted under this constitutional grant of power as to certain of these exempted classes, it has taken no action respecting the interest charges which may be made by a personal property broker. Therefore, since the adoption of said section of the Constitution in 1934, there has been no provision of law, either statutory or constitutional, limiting the amount of interest or profit which a personal property broker may exact for a loan made by him," citing Matulich v. Marlo Investment Company, supra, 7 Cal.2d 374, 60 P.2d 842. It is urged that these cases be overruled. We find no justification for such a course. They have been the law of this state since 1936 and since that time have constituted adequate notice that the regulation of the business of personal property brokers, including their interest and charges, is entirely within the control of the legislature.

From 1934 to 1939 there were numerous legislative attempts to provide for small loan regulations. In the 1939 session of the legislature 24 bills were introduced pertaining to interest rates. An analysis of many of these may be found in "California Legislature Faces the Small Loan Problem" by Stone and Thomas, 27 Cal.L.Rev. 286, 294 (1939). From this grist a revision of the Personal Property Brokers Act was accomplished. Two bills were passed. Ch. 952, Stats. 1939, p. 2667, Ch. 1004, Stats. 1939, p. 2874, Gen.Laws, Act 5825. Both enactments were subjected to referendum and both were approved by the electorate of the state on November 7, 1939. Both contained substantially the same provisions. Both were submitted to the voters as amendments to the Personal Property Brokers Act and as statutes regulating interest and charges of personal property brokers on loans of $300 or less, and each provided for the administration of the Act by the Commissioner of Corporations.

Section 17 of the revised Act captioned "Maximum Rate of Charge" fixed the maximum rate of interest and charges in connection with loans of $300 or less in the following terms: "Every licensee hereunder who lends any sum of money not to exceed three hundred dollars ($300) in amount may contract for and receive thereon charges at a rate not exceeding two and one-half per centum (2½%) per month on that part of the unpaid principal balance of any loan not in excess of one hundred dollars ($100) and two per centum (2%) per month on any remainder of such unpaid principal balance." Charges on such loans were limited to two percent of the unpaid balance where the lender was insured. Section 20 provided: "No person, except as authorized by this act, shall directly or indirectly charge, contract for, or receive any interest, discount, or consideration greater than the lender would be permitted by law to charge if he were not a licensee hereunder upon the loan, use, or forbearance of money, goods, or things in action, or upon the loan, use, or sale of credit of the amount or value of three hundred dollars ($300) or less." The purpose of this section was to permit only licensed personal property brokers to make the charges set forth in section 17 on loans of $300 or less. These two sections are adaptations of Section 13 and 18, respectively of the Sixth Draft of the Uniform Small Loan Law proposed by the Russell Sage Foundation. Hubachek, Annotations on Small Loan Laws (1938) 79, 111. A supplementing section of the uniform law (Section 15) which would limit the maximum charges by licensees on loans in excess of $300, was not included in the 1939 Act.

The duty of enforcing the Act was reposed in the Commissioner of Corporations whose statutory counsel is the Attorney General. Pol. Code, sec. 470. In the years following the effective date of the 1939 statutes frequent requests were made by the Commissioner to the Attorney General with reference to his power of supervisory control with reference to loans exceeding $300. He was uniformly advised, the last time by written opinion dated March 10, 1948, 11 Adv. Ops. Atty. Gen. 105, that it was not the purpose of the Personal Property Brokers Act of 1939 to limit the interest on or to regulate the charge with respect to loans exceeding $300, and that the Commissioner of Corporations had no power to supervise loans by personal property brokers in excess of $300.

In his advice to the Commissioner the Attorney General followed the decisions of this court. Because of difficulties arising in the enforcement of the statute the Commissioner also sought advice as to his power to curb exorbitant charges. He suggested that he should be held to possess such power on loans of over $300 by virtue of his licensing and rule-making powers. The Commissioner is empowered by section 8 of the Act to issue licenses "if he shall find (a) that the financial responsibility, experience, character, and general fitness of the applicant * * * are such as to command the confidence of the community and to warrant belief that the business will be operated honestly, fairly, and efficiently within the purposes of this act * * *." Section 22 authorizes him to "make general rules and regulations and specific rulings, demands, and findings for the enforcement of this act, in addition hereto and not inconsistent herewith."

Acting under the authority granted by section 22 the Commissioner of Corporations in 1941 promulgated a rule that "a finance company shall not charge on a loan of more than $300 a rate in excess of the statutory rate on that part of the unpaid principal balance of such loan not exceeding the sum of $300." This rule in substance was incorporated in section 1437 of the Administrative Code Title 10, p. 141. It was later deleted, probably because of its doubtful validity.

[20] Neither the statute nor the rules adopted pursuant thereto may be interpreted as authorizing the Commissioner to establish the rate of interest or charges on loans in excess of $300. The subject of fixing the interest rate and charges of money lenders is a matter of substantive law governing the rights and duties of those affected thereby. It is not the subject of administrative determination. The Commissioner, under his rule-making power or otherwise, has no authority to declare what interest rates and charges are unlawful or exorbitant. This may be done only by the constitution or by legislative enactment consistent with the constitution. As a consequence the Commissioner may not employ his rule-making power or procedural statutory enactment as a means of prohibiting a licensee from doing what the law says he has the right to do. The Attorney General correctly advised the Commissioner, 11 Adv. Ops. Atty. Gen. 105, supra, that he could not assume such power. See First Industrial Loan Co. v. Daugherty, 26 Cal. 2d 545, 159 P.2d 921.

At the 1947 session Assembly Bill No. 663 was introduced. The purpose of this measure was to amend the Personal Property Brokers Act so as to restrict the maximum charges on loan balances of personal property brokers in excess of $300 to 10 per cent per annum. The Attorney General states in his brief that this bill was introduced at the request of the Commissioner of Corporations. The measure passed the

Assembly but in the Senate failed of passage by a single vote. Senate Journal, June 19, 1947, p. 3277.

[21] The foregoing leads inevitably to the conclusion that the power to regulate the business of personal property brokers, including the fixing of interest and charges on their loans, is, under the Constitution, vested in the legislature and that at the present time there is no legislation affecting interest and charges on such loans in excess of $300.

[22] Plaintiff contends that defendant violated and evaded the Personal Property Brokers Act in numerous particulars. He charges that because of asserted trickery practiced upon him he signed blank instruments authorizing charges in addition to the initial obligation which the defendant used to increase the obligation to $18,955.74, whereas the mortgage provided that it was to be security for additional advances of only $250. Whether the additional sums were secured by the mortgage is immaterial, and the trial court found on conflicting evidence that the allegation that the additional advances were not expressly authorized by the plaintiff was untrue. Another point particularly urged is that the defendant entered on its books an overcharge for interest. The court found that the entries in question were unintentional clerical errors which were corrected when discovered. The trial court's findings and conclusions that the defendant committed no violation of the Personal Property Brokers Act are supported by the evidence.

The effect of an amendment to the Act in 1945 was to relieve licensees from certain regulatory and penal provisions of the Act on bona fide loans of $5000 or more provided the amending section was not used for the purpose of evading the Act. Stats.1945, ch. 1220, p. 2321, 2 Deering's Gen.Laws 1947 Supp. Act 5825, (1st) sec. 4(d). Because of this amendment, many of the alleged irregularities would no longer be violations of the Act. Nor is there merit in the contention that the defendant resorted to evasion or subterfuge to avoid applicability of those provisions which still apply to loans of less than $5000. The trial court was justified in concluding from the evidence in this case that the loan in the lump sum of the contract was not an attempt to evade the provisions of the Act. Therefore, under the law in effect at the time of the transaction here under consideration the defendant was not guilty of usury as charged in count three, nor was it guilty of violating or evading the Act.

[23] The Attorney General has suggested that if this court is to arrive at the conclusions hereinbefore announced two federal Constitutional questions arise on the face of our Constitution and statute. These questions have been briefed by counsel representing opposing views, and it is requested that we inquire into and decide whether Section 22 of Article XX and the interest limitations of the Personal Property Brokers Act are valid under the equal protection clause of the Fourteenth Amendment. Specifically it is stated that a possible violation of that Amendment is found in the 1934 constitutional classification of personal property brokers as a preferred group, as against the public in general and as against other lenders similarly situated, and in the classification of loans in the Personal Property Brokers Act by which lenders of more than $300 are subject to restrictions less severe than lenders of lesser sums. These problems are inherent in the case before us and in view of their importance in the enforcement of the law they should be answered.

The classification of personal property brokers as a distinct class has consistently been upheld by California courts as justified by the unique problems of that class. In re Halck, supra, 215 Cal. 500, 11 P.2d 389; In the Matter of Application of Stephan, supra, 170 Cal. 48, 148 P. 196, Ann. Cas.1916E, 617; Eaker v. Bryant, supra, 24 Cal.App. 87, 140 P. 310. The assembly Interim Committee, whose report has been referred to, in 1935 recommended that the classification be retained in future legislation, setting forth the special problems met with in connection with personal property brokers, and stated: "In the sense that personal property is used as security, it is distinguished from real property by being movable, destructible, difficult to record as to property rights therein, susceptible of abuse as to rights of third persons, and not subject to a period of redemption after foreclosure. These differences make personal property less valuable as security both to borrower and to lender; special regulations are required to overcome these difficulties. Borrowers on personal property are subject to temptations in respect to its treatment after a lien is created, and lenders are tempted to abuses after default. This type of security and the fact that its possession is left with the borrower present problems of regulation peculiar to the class."

In adopting the 1934 amendment the voters were approving a plan by which the legislature could regulate the exempted classes in accordance with their peculiar requirements. On highest authority this plan of classification has been approved, Griffith v. Connecticut, 218 U.S. 563, 31 S.Ct. 132, 54 L.Ed. 1151; Mutual Loan Co. v. Martell, 222 U.S. 225, 32 S.Ct. 74, 56 L.Ed. 175, Ann.Cas.1913B, 529, and it must be held that the exemption of personal property brokers from the usury restrictions of that 1934 amendment was neither unwarranted nor arbitrary, but on the contrary, was based on sound and reasonable grounds.

The objections to the Personal Property Brokers Act of 1939 on constitutional grounds are likewise without foundation. The federal equal protection clause does not prevent the legislature from classifying loans according to size. It has long been recognized that in general borrowers of large sums are better able to protect themselves against excessive charges than small borrowers. The economically weak, those who borrow to meet exigent needs, have been the principal victims of unscrupulous lenders. Consequently legislation pertaining to small loans, usually demarked as above stated as loans of $300 or less, has been common in this state as elsewhere and the classification sustained. In re Fuller, 15 Cal.2d 425, 102 P.2d 321; In re Halck, supra, 215 Cal. 500, 11 P.2d 389. Hence it was competent for the legislature pursuant to the authority granted by the 1934 amendment to restrict charges by personal property brokers on loans of $300 or less. It is true that personal property brokers lending sums of more than $300, as well as banks, building and loan associations and certain agricultural associations are not so limited in their interest and charges. But under the plan contemplated by the constitutional amendment the legislature was expected to enact legislation with respect to the exempt classes whenever the necessity should arise. Because it has found such a necessity with regard to some exempt lenders and not others, does not affect the validity of the plan under the federal Constitution. The legislature may proceed with deliberateness to strike at abuses wherever they appear and need not formulate simultaneous regulation for all exempted groups. State of Minnesota v. Probate Court, 309 U.S. 270, 275, 60 S.Ct. 523, 84 L.Ed. 744, 126 A.L.R. 530; Sproles v. Binford, 286 U.S. 374, 396, 52 S.Ct. 581, 76 L.Ed. 1167.

The judgment on the first and third causes of action is affirmed. The judgment on the second cause of action is reversed with directions to the trial court to determine the sums due to the plaintiff on the unenforceable portion of the contract relating to the Sterling and Fruehauf vehicles and enter judgment accordingly.

GIBSON, C. J., and EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

CARTER, Justice (dissenting).

I dissent.

I believe that that portion of the constitutional provision on usury, Cal.Const. Art. XX, sec. 22, third par. which excepts certain kinds of lenders, such as personal property brokers, is inoperative under the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, at least until such time as the Legislature acts and makes a reasonable classification and fixes maximum rates for such excepted persons, and that such exception is severable from the balance of section 22, thus leaving in effect the first two paragraphs thereof which provide for a maximum rate of 10% for all lenders.

Section 22 fixes a 10% maximum rate of interest and then exempts from its operation certain named institutions, such as personal property brokers. It leaves to the legislature the fixing of rates for the exemptees. The sum and substance of it is that until the legislature acts, *there is a maximum rate of interest fixed for individuals loaning money* but *none whatever* for the named exemptees. They may charge any rate they please. The sole basis of that discrimination is the type or character of the lender, such as personal property brokers, where personal property is taken as security, and not even then, unless the person is engaged in the business of lending money and taking personal property as security. I am cognizant of the fact that the legislature has acted with respect to personal property brokers but concededly only as to loans of $300 or less. *There is no limit,* as clearly appears from the majority opinion, *on the rates they may charge for loans over $300.* Therefore, it cannot be doubted that under the Constitution and the legislation thus far enacted, John Doe, who makes an occasional loan, not as a business, is limited to a 10% rate of interest regardless of the amount of the loan, whereas the exemptees, for at least all loans over $300, can charge whatever rate they please. I am not unmindful that there may be appropriate reasons for permitting a higher rate to be charged on small loans because of the administrative expense, or on personal loans or those secured by personal property only, than on loans secured by real property because of the disparity in the quality of the security, or that those reasons might constitute a basis for higher rates for businesses which are strictly regulated as to the character of persons who may engage therein and otherwise, but that is not to say that there may be a maximum fixed for individual occasional lenders and *none whatever on the favored few.* The cases—Griffith v. Connecticut, 218 U.S. 563, 31 S.Ct. 132, 54 L.Ed. 1151, and Mutual Loan Co. v. Martell, 222 U.S. 225, 32 S.Ct. 74, 56 L.Ed. 175, Ann.Cas.1913B, 529—relied upon by the majority, are clearly distinguishable inasmuch as the exemption there was of banks, and the court proceeded upon the assumption that such institutions were not likely to be in such financial straits that they would be compelled to charge exorbitant rates of interest. I do not believe that such an assumption may be made as to personal property brokers. Indeed, the legislature has so determined, for it restricts the rates of interest that they may charge on loans under $300. It is not to be supposed that the second they make a loan above that amount they become so virtuous and philanthropic that no curb at all on their interest charges is necessary.

I am of the opinion, therefore, that the above mentioned exemption of personal property brokers from the maximum rate of 10% interest for loans of over $300 is inoperative until the legislature has legislated in the field and made appropriate and constitutional classifications. The restrictions now imposed by the legislature on loans of $300 and less may stand as there is a valid basis for such a classification. It must necessarily follow that the rate charged in the case at bar was in violation of the above mentioned provision and is therefore usurious.

90 Cal.App.2d 575

In re DOLSEN'S ESTATE.

DOLSEN v. DOLSEN.

Civ. 16745.

District Court of Appeal, Second District,
Division 3, California.
March 14, 1949.

1. Wills ⚿472

Under statute providing that a clear and distinct devise cannot be affected by any other words not equally clear and distinct, provisions of a will are "clear and distinct" when they will admit of only one reasonable interpretation. Probate Code, § 104.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Clear and Distinct".

2. Wills ⚿634(12)

Under will devising realty to three sons, share and share alike, providing that in event of decease of one or two of the sons survivors should receive shares of decedents in the remainder or equal portions, each son took a life estate at death of testatrix with remainder over to surviving brother or brothers. Probate Code, §§ 101, 102, 104, 122.

3. Wills ⚿728

Where will devised realty to three sons in equal shares, remainder over in equal shares to survivors upon death of any one or more, one of two sons who remained in possession of premises before and after death of brother, but claimed no right to exclusive possession, had a right to live on premises rent free.

◆

Appeal from Superior Court, Los Angeles County; Newcomb Condee, Judge.

Proceeding in the matter of the estate of Luella J. Dolsen, deceased, on the first account of Ray Dolsen, executor, to which Pearl A. Dolsen, as executrix of the estate of Frank Dolsen, deceased, filed exceptions, and wherein Ray Dolsen, executor, also filed a petition to determine heirship. From orders requiring the executor to account to the estate for rental value of rooms occupied by him as an individual, and from an order construing the will of Luella J. Dolsen, Ray Dolsen, executor, appeals.

Orders reversed.

L. E. Dadmun and J. M. Ray, both of Los Angeles, for appellant.

Randles & Randles, of Los Angeles, for respondent.

SHINN, Presiding Justice.

Luella J. Dolsen died in 1940, survived by three sons, Fred, Ray and Frank. She left a will by which she devised the home in which she had resided for many years to the three sons and appointed Ray Dolsen executor. Other property, if any, was given to the sons in equal shares. Frank died after the death of his mother. He left a will naming his wife, Pearl A. Dolsen, as executrix. Some seven years after the death of Luella, Ray filed his first account current as executor, and Pearl, as executrix, filed exceptions. Ray also filed a petition to determine heirship. The two matters were heard together. The court surcharged Ray's account in the amount of $2,173.07 as rent for the occupation of a portion of the dwelling house after the death of his mother. It was also determined that the three sons took the home place under the will in equal shares and as tenants in common. Ray Dolsen appeals from both orders.

The entire controversy turns upon the construction to be given to the provisions of the will with respect to the real property. Ray contends that the three brothers were devised a life estate with remainder to the survivors or survivor, and that upon the death of Frank his interest passed to Ray and Fred. Pearl contends that the estate of Frank owns a one-third interest in the real estate.

The provisions of the will to be considered are the following: "Second: I declare that the Court Street property of which I am possessed is my separate property, and I hereby devise this property to my sons, Fred, Ray and Frank Dolsen, share and share alike. If any of them shall predecease me, I devise such share or shares equally to my remaining son or sons. * * *

"Fourth: In the event of the decease of one or two of my sons, the survivor or survivors shall receive the share or shares of such decedents in the remainder or equal portions, as the case may be. * * *

"Sixth: I here remember my grandson, Richard Danner, but do not feel that I can make any gift or bequest to him. To other persons who would be entitled to share in my estate through intestate succession, I hereby leave the sum of one dollar to each such claimant."

By the eighth paragraph the residuary estate was left to the three sons in equal shares.

The argument of respondent is centered upon the fourth paragraph, and she discusses it as if it contained the only provision for survivorship. She contends that it should be construed under the rule of section 122, Probate Code, which reads as follows: "Words in a will referring to death or survivorship, simply, relate to the time of the testator's death, unless possession is actually postponed, when they must be referred to the time of possession." She argues that the fourth paragraph refers to death or survivorship, *simply,* and that the words must be deemed to relate to the time of the testatrix' death and not to the event of the death of any of the sons after the death of testatrix, and hence were not effective to create a life estate. The argument would be sound if we were called upon to construe only the fourth paragraph. But there are two provisions for survivorship, and they must be read together in order to determine whether testatrix expressed a purpose contrary to that which would be imputed to her through the application of section 122. If it appears that Mrs. Dolsen intended to provide for survivorship in the contingency of the death of one or more of the sons after her death, as well as in the event one or more predeceased her, section 122 has no application.

It appears from even a casual reading of the second and fourth paragraphs that Mrs. Dolsen intended to provide for survivorship in two contingencies, namely, the death of one or more of the sons prior to her death, and the death of one or more of them after her death. Her intentions as to the first contingency were fully expressed in the second paragraph, and it strikes one rather forcibly that if she had not intended to provide for survivorship after her death, she would not have written the fourth paragraph of the will. She surely would not have intended the fourth paragraph to mean the same as the second. One does not intentionally express the same testamentary purpose in separate paragraphs of a will, either in the same or in different language. The fourth paragraph is in broad general terms, whereas the second is specific. If testatrix did not intend to accomplish the same thing by the fourth paragraph as was accomplished by the second, she must, of course, have had a different purpose. If she has expressed two purposes in the two provisions for survivorship, it is our duty to give effect to both. Her intentions are controlling. Prob.Code, sec. 101. Every expression should be given some effect. Prob.Code, sec. 102. Under the construction urged by respondent, the second and fourth paragraphs would have the same meaning and one or the other would be redundant and of no force or effect. This result is to be avoided in construing the will. Unless the fourth paragraph is treated as superfluous, it must be deemed to make provision for survivorship in the event of the death of one or more of the sons after the death of testatrix.

It is clear throughout the will that Mrs. Dolsen had wishes with respect to the real property which differed from those which pertained to any other property she might leave. She desired the home place to remain in the ownership of the sons. If any should predecease her their heirs, excepting the surviving brother or brothers were to be excluded. She had a grandson (whether he was an heir does not appear) and she intentionally omitted any provision for him. And with relation to her intention it may be asked why, when she desired that the heirs of any of the sons who might predecease her should take no share of the real property, should she have been indifferent to their coming in as heirs of a son who might survive her? Some light is cast upon her intentions by the use she had made of the property. The house was built in 1885; Ray and his wife had resided with testatrix and looked after her for more than forty years. It had evidently been the Dolsen home for an even longer period. The house had 15 rooms; it had fallen into a sad state of decay. Termites had taken virtual possession of the house from cellar to garret. Dry rot also spread throughout the building. A large section of the rear upper story had fallen away, timbers had disappeared, floor boards gave way when stepped on, much of the place was unlivable, Ray had twice replaced the underpinning to prevent the collapse of the whole structure and yet it was the home of the Dolsens and they stayed on. Whether this was because of sentimental attachment to the old place, or because they had no other place to go is unimportant. The same considerations might well have influenced Mrs. Dolsen to make provision for its use as a home for the sons as long as they had need for it. Whatever else she might own was to go to them outright, but not the home. In both the second and fourth paragraphs she expressed this wish. It would seem to have been the main purpose in making the will, aside from the appointment of Ray as executor. As already mentioned it does not appear whether there were other heirs. We conclude that the order of the trial court declaring that the three sons took under the will as tenants in common is contrary to the expressed intentions of the testatrix.

[1, 2] The views we have expressed find support in the use of the word "remainder" in the fourth paragraph. In its nontechnical use the word means what remains after a part has been taken away, and as used in the will it could only mean the interest that would come to a survivor in case of death, and which would be lost to the son or sons who might die first. The word was not used in the second paragraph, but only in the fourth, where its use would be appropriate and meaningful only if it was the intention to create a life estate. We hold, therefore, that it was the intention of testatrix by the fourth paragraph to provide for survivorship in case of the death of one or more of the sons after her death, just as she had made similar provision in the event one or two of the sons predeceased her. The provisions of paragraph four created a life estate in the sons. 16 Cal.Jur., sec. 2, p. 366.

"A clear and distinct devise * * * cannot be affected * * * by any other words not equally clear and distinct." Prob.Code, sec. 104. This rule is relied upon by respondent in support of the trial court's construction of the will. We think its requirements have been fully met. The provisions of a will are clear and distinct when they will admit of only one reasonable interpretation. Such is the case here. It is not necessary that the fourth paragraph, alone, should have clearly disclosed the intention of testatrix to create a life estate in the three sons, with rights of survivorship. It is sufficient if it clearly appears from the will as a whole that she has expressed that purpose.

[3] The order requiring Ray to account to the estate for the rental value of the rooms he occupied also must be reversed. He had accounted for the rent received from other tenants and had never claimed the right to exclusive possession of the premises. Fred filed no exceptions to the account. He evidently understands that as long as he has not been excluded from the premises, Ray, his co-tenant, has had the right to live in them, rent free. 7 Cal.Jur., sec. 32, p. 364.

The orders appealed from are reversed.

WOOD and VALLÉE, JJ., concur.

90 Cal.App.2d 738

NOBLE et al. v. TWEEDY et al.

Civ. 16542.

District Court of Appeal, Second District, Division 3, California.

March 21, 1949.

Rehearing Denied April 6, 1949.

Hearing Denied May 19, 1949.

1. Appeal and error ⚷933(4)

Where no grounds for granting new trial were stated in order granting new trial, it was required to be presumed that order was not based on ground of insufficiency of the evidence to support the judgment. Code Civ.Proc. § 657.

2. New trial ⚷97

A party's right to a new trial on ground of surprise is waived if alleged surprise is not called to court's attention by a motion for a continuance or other relief. Code Civ.Proc. § 657.

3. New trial ⚷97

Fact that complaint, in action for specific performance and for damages for breach of contract, sought recovery of special damages while plaintiffs introduced evidence of general damages, did not entitle defendants to a new trial on ground of surprise, where defendants did not object to such evidence, made no claim of surprise at hearing, and at no time requested a continuance to meet plaintiffs' proof, though plaintiffs' counsel consented to a continuance if desired by defendants. Code Civ. Proc. § 657.

4. Landlord and tenant ⚷48(2), 154(4)

A proper measure of tenant's general damages for breach of a landlord's covenant to construct or repair is difference between reasonable rental value of premises "as is" and as contracted to be.

5. Landlord and tenant ⚷48(2)

Where landlords leased realty to tenants for 10 years at monthly rental of $500 with option to renew for like period, and agreed to erect a building thereon in accordance with agreed plans, but landlords did not complete building in all particulars as called for in plans, and, in action for breach of contract, tenants' expert testified that rental value "as is" was $425 a month, whereas, if building had been completed according to plans, it would have been $500 a month, court was justified in giving a lump-sum judgment for both past and prospective damages during term of lease, calculated at rate of $75 a month, for full term of lease, rather than to reduce rental to $425 a month. Civ.Code, § 3283.

6. Damages ⚷6

Rule with respect to future damages is satisfied by a showing of reasonable certainty that substantial future damages will result, and fact that amount thereof may be difficult of exact admeasurement, or subject to various possible contingencies, does not bar a recovery. Civ.Code, § 3300.

7. Damages ⚷117

In an action for breach of contract, the law seeks to give the complaining party the value of his bargain in order to prevent a loss which fulfillment of contract would have prevented and to put complaining party, so far as money can do it, in same position as if contract had been performed.

8. Landlord and tenant ⚷48(2)

Where landlords breached a contract to construct building for tenant in accordance with plans so that rental value of building as constructed was only $425 a month, whereas, if it had been completed according to plans, rental value would have been $500 a month, tenants would not be denied recovery of damages at rate of $75 a month over ten year term of lease because of possibilities of breach by tenants, or insolvency, or of destruction of building.

9. Damages ⚷24

Generally, in estimation of future damages, a court is entitled to consider only those contingencies which are reasonably probable of occurrence and are reducible to a present monetary value.

10. Damages ⚷6, 26

Whatever degree of uncertainty is introduced in ascertainment of prospective damages by possibility of future events affecting extent of injury, which are wholly conjectural and have no ascertainable present worth, will be disregarded by a court, and award of prospective damages is proper.

11. Damages ⚿6

As long as there is available a satisfactory method for obtaining a reasonably proximate estimation of damages, defendant, whose wrongful acts gave rise to injury, will not be heard to complain that amount thereof, cannot be determined with mathematical precision.

12. Damages ⚿15

Damages should be compensatory only.

13. Interest ⚿31

In action by tenants against landlords for breach of contract by landlords to construct a building for tenant in accordance with plans, court, in awarding tenants damages, properly employed the "legal" interest of 7%.

◆

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Kenneth K. Noble and Gabriel Masor against Harvey E. Tweedy and Mattie Tweedy for specific performance of a contract whereby defendants leased certain realty to plaintiffs and agreed to erect a building thereon, and for special damages for breach of contract. A judgment was entered for plaintiffs for damages. From an order granting defendants' motion for a new trial, the plaintiffs appeal.

Order reversed.

McCarroll & McCarroll, of Los Angeles, for appellants.

John C. Miles, of Los Angeles, and Kenneth Chantry, of Beverly Hills, for respondents.

SHINN, Presiding Justice.

Appeal from an order granting a new trial. In February, 1946, the parties to the action executed a written contract whereby defendants leased certain real property to plaintiffs for a stated term of 10 years, with an option to renew for a like period, and agreed to erect a building thereon in accordance with agreed plans and specifications, for use by plaintiffs as a bowling recreation center. The agreed rental was $500 per month and plaintiffs were required to pay $6,000 (i. e. the amount of the last year's rent) in advance as security for performance by them of their covenants under the lease. Construction of the building was commenced in March. On June 16th defendants informed plaintiffs that because of a shortage of materials and exorbitant costs they could not complete the building in all particulars as called for in the plans and specifications which had been previously agreed upon by the parties. At this time plaintiffs had over $30,000 worth of fixtures and equipment either installed upon or already purchased for the premises. The installations, such as bowling alleys, could not have been removed except at great expense. Upon October 28, 1946, defendants having failed and refused to complete the building as required by their contract, plaintiffs commenced this action seeking relief by way of specific performance and special damages for breach of contract. Subsequently, while the action was pending, plaintiffs were permitted by defendants to take possession of the premises and uncompleted building without thereby waiving their right of action.

The court found that the building was incomplete in a number of specified particulars, and that defendants had breached their contract, but rendered an interlocutory judgment denying specific performance as being impracticable and inequitable. On the ground that there was no evidence before it from which plaintiffs' damages, if any, could be ascertained, a further hearing was granted for the purpose of determining that issue. Upon the basis of evidence introduced at this further hearing new findings were made which incorporated the substance of the previous findings and assessed plaintiffs' damages in the amount of $75 per month for each month of the 10-year term of the lease, or a total of $9,000. The accrued damages were calculated to be $682.50, and the present value of the prospective damages was fixed at $6,455, making a total of $7,137.50 for which sum judgment was entered in favor of plaintiffs. On motion of defendants a new trial was thereafter granted by a judge other than the one who presided at the trial and hearing, but only as to the amount of damages. From this order plaintiffs have prosecuted the present appeal.

[1] Although defendants' notice of motion for new trial set forth some seven grounds upon which the motion was made, the only ones seriously urged before the court below and before us on appeal are: (1) "Accident and surprise which ordinary prudence could not have guarded against," and (2) "the decision and judgment are against the law." No contention is made that there were any irregularities or errors of law occurring at the trial, or that the damages were excessive, or that any evidence material to defendants' case has since been discovered; and since no grounds for granting the new trial were stated in the order it must be presumed that it was not based upon the ground of insufficiency of the evidence to support the judgment. Code Civ.Proc. sec. 657.

The complaint contained a prayer for $100,000 exemplary damages, and some $117,000 as compensatory damages. The latter sum was made up of claimed loss of profits, loss of earnings, prepaid rent, cost of equipment, etc. There was no allegation as to the difference in rental value of the building as agreed to be constructed and as actually constructed.

Defendants' claim of accident and surprise proceeds upon the theory that all of plaintiffs' evidence at the hearing, which consisted of the testimony of two expert witnesses, related to general damages, whereas the complaint alleged facts relating solely to, and prayed only for, special damages. Defendants' argument is limited to the proposition that since there was no amendment of the complaint, nor any notice to counsel prior to the hearing of the change in plaintiffs' theory of recovery, the variance in proof was one which, through no fault or neglect on their part, defendants were unprepared to meet. An examination of the record, however, discloses that defendants did not object to the evidence offered by plaintiffs in respect to general damages; that no claim of accident or surprise was made at the hearing; and that defendants at no time requested a continuance for the purpose of meeting plaintiffs' proof. In the affidavit of one of the counsel for plaintiffs in opposition to the motion for new trial, it is stated without contradiction that "prior to the commencement of the hearing, Mr. Chantry [counsel for defendants] asked affiant if he would consent to a continuance after putting on affiant's case should he, Chantry, deem the same advisable in order to call added witnesses. Affiant readily and unhesitatingly agreed." At the close of plaintiffs' case, however, counsel for defendants submitted the matter without offering any evidence at all.

[2, 3] It is well settled that a party's right to a new trial upon the ground of surprise is waived if the alleged surprise is not called to the court's attention by a motion for a continuance or other relief. Kauffman v. De Mutiis, 31 Cal.2d 429, 432, 189 P.2d 271; Baker v. Berreman, 61 Cal.App.2d 235, 241, 142 P.2d 448; Bailey v. Richardson, 66 Cal. 416, 423, 5 P. 910; see also, Snodgrass v. Snodgrass, 81 Cal.App. 360, 253 P. 755. The rule finds its justification upon essentially practical and equitable considerations: it would be intolerable, in such cases, to permit parties to proceed without objection or application for relief, speculate as to the rulings of the court, and then after an unfavorable decision, predicate a claim of surprise upon a ground which could have been obviated in the first instance had timely objection been made. Moreover, the failure to object tends strongly to indicate that the party has not, in fact, been misled. Upon the facts presented, we think there was no sufficient showing to justify the granting of a new trial upon the ground of surprise, and the order cannot be supported upon that ground.

Since the new trial was granted solely on the issue of damages, the question is presented whether the judgment was contrary to law upon that issue. Plaintiffs' evidence at the hearing consisted of the uncontradicted testimony of two expert witnesses. The first gave his opinion that the reasonable rental value of the premises "as is" was $425 per month, whereas, if the building had been completed according to specifications, it would have been $500 per month.

The second testified that the cost of completing the building pursuant to the specifications would be $7,328. The trial court followed the testimony of the first expert and, as indicated previously, gave a lump-sum judgment for both past and prospective damages during the stated term of the lease, calculated at the rate of $75 per month.

[4,5] The authorities uniformly hold that a proper measure of the tenant's general damages for a breach of the landlord's covenant to construct or repair is the difference between the reasonable rental value of the premises "as is" and as contracted to be. Force Bros. v. Gottwald, 149 Minn. 268, 183 N.W. 356; Ingalls v. Beall, 68 Wash. 247, 122 P. 1063; Partridge v. Dykins, 28 Okl. 54, 113 P. 928, 34 L.R.A.,N.S., 984; Brunson v. Teague, 123 Ark. 594, 186 S.W. 78; Thomson-Houston Electric Co. v. Durant Land Imp. Co., 144 N.Y. 34, 39 N.E. 7; Kohne v. White, 12 Wash. 199, 40 P. 794; Knight v. Potter, 147 Or. 339, 32 P.2d 1014; Kellogg v. Malick, 125 Wis. 239, 103 N.W. 1116, 4 Ann.Cas. 893; 32 Am.Jur. sec. 731, p. 606; 51 C.J.S., Landlord and Tenant, § 406, p. 1155. Cf. Gillaspie v. Hagans, 90 Cal. 90, 94, 95, 27 P. 34. The amount recoverable bears no necessary relationship to the rental agreed upon, for, as said in Kohne v. White, supra [12 Wash. 199, 40 P. 795], "It cannot be said that the stipulated price in the lease absolutely indicates the rental value of the building. The respondent [lessee] may have leased this building for a less sum than it was actually worth in the market, or she may have paid more than it was worth. In the latter instance the lessor would be entitled to the benefit of her bargain, and in the first instance the lessee would be as plainly entitled to the benefit of her bargain." We conclude that the measure of damages employed by the court was the correct one. Respondents contend that under some circumstances the damages might exceed the value of the property, as they possibly would have if plaintiffs' lease had been for 99 years and the same measure of damages had been adopted. Whether, as an alternative, plaintiffs could have completed the bowling center according to specifications and have held defendants for the cost (see Beardsley v. Morrison, 18 Utah 478, 56 P. 303, 72 Am.St.Rep. 795; Kimball & Co. v. Doggett, 62 Ill.App. 528; Myers v. Burns, 35 N.Y. 269), and whether, under certain circumstances, a tenant may be under a duty to finish the construction work himself in order to mitigate the damages (see Cook v. Soule, 56 N.Y. 420, 423; Brett v. Berger, 4 Cal.App. 12, 17, 87 P. 222; cf. Ladner v. Balsley, 103 Iowa 674, 72 N.W. 787), are questions which are not here presented and upon which we express no opinion. It may be noted, however, that the damages assessed were in close approximation to the cost of completing the building as agreed.

Although on the facts presented the measure of damages was correct, the question remains whether the court could properly apply that measure over the full term of the lease, and grant a recovery for damages accruing in the future as well as in the past. It will be observed at once that defendants' obligation was not a continuing one like a covenant to *keep* in repair which would be subject to successive breaches, for each of which the tenant might sue, Block v. Ebner, 54 Ind. 544; Beach v. Crain, 2 N.Y. 86, 95, 49 Am.Dec. 369; 32 Am.Jur., sec. 714, p. 590; but, like a covenant to *put* in repair, was entire and subject to only one breach for which only one action would lie. See Bromberg v. Eugenotto Const. Co., 162 Ala. 359, 50 So. 314; Coward v. Gregory, [1866] L.R. 2 C.P. 153, 169, 171; 1 Tiffany on Landlord and Tenant, p. 600; 1 McAdam on Landlord and Tenant, 5th Ed., p. 550; 51 C.J.S., Landlord and Tenant, § 368, p. 1103. By the terms of the contract, defendants were required to complete the building, pursuant to specifications, prior to placing plaintiffs in possession. By their failure to do so, the covenant was fully and finally breached before the term began, and plaintiffs were compelled to seek a complete recovery in one action for the full damage sustained by them. It follows that all damages which accrued prior to judgment, as well as any "detriment * * * certain to result in the future", were compensable in this action. Civ.Code, sec. 3283.

Defendants challenge the legality of the judgment chiefly upon the ground that any future detriment to plaintiffs is inherently incapable of ascertainment within the degree of certainty required by the Code. It is said that the judgment ignores the possibilities that plaintiffs may breach their lease and be ousted; that they may fail in business and become insolvent; that the lease may be terminated by the destruction of the building; or that future rental values may be quite different from those upon which the judgment was based. If any of these contingencies, or other similar changes in the conditions and circumstances of the parties, should occur, it is said that a "windfall" will have been given plaintiffs under the provisions of the present judgment.

[6-8] We think the argument is based on a fundamental misconception of the nature of the requirement of certainty in respect to future damages. The rule is satisfied by a showing of reasonable certainty that substantial future damages will result, Caminetti v. Pacific Mut. Life Ins. Co., 23 Cal.2d 94, 103, 142 P.2d 741; Meyers v. Nolan, 18 Cal.App.2d 319, 324, 63 P.2d 1216, and the fact that the amount thereof may be difficult of exact admeasurement, or subject to various possible contingencies, does not bar a recovery. Monroe v. Owens, 76 Cal.App.2d 23, 29–31, 172 P.2d 110; Long Beach Drug Co. v. United Drug Co., 13 Cal.2d 158, 174, 88 P.2d 698, 89 P.2d 386; annotation 78 A.L.R. 856. The Civil Code declares the right of a party injured by a breach of contract to recover an amount which will compensate him for all detriment proximately caused by the breach, or which in the ordinary course of events would be likely to result therefrom. Civ.Code, sec. 3300. In regard to damages for breach of contract, it has been said: "The law seeks to give the complaining party the value of his bargain; to prevent a loss which the fulfillment of the contract would have prevented; to put the injured party, so far as money can do it, in the same position as if the contract had been performed." Coburn v. California, etc., Co., 144 Cal. 81, 84, 77 P. 771, 772. See also, Civ.Code, sec. 3358; 8 Cal.Jur. 821. In the instant case, it is manifest that defendants committed a substantial breach of their contract, and that plaintiffs thereby failed to receive the full value of what they had bargained for. There is no uncertainty as to the fact of future damages but only as to the amount which will accurately compensate plaintiffs for the loss which they sustained. The undisputed evidence disclosed the present and past detriment, in terms of decreased value received, to be $75 per month. Upon this evidence the court could not have done otherwise than adopt this figure as a reasonably close approximation of what the future detriment would be, and in so doing properly ignored the various contingencies pointed out by defendants. The possibilities of a breach by plaintiffs, or insolvency, or of destruction of the building, are wholly speculative and fanciful. It is clear that an award of damages could not be *granted* upon the basis of anticipated future injuries or other events as purely hypothetical as these; and it follows by way of analogy, that they likewise do not constitute a sufficient basis for *denying* a recovery for damages which are otherwise reasonably certain to be sustained.

[9-11] In general, in the estimation of future damages a court is entitled to consider only those contingencies which are reasonably probable of occurrence and are reducible to a present monetary value. whatever degree of uncertainty is introduced by the possibility of future events affecting the extent of injury, which are wholly conjectural and have no ascertainable present worth, has been uniformly disregarded by the courts, and awards of prospective damages under such circumstances have been regularly upheld. See McCormick on Damages, pp. 48 et seq.; Holt Manufacturing Co. v. Thornton, 136 Cal. 232, 235, 68 P. 708; Shoemaker v. Acker, 116 Cal. 239, 48 P. 62. As long as there is available a satisfactory method for obtaining a reasonably proximate estimation of the damages, the defendant whose wrongful act gave rise to the injury will not be heard to complain that the amount thereof cannot be determined with mathematical precision. Hacker etc. Co. v. Chapman Valve Mfg. Co., 17 Cal.App.2d 265, 61 P.2d 944; Pacific etc., Co. v. Alaska Packers' Ass'n, 138 Cal. 632, 638, 72 P. 161;

Seymour v. Oelrichs, 156 Cal. 782, 803, 106 P. 88, 134 Am.St.Rep. 154; Calkins v. F. W. Woolworth Co., 8 Cir., 27 F.2d 314, 320. See also, Natural Soda Products Co. v. City of L. A., 23 Cal.2d 193, 199, 200, 143 P.2d 12. The method in the present case was practicable and fair, and the amount of damages assessed was as reasonably accurate as the circumstances would permit.

It appears to have been argued on the motion for new trial that any possibility that defendants might incur an undeserved loss, or that plaintiffs might enjoy a windfall, through the occurrence of some future contingency such as insolvency or destruction of the premises, could have been obviated by granting relief in the form of a reduction of the rent from $500 to $425 per month over the remainder of the term instead of a lump-sum award. Similar contentions were considered by the court in City of Pasadena v. Porter, 201 Cal. 381, 257 P. 526, 53 A.L.R. 679, in reference to the compensation to be paid to a tenant where a portion of the leased premises was taken in eminent domain proceedings. Pointing out that the tenant remained bound by his contract to pay the full rental agreed upon, the court held (201 Cal. at page 388, 257 P. at page 529) that it had "no power to reform or revise the lease in question, nor to determine to what extent the covenant to pay rent shall be affected, if at all." In answer to the claim (identical to that urged here) that the landlord might sustain great loss if, after satisfaction of the judgment, the tenant should become insolvent, the following passage was quoted from Gluck v. Baltimore, 81 Md. 315, 32 A. 515, 517, 48 Am.St.Rep. 515, wherein the same question was considered: "At best, this is a mere suggestion of a possible hardship. * * * Obviously a principle, if sound, ought to be applied wherever it logically leads, without reference to ulterior results. That it may, in consequence, operate in some instances with apparent, or even with real, harshness and severity, does not indicate that it is inherently erroneous. Its consequence in special cases can never impeach its accuracy." It is clear that a judgment in an action at law, reducing the rental payments agreed upon by the parties, would be contrary to settled principles in the ascertainment of damages to accrue in the future.

[12, 13] The practice of reducing future damages to present value is in full harmony with the fundamental principle that damages should be compensatory only, and has frequently been the subject of judicial approval. Dye v. Schick, 74 Ind.App. 459, 129 N.E. 242; Hollwedel v. Duffy-Mott Co., 263 N.Y. 95, 188 N.E. 266, 90 A.L.R. 1312; Parker v. King, 68 Ga.App. 672, 23 S.E.2d 575; Proctor v. Union Coal Co., 243 Mass. 428, 137 N.E. 659; 25 C.J.S., Damages, § 74, p. 567; 15 Am.Jur., sec. 26, pp. 419, 420; annotation 90 A.L.R. 1318. It is a practice which has long been commonplace in actions for death or personal injury. See annotations, 77 A.L.R. 1439, 105 A.L.R. 234; Chesapeake & O. R. Co. v. Kelly, 241 U.S. 485, 36 S.Ct. 630, 60 L.Ed. 1117, L.R.A. 1917F, 367, and cases there cited. From the record, however, it is evident that in computing present value, the court employed the "legal" interest rate of 7%. Although there is some conflict of authority as to the proper interest rate to be used (cf. Galveston, H. & S. A. Ry. Co. v. Dehnisch, Tex. Civ.App., 57 S.W. 64, and Chesapeake & O. R. Co. v. Kelly, supra, with Ætna Life Ins. Co. v. Geher, 9 Cir., 50 F.2d 657, noted in 5 So.Cal.L.Rev. 330), the error, if any, was favorable to defendant and is beside the issue. We mention it only to say that we do not, impliedly, approve the method that was used.

Respondents make the assertion that the court found in the first stage of the trial that the reasonable rental value of the premises was $750 per month and they argue that the court in the later hearing could not properly find a rental value of $500 per month. Respondents have misread the first findings. There was no finding as to the rental value in the first hearing.

The order granting a new trial is reversed.

WOOD and VALLEE, JJ., concur.

Hearing denied; SCHAUER, J., dissenting.

PACKER v. BOARD OF RETIREMENT OF LOS ANGELES COUNTY PEACE OFFICERS' RETIREMENT SYSTEM et al.

Civ. 16480.

District Court of Appeal, Second District, Division 3, California.

March 17, 1949.

Rehearing Denied April 1, 1949.

Hearing Granted May 12, 1949.*

1. Constitutional law 🔑102(2)

Pensions for public employees are not mere gratuities which may be withdrawn at will. Const. art. 4, § 31.

2. Officers 🔑94

Where services are rendered by public employee under a pension statute, the pension provisions become part of contemplated compensation for those services, and so in a sense a part of the contract of employment itself. Const. art. 4, § 31.

3. Officers 🔑94

Statutes providing pensions for widows of public employees may be upheld on theory that they are a part of prospective compensation of officer for services previously rendered by him. Const. art. 4, § 31.

4. Contracts 🔑187(1)

The theory upon which a third-party beneficiary is permitted to enforce a contract is that the law immediately operates on acts of the contracting parties, creating a duty and establishing the essential privity of contract as between promisor and third person. Civ.Code, § 1559.

5. Contracts 🔑187(1)

While a contract for benefit of third person remains unrescinded, the relations of the parties are the same as though promise had been made directly to third party. Civ.Code, § 1559.

6. Contracts 🔑187(1)

The cause of action of third-party beneficiary springs directly from the contract at same time as that of original promisee. Civ.Code, § 1559.

7. Constitutional law 🔑102(2)

The right of a public employee to a pension under a pension statute becomes a vested one upon acceptance of employment and performance of substantial services thereunder.

8. Constitutional law 🔑140(2)
Counties 🔑69(3)

Right of widow of county peace officer as third-party beneficiary to pension under County Peace Officers' Retirement Act as amended in 1937 was a vested obligation distinct from county's obligation to officer, so that subsequent legislation attempting to deprive widow of her pension constituted an unconstitutional "impairment of a contractual obligation" of county. Gen.Laws, Act 5848, §§ 1 et seq., 11, 11.5; Const. Cal. art. 1, §§ 13, 16; U.S.C.A. Const. art. 1, § 10; Amend. 14.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Impairment of a Contractual Obligation".

9. Constitutional law 🔑140(2)
Counties 🔑69(3)

Where right of widow of county peace officer as third-party beneficiary to pension under County Peace Officers' Retirement Act as amended in 1937 was a vested obligation distinct from county's obligation to officer, subsequent legislation repealing the pension for widows of peace officers who were retired for age and service was a direct impairment of county's contractual obligation to widow, and could not be upheld as a mere modification in amount of husband's pension. Gen.Laws, Act 5848, §§ 1 et seq., 11, 11.5; Const.Cal. art. 1, §§ 13, 16; U.S.C.A.Const. art. 1, § 10; Amend. 14.

10. Constitutional law 🔑102(2)
Counties 🔑69(3)

Where right of widow of county peace officer as third-party beneficiary to pension under County Peace Officers' Retirement Act as amended in 1937 was a vested obligation distinct from county's obligation to officer, subsequent legislation repealing pension for widows of peace officers who were retired for age and service and providing options under which husband could allot part of his pension to widow could not be upheld as providing an alternative for widow's vested pension right. Gen.Laws, Act

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* Subsequent opinion 217 P.2d 660.

5848, §§ 1 et seq., 11, 11.5; Const.Cal. art. 1, §§ 13, 16; U.S.C.A.Const. art. 1, § 10; Amend 14.

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Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Della Mae Packer, also known as Mrs. Glen J. Packer, also known as Mrs. Della Packer, against Board of Retirement of the Los Angeles County Peace Officers' Retirement System for the County of Los Angeles, State of California, and others, for a writ of mandamus to compel the payment to plaintiff of a widow's pension in a sum of $75 per month pursuant to County Peace Officers' Retirement Law as amended in 1937. From adverse judgment, the plaintiff appeals.

Reversed.

Gordon M. Snyder, of Los Angeles, for appellant.

Harold W. Kennedy, Co. Counsel, and Edward H. Gaylord, Deputy Co. Counsel, both of Los Angeles, for respondents.

SHINN, Presiding Justice.

This is an appeal from a judgment dismissing appellant's petition for a writ of mandate after respondents' general demurrer thereto had been sustained without leave to amend. Appellant, as the widow of Glen J. Packer, formerly a Los Angeles County Deputy Sheriff, brought the action to compel the payment to her of a widow's pension in the sum of $75 per month, pursuant to the provisions of section 11 of the County Peace Officers' Retirement Law as amended in 1937.

The following facts are disclosed by the petition: Appellant married Glen J. Packer in 1905 and thereafter was at all times his wife until his death in 1947. She has not remarried. Mr. Parker was employed as a Deputy Sheriff of Los Angeles County for some 20 years prior to July 27, 1946, at which time he was retired for length of service at the age of 63 years. The County Peace Officers' Retirement Law was enacted in 1931, Stats.1931, Ch. 268, p. 477; Deering's Gen.Laws, Act 5848, and in 1934 pursuant to its terms was adopted and accepted by the Los Angeles County Board of Supervisors. From that time until his retirement Mr. Packer made all the required contributions to the retirement fund from his salary and, until his death, was a member of the Los Angeles County Peace Officers' Retirement System.

In 1937, section 11 of the retirement law was amended to provide for pension payments to widows of members in specified cases. As amended, the provisions of section 11, material to the present appeal, read: "Whenever any member shall be killed, or die * * * after retirement * * * then an annual pension shall be paid in equal monthly installments to his widow * * * in the sum of $75 per month. Said pension shall be paid to the widow during her lifetime or until she remarries * * * provided, however, that no widow of a pensioner shall be entitled to a pension unless she shall have been married to such deceased pensioner at least five years prior to the date of his retirement." The petition alleges that the objective of this amendment was to induce competent persons to enter and remain in public employment; that by reason of the amendment petitioner's husband was induced to retain his employment as a deputy sheriff from 1937 to the time of his retirement; that after the amendment he made all his salary contributions to the pension fund and performed his official duties in reliance upon the benefits and protection afforded to his wife thereby; and that he would not have remained in the service and would not have made his contributions to the pension fund had he not believed and relied upon the contract of the county and the respondent retirement board to pay to his wife a widow's pension pursuant to the amendment.

After Mr. Packer's death appellant twice applied to the respondent retirement board for a pension pursuant to section 11 as thus amended. Although the funds of the retirement system were then and have been at all times since sufficient to pay appellant all payments claimed to be due her, both applications were denied. No reasons were stated by the board for the denial of the first application. The second, however, was denied upon the ground that by reason of the subsequent amendment of section 11 together with the addition of section 11.5, by Statutes of 1941, Ch. 745, she was not entitled to a widow's pension. The amendment to section 11 added the words "for service connected disability," so that the provisions here involved read: "Whenever any member shall be killed, or die, * * * after retirement for service connected disability, an annual pension shall be paid in equal monthly installments to his widow, * * *" etc. The section was further amended in other particulars immaterial here. The newly added provisions of section 11.5 read: "Pension options: Election of member. At any time before the first payment on account of any pension is made, or within 60 days after the effective date of this section, a member or beneficiary may elect to receive the actuarial equivalent at that time of his pension in a lesser pension payable throughout his life and that of his widow, if she survives him, in accordance with one or the other of the following options: Option 1: Upon his death, such lesser pension shall be continued throughout the life of and paid to his widow. Option 2: Upon his death one-half of such lesser pension shall be continued throughout the life of and paid to his widow."

The ultimate question presented for decision is whether the 1941 amendments of the retirement law, when considered as an attempt to deprive appellant of the widow's pension to which she was otherwise entitled, constitute an impairment of a contracual obligation of the county in violation of Article 1, sections 13 and 16, of the Constitution of the State of California, and of Article 1, section 10, and the Fourteenth Amendment of the Constitution of the United States. Appellant contends that she has a vested right to a pension separate from the one granted to Mr. Packer and that the legislature has attempted to deprive her of that right. Respondent answers that there was but a single pension provided for, that the right belonged exclusively to the husband, and that the effect of the 1941 amendments was merely to reduce the amount of his pension.

We have reached the following conclusions: (1) Mr. Packer's services as a peace officer subsequent to the 1937 amendment created a contractual obligation of the county to provide a pension for his widow; (2) this obligation ran in favor of Mrs. Packer as a third party beneficiary; (3) it was an obligation distinct from the county's obligation to Mr. Packer; and (4) Mrs. Packer could not constitutionally be deprived of her right to the pension. The single conclusion which controls all the others is that there were separate and distinct rights in the husband and in the wife. The identical question has not been decided in California, nor so far as we know, in any other jurisdiction. However, under all the authorities, if Mrs. Packer did acquire a vested right to a pension prior to 1941, she could not be deprived of it entirely.

The questions we have been called upon to answer are of major importance to the peace officers and their wives. If Mrs. Packer has been constitutionally deprived of her widow's pension it would be competent also for the legislature to abolish the widows' pensions which were not disturbed by the 1941 amendment.

[1-3] Public pension statutes have provided a fertile source for litigation, and the nature of the rights which they confer has been considered in many reported cases. Contrary to the view prevailing in some states (see, 54 A.L.R. 943, 98 A.L.R. 505, 112 A.L.R. 1009, 137 A.L.R. 249), it is well settled in California that pensions for public employees are not mere gratuities which may be withdrawn at will. The provisions of section 31 of Article IV of the Constitution, forbidding gifts of public money to private individuals, which would otherwise invalidate most if not all of our pension statutes have been held to be inapplicable upon the ground that "a pension is a gratuity only where it is granted for services previously rendered, and which at the time they were rendered gave rise to no legal obligation. * * * But where, as here, services are rendered under such a pension statute, the pension provisions become a part of the contemplated compensation for those services, and so in a sense a part of the contract of employment itself." O'Dea v. Cook, 176 Cal. 659, 661, 662, 169 P. 366, 367, quoted with approval in Kern v. City of Long Beach, 29 Cal.2d 848, 851, 179 P.2d 709; Gibson v. City of San Diego, 25 Cal.

2d 930, 937, 156 P.2d 737, and Riggs v. District Retirement Bd., 21 Cal.2d 382, 385, 132 P.2d 1. See, also, Snyder v. City of Alameda, 58 Cal.App.2d 517, 519, 136 P.2d 857; Douglas v. Pension Bd., 75 Cal.App. 335, 340, 242 P. 756. By the same token, statutes providing pensions for employees' widows have been uniformly recognized to be valid upon the theory that they too are a part of the prospective delayed compensation of the officer for services previously rendered by him. See, Sweesy v. Los Angeles etc. Retirement Bd., 17 Cal.2d 356, 359-361, 110 P.2d 37, and cases cited. However, the mere fact that the widow's pension is treated as part of the officer's compensation under his employment contract for the purpose of determining whether or not it is a gratuity, does not necessarily mean that her pension is not a separate and distinct contractual obligation of the county, nor does it require the conclusion that her pension rights can be entirely destroyed so long as those of her husband are left substantantially unimpaired.

[4-6] Various considerations lead irresistibly to the conclusion that the two pensions were intended to be, and should be, treated as separate and distinct contractual obligations of the county, springing, however, from the same consideration, and that each is separately protected from legislative impairment by constitutional provision. The 1937 Act created the widow's pension as a new, distinct, and additional benefit to peace officers. Unlike the employee's pension, the amount was fixed by law at $75 per month, irrespective of the amount of the officer's terminal salary or pension; and the existing pension rights of peace officers were in no way affected by the supplemental pension which was provided for their widows. Upon the face of the 1937 Act, it appears that there was no necessary relationship between the two pensions. Moreover, in respect to the time for commencement of payments, the two pension rights are consecutive rather than concurrent. No installments are payable to the widow until after the termination of all pension payments to the husband, due to his death. Any question as to the enforceability of the widow's pension rights ordinarily could not arise until after her husband's death; and thus, although her pension is clearly an indirect benefit to her husband, it cannot be logically treated as a component or integral part of his pension. We attach controlling significance, however, to the fact that although appellant was not a party to her husband's employment contract (see Loveland v. City of Oakland, 69 Cal.App.2d 399, 401, 159 P.2d 70), she was, in respect to her pension, a third party beneficiary of that contract entitled to separately enforce her right thereunder prior to rescission by the parties. Civ. Code, § 1559; Garratt v. Baker, 5 Cal.2d 745, 748, 56 P.2d 225. That her right was a binding contractual obligation of the county, although subject to conditions subsequent, is implicit in the theory upon which a third party beneficiary is permitted to enforce a contract, namely, that the law immediately operates upon the acts of the contracting parties, creating a duty and establishing the essential of privity of contract as between the promisor and the third person. Sherwood & Sherwood v. Gill & Lutz, 36 Cal.App. 707, 711, 173 P. 171; Tweeddale v. Tweeddale, 116 Wis. 517, 93 N.W. 440, 61 L.R.A. 509, 96 Am.St.Rep. 1003; 12 Am.Jur. sec. 278, p. 830; anno. 81 A.L.R. 1284. See also, Corbin, Contracts For the Benefit of Third Persons, 27 Yale L.J. 1008, 1020. It has been stated that "while such a contract remains unrescinded, the relations of the parties are the same as though the promise had been made directly to the third party." J. F. Hall-Martin Co. v. Hughes, 18 Cal.App. 513, 516, 123 P. 617. Thus, the pension contract could not be unilaterally rescinded or revoked by the county so as to deprive appellant of her pension as long as her husband continued to render the consideration therefor by performing his duties and making his salary contributions. Malone v. Crescent City M. & T. Co., 77 Cal. 38, 44, 18 P. 858; Pitzer v. Wedel, 73 Cal.App.2d 86, 90, 165 P.2d 971; 6 Cal.Jur. 472. Any other view would be inconsistent with the settled rule that the cause of action of the third person springs directly from the contract at the same time as that of the original promisee. Bogart v. George K. Porter Co., 193 Cal. 197, 223 P. 959, 31 A.L.R. 1045. We conclude that appellant's right to a pension as

a third party beneficiary was in legal contemplation a separate and distinct one arising out of the contract at the same time and with the same effect as her husband's right, for which he had admittedly contracted, to have her receive a pension as provided by the 1937 statute, in addition to the pension payable to him.

[7, 8] All controversy upon the question of when the officer's pension right sufficiently partakes of a contractual status so as to be within the scope of constitutional protection has been laid to rest by the recent decision in Kern v. City of Long Beach, supra, 29 Cal.2d 848, 179 P.2d 799. In that case it was definitely settled that the right of a public employee to a pension becomes a vested one upon acceptance of employment and performance of substantial services thereunder. See, also, Dryden v. Board of Pension Commrs., 6 Cal.2d 575, 579, 59 P.2d 104; French v. French, 17 Cal.2d 775, 777, 112 P.2d 235, 134 A.L.R. 366; Aitkens v. Roche, 48 Cal.App. 753, 755, 192 P. 464. The court unanimously held that by repealing the pension provisions of its charter in respect to employees not yet eligible for retirement, the City of Long Beach had impaired their vested contractual rights to a pension. Furthermore, in giving express recognition to the fact that a number of earlier cases including Sweesy v. Los Angeles etc. Retirement Bd., supra, and Jordan v. Retirement Board, 35 Cal.App.2d 653, 96 P.2d 973 (both of which are cited by respondent), contain dicta apparently inconsistent with its decision, the court limited the authority of those cases to their particular facts. When the holdings in the various cases are considered, apart from any language used which was unnecessary to the decisions, it becomes evident that many of the apparent inconsistencies in the opinions are due to loose usage of the word "vested" where it was not necessary for the court to distinguish between its application to the relations which cause the contractual *right* to a pension to vest and the subsequent conditions upon which the *amount* and *extent* of that pension right become fixed. All the earlier decisions bearing on this point were considered in the Kern case. The holding in the latter case must be deemed controlling as to the time when and the circumstances under which a contractual right to a public employee's pension vests. It follows from what we have said that petitioner's right to a pension became a vested one prior to the 1941 legislation, and that the amendments of that year could not be constitutionally invoked to impair that right. See West v. Anderson, 187 Ga. 587, 1 S.E.2d 671. We therefore find it unnecessary to consider whether appellant's position is further fortified by the fact that her pension right, having been acquired by deductions from earnings during marriage, is community property. Crossan v. Crossan, 35 Cal.App.2d 39, 94 P.2d 609; cf. Bazzell v. Endriss, 41 Cal.App.2d 463, 464, 107 P.2d 49, and cases there cited.

[9] Still insisting that there was but a single pension right, respondent urges upon us the established rule that the *amount* of the pension payments is governed by the law in effect at the time when the contingency occurs which gives rise to the right to payment. Brooks v. Pension Board, 30 Cal.App.2d 118, 123, 85 P.2d 956, disability; Kavanaugh v. Board of Police Pension Fund Commrs., 134 Cal. 50, 66 P. 36, death; O'Dea v. Cook, supra, fatal injuries. Upon this basis, it is contended that the effect of the 1941 amendment to section 11 was merely to modify or reduce the amount of the member's pension, without impairing his contractual right to that pension. That some changes in amount are permissible was clearly indicated by the opinion in the Kern case, where the court said, pages 853-855 of 29 Cal.2d, page 802 of 179 P.2d: "The city relies upon cases holding that the governing body may make modifications in a pension system prior to the time for commencement of payments. It is true that there are many decisions in this state which permit modifications, but it does not follow that an employee may be deprived of all pension benefits by a repeal of the statute without the enactment of a substitute, and no decision has been found holding that an employee's pension rights may be entirely destroyed in that manner. * * * The ruling permitting modification of pensions is a necessary one since pension systems must be kept flexible to permit adjustments in accord with changing condi-

tions and at the same time maintain the integrity of the system and carry out its beneficient policy. The permissible scope of changes in the provisions need not be considered here, because the respondent city, with a minor exception, has repealed all pension provisions. Thus it appears, when the cases are considered together, that an employee may acquire a vested contractual right to a pension but that this right is not rigidly fixed by the specific terms of the legislation in effect during any particular period in which he serves. The statutory language is subject to the implied qualification that the governing body may make modifications and changes in the system. The employee does not have a right to any fixed or definite benefits, but only to a substantial or reasonable pension. There is no inconsistency therefore in holding that he has a vested right to a pension but that the amount, terms and conditions of the benefits may be altered."

Upon analysis, we are of the opinion that the correct application of the foregoing principles of law requires a conclusion contrary to that urged by respondent. It is true that, although the 1941 legislation repealed the $75 per month pension for widows of peace officers who were retired for age and service, it did not otherwise affect the pension rights of the officers, and it did leave them with the same substantial and reasonable pension to which they had previously been entitled, namely, one-half of terminal salary but not to exceed $150 per month. However, the contention that the elimination of appellant's pension merely reduced the amount of her husband's pension is based upon the same fundamental misconception of the true nature of appellant's pension rights to which we have previously referred. As pointed out above, the widow's pension provided by the 1937 Act was a separate vested right, apart from that of the employee. Although it could have been modified or reduced as her husband's pension could have been modified or reduced, it could not be entirely taken away. We are satisfied that respondent's contention finds no support in the cases sustaining modifications in the amount of pension payments. Many of the cases merely hold that where the original pension law fixes the amount of pension at a specified fraction of the salary attaching to the rank held at retirement, subsequent changes in the amount of that salary may validly effect an increase or decrease in the related pension payments. Casserly v. City of Oakland, 6 Cal.2d 64, 56 P.2d 237; Carr v. Fire Commission, 30 Cal.App.2d 208, 85 P.2d 959; Jones v. Cooney, 82 Cal.App. 265, 255 P. 536; Klench v. Board of Pension Fd. Commrs., 79 Cal.App. 171, 249 P. 46; Aitken v. Roche, 48 Cal.App. 753, 192 P. 464. See also, McCarthy v. City of Oakland, 60 Cal.App.2d 546, 141 P.2d 4. The effect of other decisions is that increases in pension benefits enacted subsequent to retirement are not void as gratuities, Sweesy v. Los Angeles etc. Retirement Bd., supra; Home v. Souden, 199 Cal. 508, 250 P. 162; and that reductions in the member's pension enacted prior to his retirement are valid since the amount thereof is determined by the law in effect when the right to payment accrues. Brophy v. Employees Retirement System, 71 Cal.App.2d 455, 162 P.2d 939; Brooks v. Pension Board, 30 Cal.App.2d 118, 85 P.2d 956. None of the cited cases involved the outright elimination of an independent pension; and, as the Kern decision points out, in Pennie v. Reis, 80 Cal. 266, 22 P. 176, and other related cases which did involve a repealing statute, the legislature had simultaneously substituted a more comprehensive pension system for the one abolished, with the result that the "modification * * * gave the employees more pension benefits than they had before." We conclude that the 1941 amendment to section 11, when considered as an attempt to abolish appellant's pension, is a direct impairment of the county's separate and distinct contractual obligation to appellant; and it does not constitute a mere modification in the amount of her husband's pension.

[10] The question next presented is whether section 11.5 provides an alternative for appellant's vested pension right. The statements previously quoted from the Kern case convey a direct implication that where the outright repeal of a pension law is accompanied by the enactment of a substantial substitute, the legislation may be upheld as constituting merely a permissible

modification or change in "the amount, terms and conditions of the benefits." We need not pause to consider the possible limitations upon the doctrine, for we think it clear that the options provided by section 11.5 do not amount to a substitute. It is to be noted at the outset that the provisions of section 11.5 are in no sense mandatory but on the contrary are expressly made subject to the wishes of the retired or retiring member. There is no compulsion upon members to elect either option. Any pension payments to which appellant might be entitled under section 11.5, therefore, were conditional upon the voluntary exercise of an option by her husband, whereas the pension which had been granted by section 11, as worded prior to 1941, was fixed by law, independent of the desires or actions of her husband. Furthermore, analysis of the option provisions discloses that they are merely alternative methods for payment of the peace officer's pension as distinguished from that of his widow. The words, "actuarial equivalent at that time of his pension," in their ordinary significance would appear to refer to the present value at the time of retirement of an annuity sufficient to meet all anticipated future pension installments at current rates of payment over the life expectancy of the member. Where either option is exercised, the amount of the monthly payments would presumably be calculated in accordance with actuarial principles by taking into consideration the life expectancy of the wife; so that, in theory, when the survivor died, the total amount which had been paid under the option would be equal to that which would have been paid to the member alone if he had not exercised either option. It would seem, therefore, that if the life expectancy of the wife were less than that of her husband, and the statistical probability of her surviving him was nil, payments under the selected option would be no different in amount from payments of a regular pension. It is manifest that by exercising either option the member is in effect merely choosing to have his accrued pension paid in a different manner from that originally contemplated. Strong support for this view is found in the fact that the options created by section 11.5 are available to and may be elected by any member of the system, including those members whose widow's pension rights were left undisturbed by the 1941 amendments. The section evidently was designed to liberalize the method of payment of accrued members' pensions by permitting them to choose from designated alternatives the distribution plan best suited to their individual financial requirements. Since it appears that there would be no impediment to, nor inconsistency in, the exercise of an option by a member whose wife was already clearly entitled to a future widow's pension (e. g. where the member was retired for service-connected disability), it is clear that section 11.5 constitutes solely an optional modification of the individual pension rights of the members, exclusive of those of their widows. Any payments which a widow might receive pursuant to the section would not be due to a pension right conferred by the Act but would be the result of her husband's allotment to her, under the option, of part of his pension. Therefore, an election by Mr. Packer of one of the options, had he made one, would only have affected the time and manner of payment of his personal pension, and would have been in no way a substitute for the separate pension payable to appellant.

We have felt impelled to decide the important questions involved upon the grounds stated in our opinion, and have therefore not decided whether the 1941 amendments were intended to affect the pension rights of widows of officers who entered the service prior to the adoption of the amendments.

The judgment is reversed.

WOOD and VALLEE, JJ., concur.

90 Cal.App.2d 596

PEOPLE v. McCONAHAY.

Cr. 667.

District Court of Appeal, Fourth District, California.

March 14, 1949.

Hearing Denied April 11, 1949.

1. Escape ⚿10

In prosecution for escape from police officer's lawful custody, evidence was sufficient to show that defendant was lawfully arrested for misdemeanors of petit theft and removal of automobile license plates in officers' presence, so as to support verdict of conviction, though officers had no warrant for defendant's arrest. Pen.Code, § 4532; Vehicle Code, § 504.

2. Criminal law ⚿730(2)

The district attorney's opening statement to jury that one arrested with defendant before his alleged escape from police officer's lawful custody was booked on charge of petit theft did not constitute prejudicial misconduct, where court struck out statement and instructed jury to disregard it. Pen.Code, § 4532.

3. Criminal law ⚿730(3)

In prosecution for escape from police officer's lawful custody, district attorney was not guilty of prejudicial misconduct in asking defendant, after he testified that he did not write certain letter, copy of which was shown him, but authorized another to do so, whether he authorized statement therein that he resisted arrest and started fight with arresting officers, where such statement was stricken on defendant's objection and jury was instructed to disregard it. Pen.Code, § 4532.

4. Criminal law ⚿730(3)

The district attorney was not guilty of prejudicial misconduct in offering in evidence four bottles of liquor and two knives, taken from defendant and another at time of their arrest before escape charged, though district attorney admitted his inability to prove which bottles and knife were taken from defendant, where objection to their admission was sustained. Pen.Code, § 4532

5. Criminal law ⚿730(3)

In prosecution for escape from police officer's lawful custody, district attorney was not guilty of prejudicial misconduct in offering as rebuttal evidence a police circular, which police officer testified that he saw before shackling defendant after his second arrest, where objection to admission of such document was sustained. Pen.Code, § 4532.

6. Criminal law ⚿1171(3)

In prosecution for escape from police officer's lawful custody, district attorney's statement in argument to jury that officers testified that they told defendant when they arrested him that he was guilty of stealing automobile license plate was not prejudicial misconduct, though officers actually testified that they told defendant that he was under arrest for petit theft in taking such plate; the difference being immaterial. Pen.Code, § 4532; Vehicle Code, § 504.

7. Criminal law ⚿1171(3)

The district attorney's remark, in referring to portion of defendant's testimony, that "that is grabbing at straws" and "means that a man that is guilty should not be so found," was not prejudicial misconduct as stating district attorney's personal opinion that defendant was guilty; remark being purely his opinion of evidence.

8. Criminal law ⚿1171(1)

The district attorney's references, in argument to jury, to facts that accused's counsel was public defender paid with public funds, as was district attorney, and being paid in particular case by private party, was not prejudicial misconduct as implying that defendant's counsel was not sincere in his defense because it was his duty to defend accused.

9. Criminal law ⚿1169(1), 1170(1)

In prosecution for escape from police officer's lawful custody after accused's arrest for petit theft and removal of automobile license plates, exclusion of testimony as to whether complaint for theft had previously been filed against defendant, doctor's testimony explaining in lay terms meaning of portion of his testimony, city judge's testimony as to maximum sentence for petit theft, and police officer's testimony as to how long he had observed parked automobile from which defendant took plates, was not prejudicial error. Pen.Code, § 4532; Vehicle Code, § 504.

10. Criminal law ⚿829(1)

Refusal of defendant's offered instructions, completely and repeatedly covered in instructions given jury, was not error.

◆

Appeal from Superior Court, Orange County; Kenneth E. Morrison, Judge.

Charles Elias McConahay was convicted of escape from a police officer's lawful custody, and he appeals.

Affirmed.

Meyer & Dreizen, N. D. Meyer and Samuel Dreizen, all of Santa Ana, for appellant.

Fred N. Howser, Atty. Gen. and John F. Hassler, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with escape from the lawful custody of a police officer in violation of section 4532 of the Penal Code and, in a second count, with assault with intent to commit murder in that he had assaulted the officers with a revolver with the intent to murder. A jury found him guilty on the first count and not guilty on the second. He has appealed from the judgment and from an order denying a new trial.

About 7:00 P.M. on June 12, 1948, two police officers were cruising in a police car when they came upon two men near a 1928 Dodge automobile which was standing on a public street in Santa Ana. One of the men, Walker, was holding a license plate in his hand, which was dropped when he saw the officers. The officers saw the appellant bending over the front of the Dodge and saw him "come up with the license plate" in his hands. It was established that the license plates were registered to the Dodge and that no permission to remove them had been given to the appellant or to any one else. When asked for their names the appellant told the officers his name was Walker, and Walker said his name was McConahay. When the officers asked them what they were doing there they stated that they were getting license plates for a party named Owens. They further stated that they did not own the car and did not know to whom it belonged. The officers arrested the two men, telling them that they were being arrested for petit theft and taking license plates. The men were searched, two bottles of gin and a knife being found on each man. They then started for the police station, one officer driving the police car while the other sat in the rear seat with these two men.

On the way to the police station the appellant started to scuffle with the officer in the rear seat. There is evidence that the appellant secured this officer's gun and attempted to kill the officer, but the jury found in appellant's favor on the second count. In any event, a scuffle ensued during which the appellant succeeded in getting out of the car and in getting away. He was rearrested the next day.

[1] The appellant first contends that the evidence is insufficient to support the verdict. There is no conflict as to the attempted arrest and the escape, the only contention being that the arrest was not legally made. It is argued that since the officers did not have a warrant they were authorized to make an arrest only if a misdemeanor was committed or attempted in their presence, and that the evidence is not sufficient to show such a fact since there is no evidence that the license plates were on the car on the day in question, and no evidence that the officers actually saw the appellant remove a license plate from the vehicle. There is ample evidence that these plates were registered to this car, that the appellant had been given no permission to remove them, and that he did not know who owned the car. Walker was seen standing in front of the car with a license plate in his hand, which he dropped when the officers approached. The appellant was seen bending over the car

above the front license plate and came up holding a license plate which had previously been on the car. The appellant told the officers that he was getting the plates for a party named Owens. Although he took the stand, he did not deny having made this statement to the officers. The appellant testified that no one had given him permission to "play" with the plates, and Walker testified that the appellant had said something about coming out after license plates. These facts, with the reasonable inferences therefrom were sufficient to show not only petit theft but a violation of section 504 of the Vehicle Code, which forbids tampering with or removing parts from an automobile and provides that a violation thereof is a misdemeanor. It sufficiently appears from the evidence, and the reasonable inferences, that a misdemeanor was committed in the presence of the officers. The officers could, and did, testify to every element necessary and sufficient to sustain a finding that the Dodge was tampered with and that the plates were removed from it. People v. Craig, 152 Cal. 42, 91 P. 997. It cannot be held that the evidence is insufficient to show that a lawful arrest was made.

[2, 3] Ten charges of prejudicial misconduct against the district attorney are made by the appellant. In his opening statement the district attorney said that Walker was booked on a charge of petit theft, "and I believe a plea—". Before the sentence was completed appellant's counsel objected, and the court struck out the statement and instructed the jury to disregard it. Neither prejudice nor intentional misconduct appears. In another instance the district attorney asked Walker, on cross-examination, if he had pleaded guilty to petit theft. Walker said he had not. The question was asked for impeachment purposes and the court instructed the jury that any evidence in that connection should be considered for that purpose only. Later, the district attorney asked the city judge whether Walker had pleaded guilty to petit theft. By consent of the defendant the portion of the complaint charging petit theft in the city court was read and the city judge testified that Walker pleaded guilty to that charge, no objection being made. This was also for the purposes of impeachment. Again the district attorney asked the appellant whether he wrote a certain letter, a copy of which was shown him. The appellant stated that he did not write it but that he had authorized the writing of it by another person, and that he had read portions of it but not all of it. The district attorney then asked him whether he had authorized the statement therein "I resisted arrest and started to fight with the cops." An objection was sustained, this portion was stricken, and the jury was instructed to disregard it. It is argued that the appellant did not write the letter and that the district attorney did not show it to the appellant before asking the question. While the appellant denied authorizing that portion, the letter was shown to the appellant in advance. No misconduct appears and the jury was instructed to disregard it.

[4, 5] Misconduct is next assigned in that the district attorney offered in evidence the four bottles of liquor and two knives taken from the appellant and Walker at the time of their arrest. An objection to their admission was sustained. Misconduct is claimed because the district attorney admitted that he was unable to prove which two bottles and which knife came from the possession of the appellant. Neither misconduct nor prejudice appears. In another instance, a police officer was asked whether he had brought a police circular with him. He was then shown a "white document with some black printing and pictures" and asked whether he had seen the document before he shackled the appellant (after his second arrest) to which he replied in the affirmative. The document was then offered in evidence and an objection to it was sustained. The evidence was offered in rebuttal to certain evidence produced by the appellant, and neither misconduct nor prejudice appears. Complaint is next made that the district attorney, by two remarks, injected "innuendos and inferences that the counsel for the appellant was trying to keep the facts from the jury." The incidents were trivial,

no assignment of error was made at the time, and no possible prejudice appears.

[6-8] Three assignments of misconduct relate to the district attorney's argument to the jury. First, the district attorney stated that the officers testified that they told the appellant when they arrested him that he was guilty of stealing the license plate. Actually, these officers testified that they told the appellant that he was under arrest for petit theft in that he took the license plate. The difference is immaterial. In the second instance it is said that the district attorney gave his personal opinion that the appellant was guilty. This contention is entirely unsupported by the record. In referring to a portion of the appellant's testimony the district attorney remarked, "that is grabbing at straws. That means that a man that is guilty should not be so found." As the court remarked at the time this was purely the district attorney's "opinion of the evidence as given from the stand." Finally, it is claimed that the district attorney in his argument "made prejudicial innuendos concerning appellant's counsel." In this connection the district attorney referred to the fact that appellant's counsel was public defender and was paid with public funds as was the district attorney, and also stated that this counsel was being paid, in this case, by a private party. It is argued that the district attorney was implying that this counsel was not sincere in his defense of the appellant because it was his duty, as public defender, to defend him. Not only was any such implication clearly not intended, but it would apply equally to the district attorney in any event. The matter was unimportant and could not have been prejudicial. We are unable to see how these various incidents, singly or collectively, could be held to indicate intentional misconduct or to have been sufficiently prejudicial to justify a reversal.

[9] It is next contended that the court erred in refusing to admit testimony as to whether a complaint for theft had been filed against the appellant prior to this action; in sustaining an objection when a doctor was asked to explain in lay terms the meaning of a portion of his testimony; in sustaining an objection to a question asked of the city judge as to what was the maximum sentence for petit theft; and in sustaining an objection when one of the officers was asked for how long a period of time he had observed the Dodge automobile parked in that particular place. The record indicates that these matters were probably immaterial. In any event, no prejudice appears.

[10] It is contended that the court erred in giving instructions on what constitutes petit theft, on tampering as covered by section 504 of the Vehicle Code, and on the elements of an attempt to commit a crime. The only argument made is that there was no evidence to justify the giving of such instructions. That matter has already been covered in our discussion of the sufficiency of the evidence. It is also urged that the court erred in refusing to give two instructions offered by the appellant with respect to the burden of proving a lawful arrest, and to a presumption in favor of the defendant in that connection. These matters were completely and repeatedly covered in the instructions which were given, and no error appears.

The judgment and order appealed from are affirmed.

GRIFFIN and MUSSELL, JJ., concur.

90 Cal.App.2d 719

DOWNER et ux. v. BUEHRLE et al.

Civ. 16698.

District Court of Appeal, Second District, Division 2, California.

March 21, 1949.

1. Evidence ⚷448

In action to require conveyance of realty to plaintiffs pursuant to option provision of lease, evidence pertaining to conversations occurring prior to execution of lease could not be considered in determining whether option was exercised contemporaneously with execution of lease, where the lease was unambiguous. Code Civ.Proc. § 1856.

2. Specific performance ⚷120

In action to require conveyance of realty to plaintiffs pursuant to option provision of lease, evidence pertaining to conversations leading up to execution of lease was properly excluded when offered to show exercise of the option to purchase contemporaneously with execution of lease, since the evidence could not show an exercise of option because no option was given until lease was executed.

3. Vendor and purchaser ⚷18(3)

Where payment of purchase price of land by an optionee and the delivery of the conveyance thereof are mutual and independent covenants, neither party can be put in default without first tendering performance to him, during the term of the option.

4. Vendor and purchaser ⚷18(3)

An optionee to purchase realty, to make a valid "tender" of the option price, must have the money at hand under his control and be ready and willing to pay it and must actually produce and offer the money to the optioner upon optioner's delivery of a good and sufficient conveyance.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Tender".

5. Landlord and tenant ⚷92(3)

Tenants who failed to tender purchase price within term specified by option to purchase contained in lease, could not require a conveyance after termination of lease.

◆

Appeal from Superior Court, Los Angeles County; Paul Nourse, Judge.

Action by Albert J. Downer and Maxine E. Downer, husband and wife as joint tenants, against Elmer W. Buehrle and Erma S. Buehrle, and Blanche Avedisian, to require a conveyance of realty pursuant to option. From an adverse judgment, plaintiffs appeal and are opposed by defendant Blanche Avedisian.

Judgment affirmed.

Rinehart, Merriam, Parker & Berg, of Pasadena, for appellants.

Wendell P. Hubbard, of Los Angeles, for respondent, Blanche Avedisian.

MOORE, Presiding Justice.

On January 20, 1941, defendants Buehrle executed a writing whereby they leased to appellants for a period of five years certain realty and improvements in Pasadena. The lease provided that should appellants during their faithful performance of the lease desire to purchase the premises, the Buehrles would sell same to appellants "at any time during the faithful fulfilment of the above lease" for $3500 and all moneys paid by lessors on account of the property for taxes, insurance and assessments, with 6 per cent interest per annum, compounded monthly, from the commencement of the lease. The instrument makes no mention of the manner or method for the exercise of the option.

After the lease had expired the Buehrles conveyed the premises to respondent. Although appellants did not faithfully perform all covenants imposed upon them by the lease and did not pay or tender the purchase price at any time, after the expiration they instituted action for specific performance alleging that they had elected to buy the property pursuant to their option and had "orally or otherwise" so advised the Buehrles. The court found contrary to such allegations and entered judgment in favor of all defendants.

The questions presented for decision are (1) did the court improperly exclude evidence tending to show an exercise of the option contemporaneously with the execution of the lease, and (2) did appellants tender payment of the option price during the five-year-term?

[1, 2] The trial court ruled that "there is nothing ambiguous in the option" and therefore properly concluded that evidence as to conversations occurring prior to the execution of the lease could not be considered in determining any of the issues under the contract. Since all the testimony which appellants assert was admissible pertained to conversations leading up to the execution of the agreement, and since that instrument is entirely unambiguous, such evidence was properly excluded. Code Civ. Proc., sec. 1856; Ross v. Sweeters, 119 Cal.App. 716, 723, 7 P.2d 334, 10 Cal.Jur., sec. 134, p. 853. Furthermore, such evidence could not show an exercise of the option to purchase because no option was given until the lease was executed.

However, the court did not entirely exclude the disputed evidence. It heard the testimony merely for the purpose of explaining the circumstances of the execution of the lease and refused to strike the conversations for that reason.

Thus it is apparent that the evidence which appellants contend was improperly excluded was in fact admitted for the limited purpose for which appellants proffered it, namely to show an exercise of the option contemporaneously with the execution of the lease, and the same evidence was properly excluded insofar as it tended to vary the explicit terms of the written agreement.

[3, 4] Conceding that appellants did at some time advise the Buehrles that they wished to exercise their option, still there was no election to exercise it. Where a person is granted the privilege of buying a property at a specified sum within a stipulated period, it is no more than an offer and is utterly meaningless if not accepted by a tender of the option price within the time designated, Upton v. Travelers' Insurance Company, 179 Cal. 727, 729, 178 P. 851, 2 A.L.R. 1597, and the acceptance must be positive and unambiguous. Laird v. McPhee, 90 Cal.App. 136, 139, 265 P. 501. Where the payment of the purchase price of land by an optionee and the delivery of the conveyance thereof are mutual and independent covenants, neither can be put in default without first tendering performance to him, during the term of the option. For the purchaser to make a valid tender he must have the money at hand under his control and be ready and willing to pay it and must actually produce and offer it to the optioner upon the latter's delivery of a good and sufficient conveyance. Mott v. Cline, 200 Cal. 434, 253 P. 718; Staudigl v. Harper, 76 Cal.App.2d 439, 446, 173 P.2d 343; Heine v. Treadwell, 72 Cal. 217, 220, 13 P. 503. Therefore, when a lessee has failed fully to perform the requirements of the option contained in his lease, viz, paying the price within the term, he is without remedy.

[5] Not only did appellants never make a tender, but they did not even open an escrow or request the Buehrles to do so for the purpose of consummating a purchase. They did not believe they had an option at the time of the sale to respondent. They knew that whatever right to purchase they had acquired by their lease had expired in January, 1946. They did not have the money to buy the property. In fact, by reason of their lack of funds in 1941 and of their personal relationship to the Buehrles, the latter accepted $30 monthly whereas the house had theretofore rented at $50. They never at any time suggested procuring a loan in order to make the purchase. While Mr. Downer was in the service in the Philippines in 1946 four separate notices dated variously from March 30 to June 26 were served upon his wife for violations of the lease and to pay rent or quit. In July he wrote his wife that he was sorry "Elmer couldn't have waited until I got home before going ahead." Action was filed in November, 1946, by the Buehrles for one month's rental. Appellants did not claim then that they had exercised the option to purchase but paid the rent. Although Mr. Downer returned to civil life November 11, 1946, and had been at home for several months he

did not call upon the Buehrles or assert claim to an interest in the property with the exception of the declaration to respondent on the occasion of her visit to inspect the place in December. The claim asserted then was that they still had an option to purchase—not that they had ever elected to buy. They declined to interfere in respondent's escrow for consummating her transaction in December with the Buehrles and did nothing until three months after respondent had acquired title to the home.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.

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90 Cal.App.2d 759

FERRIERA et al. v. WARE et al.

Civ. No. 7540.

Sac. No. 5944.

District Court of Appeal, Third District, California.

March 22, 1949.

1. Easements 🔑7(5)

User of right of way over defendants' lands by strangers to title of plaintiffs' adjoining lands would not inure to plaintiffs or their predecessors in interest for purpose of establishing an easement by prescription.

2. Dedication 🔑44
Easements 🔑36(3)

Evidence failed to establish that so-called road across defendants' lands had been dedicated to public by defendants' predecessors in interest or that easement by prescription had been acquired therein by plaintiffs' predecessors in interest.

3. Highways 🔑79(7)

Where plaintiffs and their predecessors in interest had no right to use road across defendants' lands except such rights as they shared with public when road was a county road, abandonment of the road by county terminated those rights, even if plaintiffs' lands abutted upon the road.

◆

Appeal from Superior Court, El Dorado County; George H. Thompson, Judge.

Action by Angelo Ferriera and another against Beth A. Ware and another to enjoin defendants from obstructing what plaintiffs refer to as a "public road", and to recover actual and exemplary damages. From judgment for defendants, the plaintiffs appeal.

Affirmed.

Russell F. Milham, of Placerville, for appellants.

Ware & Ware and Phil Ware, all of Chico, for respondents.

ADAMS, Presiding Justice.

Plaintiffs brought this action to enjoin defendants from obstructing what plaintiffs refer to as a "public road," and to recover actual and exemplary damages because of the obstruction of said road by defendants where it crosses defendants' land. The action was tried by the court sitting without a jury, and culminated in a judgment for defendants from which this appeal has been taken.

The evidence shows that the property owned by plaintiffs, referred to by them as the "French Gardens," was acquired by them in 1946, and that it adjoins property owned by defendants and known as the Johnson Ranch. The land is not, as the name might suggest, in any sense a garden, but apparently consists mainly of rock piles. The so-called public road, referred to by appellants as the Old River Road, formerly crossed the Johnson Ranch, now owned by defendants, and ended in the land owned by plaintiffs. It is conceded by all parties that the said road was, between 1870 and 1880, a county road maintained by the El Dorado County authorities, but that it was abandoned by the board of supervisors more than sixty years ago. That there was thereafter any such road across defendants' land was denied by defendants, and they produced numerous witnesses whose testimony covered a long period of time, and which denied the existence of such road for many years prior to the bringing of this action, and which tended to show that what plaintiffs call a public road across defendants' lands was no more than a trail impassable for vehicles, covered with willows, filled with logs, driftwood and sand, often overflowed by water from the American River which it adjoins, and only used by persons who crossed the Johnson Ranch with permission of the owners, or by hunters, fishermen or others who were mere trespassers; and that for many years a wire fence had been maintained across the so-called road where it entered the Johnson Ranch.

Plaintiffs produced some testimony to the contrary, but the most that can be said of it is that it created a conflict. The resolution of such conflict was matter for the trial court; and since there is ample evidence to support the findings of that court, this court is without power to find to the contrary. Those findings were: "* * * that there is no public road called by any name whatever leading to the said French Gardens and connecting with a public road at or near the town of Coloma extending in a northwesterly and southeasterly direction, or in any other direction, across and through the premises owned by defendants Beth A. Ware and Gladys A. White. That no public or private road or easement for travel or right of way in favor of plaintiffs land or any part thereof exists across any portion of the premises of said defendants or affords the sole or any means of ingress or egress to or from any part of the said land owned by plaintiffs." Also "that more than sixty years prior to the commencement of this action, by resolution duly adopted by the Board of Supervisors of El Dorado County, the so-called Old River Road was abandoned as a public road. That thereafter the same was never travelled by the public or anyone in such a manner as to constitute the same a public road or a private road or a right of way or easement in favor of any part of plaintiffs land and against, over or upon any part of the lands of said defendants. That plaintiffs have no private or appurtenant easement of way, annual, periodical or otherwise, in favor of any of their land described in plaintiffs complaint over, upon or across any part of the land owned by defendants."

[1, 2] Appellants make some argument here that their predecessors in interest acquired an easement or right of way over defendants' lands by adverse possession; but they failed to show that there was user sufficient to create an easement, or that any user of such road was made by anyone owning the French Gardens, or, prior to the claims asserted by plaintiffs, that anyone ever laid claim to any such easement; and user by strangers to that title would not inure to plaintiffs or their predecessors in interest even if it met the tests for acquisition of title by prescription as laid down in numerous decisions, which it does not. Appellants also argue that the so-called road was dedicated to the public by the owners of the Johnson ranch. But they failed to meet the burden of proof cast upon them to show either an easement or dedication. See Dooling v. Dabel, 82 Cal.App.2d 417, 421–422, 186 P.2d 183, and cases there cited; Lyons v. Schwartz, 40 Cal.App.2d 60, 65–66, 104 P.2d 383; City of Santa Clara v. Ivancovich, 47 Cal.App.2d 502, 507, 118 P.2d 303; Bree v. Wheeler, 129 Cal. 145, 147, 61 P. 782; Alta Land & Water Co. v. Hancock, 85 Cal. 219, 226, 24 P. 645, 20 Am.St.Rep. 217.

[3] Appellants finally urge that the abandonment of the road as a public highway merely surrendered the right of the public to its use, and did not affect the rights of abutting property owners to its use, citing Swift v. Board of Supervisors, 16 Cal.App. 72, 116 P. 317. Even assuming that appellants' lands abutted upon the road (which we do not decide), we find nothing in that case which supports appellants' contentions on appeal. As hereinbefore stated, and as found by the trial court, appellants and their predecessors in interest never had a right to use the road across defendants' lands, except such right as they shared with the public when it was a county road. And when the county abandoned the road as a county road those rights terminated and the

owners of French Gardens had no other right to fall back upon; and certainly no right or interest in defendants' lands.

The judgment is affirmed.

PEEK and THOMPSON, JJ., concur.

90 Cal.App.2d 651

Ex parte BROWN.

Cr. 4322.

District Court of Appeal, Second District, Division 3, California.

March 15, 1949.

1. Judgment 🔑818(4)

A judgment of foreign court is presumed to be valid, and the burden of proof to show invalidity rests upon person challenging it.

2. Judgment 🔑818(6)

Party challenging validity of decree of foreign court is required to support charges by clear and convincing evidence.

3. Divorce 🔑327

In proceeding for custody of child awarded wife by Nevada divorce decree, evidence was insufficient to establish that wife was not a bona fide resident of Nevada when she was awarded decree.

4. Divorce 🔑332

Where husband and wife resided in different states, domicile of child in state where wife sought divorce was sufficient to vest court with jurisdiction to make award of custody to wife.

5. Divorce 🔑332

Child custody provision of Nevada divorce decree was subject to modification either by Nevada court or court of California.

6. Divorce 🔑332

Foreign decree with respect to custody of child of divorced parents will be respected by California courts, and will be superseded by a contrary award of custody only for changed circumstances.

7. Divorce 🔑326, 332

Where custody of child was granted husband by California divorce decree after Nevada court had previously granted wife divorce and awarded her custody, but husband presented no facts to California court showing change of circumstances after Nevada divorce decree, California court was not competent to award husband a divorce, and provision for custody of child, which was a mere incident to main relief requested, was ineffective. Civ.Code, §§ 138, 199, 214.

Proceeding in the matter of the application of Ellen Maxine Brown for writ of habeas corpus to secure custody of a minor child.

Custody granted petitioner.

Johnson & Ladenberger, of Los Angeles, for petitioner.

Ray H. Enter, of Los Angeles, for respondent.

SHINN, Presiding Justice.

Habeas corpus to determine conflicting claims of divorced parents to the custody of a minor child. Petitioner, the mother, was awarded a decree of divorce and exclusive custody of the female child, five years of age, by the court of the Eighth Judicial District, in and for Clark County, Nevada, on April 9, 1948. Respondent, the father, was awarded a decree of divorce and exclusive custody of the child by the superior court of Los Angeles County, California, on April 30, 1948. In May, 1948, the child was taken from the custody of petitioner and has since been detained by respondent in the State of California. A writ of habeas corpus was issued upon the application of petitioner, respondent filed his return, and at the hearing it was stipulated that the petition be deemed a traverse to the return. The following facts were established, either by uncontroverted allegations of the verified pleadings or by stipulation of the parties at the hearing: Petitioner went from Los Angeles to Las

Vegas, Nevada, in January, 1948, for the purpose of establishing residence in the State of Nevada; the child remained in Los Angeles with respondent until March 3, 1948, when petitioner took her to Nevada, with the intention of retaining her custody permanently; the child remained in Nevada with petitioner; on March 5, 1948, the petitioner filed suit for divorce in Nevada and respondent was personally served with summons and complaint in Nevada on the same day; a demurrer was filed by a Las Vegas attorney for respondent, but it was later withdrawn upon an order of court after a showing that it had been filed inadvertently and without authority; respondent's default was entered, and on April 9 the court adjudged that petitioner was a bona fide resident of the State of Nevada and granted her a divorce and sole custody of the child. Respondent instituted his action for divorce in Los Angeles County on March 2, 1948; petitioner was personally served with summons and complaint in Clark County, Nevada, on March 3rd, the same day she had taken the child to Nevada. Petitioner defaulted in the California action and respondent was awarded a decree of divorce and custody of the child. In May, petitioner returned to Los Angeles with the child, and respondent, when allowed to visit the child, took her into his custody upon the authority of the California decree. Petitioner has remarried and now resides with her husband in Utah.

Upon the hearing before us the validity of the Nevada decree was brought in question. Respondent alleged in his return that petitioner did not establish a bona fide residence in Nevada. He further alleged that petitioner came to Los Angeles County where she remained and was employed from June until some time in August. He also produced what purported to be a letter from petitioner's former employer in Los Angeles County, stating that while petitioner was in Las Vegas she wrote to him requesting that she be given her former position, which request was denied. No objection was made by petitioner to the receipt of these matters in evidence upon the ground that the Nevada decree was not subject to collateral attack, and we do not decide that question. We shall consider only the question whether respondent has succeeded in proving that petitioner did not establish a bona fide residence in Nevada. He charges, in effect, that petitioner was guilty of perjury and of fraud upon the Nevada court when she testified that she was a bona fide resident of the State. This accusation has no support beyond its mere assertion by respondent. Petitioner's presence in Los Angeles County during a part of the summer of 1948 was subsequent to respondent's taking possession of the child and it does not appear that her request to be reinstated to her former employment in Los Angeles County was made prior to that time.

[1-4] A presumption of validity attached to the Nevada decree In re Kyle, 77 Cal.App.2d 634, 636, 176 P.2d 96, and cases there cited, and the burden of proof to show invalidity rested upon respondent, Blain v. Burge, 75 Cal.App. 418, 420, 242 P. 894; 27 C.J.S., Divorce, § 335, page 1301. He was required to support his charges by clear and convincing evidence. Collins v. Maude, 144 Cal. 289, 293, 77 P. 945; Smith v. Moore Mill & Lumber Co., 101 Cal.App. 492, 496, 281 P. 1049. It would result in endless confusion and work great injustice if a judgment based upon findings of fact judicially established by the court could be overthrown by the affidavit or other sworn statement of an interested party that the facts had been erroneously determined. It is sufficient to say that the meager showing of respondent in the instant proceeding was wholly insufficient to justify a finding that petitioner was not a bona fide resident of the State of Nevada when she was awarded a decree. It follows, therefore, that petitioner ceased to be the wife of respondent on April 9, 1948. The child was domiciled in Nevada and this fact was sufficient to vest the Nevada court with jurisdiction to make an award of custody to petitioner. Sampsell v. Superior Court, 32 Cal.2d 763, 773, et seq., 197 P.2d 739; Rest., Conflicts, **117**; 27 C.J.S., Divorce, § 303, p. 1163.

The final question is whether the award of custody to petitioner was superseded by the California decree. We shall assume, without so deciding, that the California court had jurisdiction in the custody matter for the reason that at the time respondent's action was filed, March 2, 1948, the child was living in California. Her presence there would have given the California court jursidiction to make an award of custody. Maloney v. Maloney, 67 Cal. App.2d 278, 154 P.2d 426. It may be noted, however, that long before respondent received his decree, on April 30, 1948, the domicile of the child had been established in Nevada, although we do not comment as to whether this fact affected the jurisdiction of the California Court.

[5-7] In awarding custody, the California court was exercising the powers conferred by section 138, Civil Code, which provides for the award of custody of minor children in actions for divorce. The court possesses similar powers where an action for custody is brought without application for divorce, Civ.Code, secs. 199, 214, but respondent did not bring an independent action for custody. It is not necessary to distinguish between the powers of the court with respect to custody in divorce actions and those in actions where no divorce is sought. We have to consider only the decree that was rendered by the California court and to determine from the decree itself what the court attempted to do, and what, if anything, it succeeded in doing. Relief was granted in two forms, namely, dissolution of the marriage and custody of the child. The court, of course, was not competent to dissolve a marital relation that no longer existed. The attempted award of a divorce was a nullity. The question then is whether the provision for custody can stand alone. Clearly, it cannot. The court did not award custody independently of the award of divorce. The decree was entire. Respondent was awarded a divorce, and with it the custody of the child. We are compelled to conclude that custody was awarded because the court undertook to dissolve the marital relationship, and as a mere incident to the main relief granted. The Nevada decree, of course, was not final with respect to the matter of custody. It was subject to modification either by the Nevada courts or the courts of California. However, the decree of a foreign state with respect to custody will be respected by a California court, and will be superseded by a contrary award of custody only upon the ground of changed circumstances. Foster v. Foster, 8 Cal.2d 719, 726–728, 68 P.2d 719; In re Dean, 90 Cal.App.2d 177, 202 P.2d 845; Rest., Conflicts, sec. 147. Not only did respondent fail to show that his application to the California court was made upon that ground, but it was established by the facts in evidence on the hearing before us that no change of circumstances had taken place between April 9th, when petitioner was awarded her decree, and April 30th, when respondent's action was tried. We must necessarily assume that no facts were presented to the California court which would justify a modification of the award of custody to petitioner and that the court therefore awarded custody to respondent solely upon the ground that petitioner had been guilty of conduct which constituted a ground for divorce. Any attempt upon our part to give effect to the custody provision alone would be an attempt to create a judgment which the court did not render. The California court did not undertake to exercise its power to determine the right to custody as between undivorced parents of the child. Since the decree, in form and purpose, was an attempt to dissolve the supposed marital relationship, and as an incident thereto to award custody to respondent, it was ineffective for any purpose. We therefore conclude that plaintiff's right to custody, granted by the Nevada court, was not impaired or affected in any way by the California decree.

It is ordered that the child, Bonnie Lynn Brown, be forthwith delivered into the custody of petitioner.

WOOD and VALLÉE, JJ., concur.

90 Cal.App.2d 641

PARSHALLE v. CURL.

Civ. 16328.

District Court of Appeal, Second District, Division 3, California.

March 15, 1949.

1. War and national defense 🔑218

A bonus, paid landlord by tenant, should not have been included in judgment for rental overcharges in action commenced over year after payment of bonus. Emergency Price Control Act of 1942, § 205 (e), as amended, 50 U.S.C.A.Appendix, § 925(e).

2. War and national defense 🔑222

A bonus, paid landlord by tenant during period in which no price control statute was in effect, should not have been included in judgment for rental overcharges. Emergency Price Control Act of 1942, § 205(e), as amended, 50 U.S.C.A.Appendix, § 925(e).

3. War and national defense 🔑210, 222

Where area rent director recognized dwelling house owner's belated registration of pagoda in garden as registration of separate rental unit by giving notice of intention to decrease stated pagoda rent and fixed maximum rent for dwelling house by order not mentioning pagoda, amount stated as pagoda rent was not overcharge for accommodations included in house rent, so that tenant could not recover treble such amount from landlord. Emergency Price Control Act of 1942, § 205(e), as amended, 50 U.S.C.A.Appendix, § 925(e).

4. War and national defense 🔑209, 214

A rent director, acting as federal Price Administrator's agent, has exclusive right to determine maximum legal rent chargeable for housing accommodations, and state court has no jurisdiction to enjoin issuance of rent order by director, but has concurrent jurisdiction with federal courts in civil suits to enforce such orders. Emergency Price Control Act of 1942, § 205(e), as amended, 50 U.S.C.A.Appendix, § 925 (e).

5. War and national defense 🔑216

A state court's fact findings in conflict with records, findings, and orders of federal Office of Price Administration and rent director in action to recover rental overcharges are erroneous. Emergency Price Control Act of 1942, § 205(e), as amended, 50 U.S.C.A.Appendix, § 925(e).

6. War and national defense 🔑212

A landlord's failure to register a pagoda in garden adjacent to her dwelling house with Office of Price Administration within 30 days after renting pagoda, as required by statute, did not render rental charge therefor unlawful, but she had right to collect amount of rental fixed by her, subject to readjustment by rent director, and tenant had no cause of action to recover any part of such rental until such readjustment. Emergency Price Control Act of 1942, § 205(e), as amended, 50 U.S.C.A.Appendix, § 925(e).

7. War and national defense 🔑222

Where rent director's order, fixing maximum rent for dwelling house, specifically stated that garage was included as part of leased housing accommodations, tenant was entitled to recover from landlord treble amount of additional monthly rental charges collected by landlord for garage. Emergency Price Control Act of 1942, § 205(e), as amended, 50 U.S.C.A. Appendix, § 925(e).

8. War and national defense 🔑223

Where amount of judgment for rental overcharges paid by tenant was reduced on landlord's appeal from $2,895 to $90, amount of tenant's attorney's fees should be reduced from $500 allowed by superior court to $250. Emergency Price Control Act of 1942, § 205(e), as amended, 50 U.S.C.A.Appendix, § 925(e).

9. War and national defense 🔑223

In fixing amount allowed respondent for attorney's fees on appellate court's modification of judgment for rental overcharges by reducing amount thereof, fact that such fees were allowed as penalty under Emergency Price Control Act must be considered. Emergency Price Control Act of 1942, § 205(e), as amended, 50 U.S.C.A. Appendix, § 925(e).

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Eve Parshalle against Mary Curl to recover rental overcharges for residential property. Judgment for plaintiff, and defendant appeals.

Modified and affirmed as modified.

Hahn, Ross, Goldstone & Saunders, of Los Angeles, for appellant.

Mark F. Jones and W. L. Engelhardt, both of Los Angeles, for respondent.

WOOD, Justice.

Action to recover overcharges paid as rental for residential property. Defendant appeals from a judgment for plaintiff.

Plaintiff asserted at the trial that in January, 1946, she rented from defendant a dwelling house at 6672 Whitley Terrace in Los Angeles, including the garage and "the pagoda," for $85 per month. (The pagoda, located in the garden, consisted of two rooms—one above the other.) She testified that on January 7, 1946, she paid to appellant, upon her demand, a bonus of $450 cash. She also testified that she paid to appellant, upon her demand, the following amounts: $135 per month as rental for each of the months of April, May, and June, 1946; $140 per month as rental for each of the months of July, August, September, October, November, December, 1946, and January, 1947; and $450 as a bonus (about July 11, 1946), upon demand by appellant.

The court found that plaintiff rented the house, garage, and pagoda for $85 per month; that plaintiff paid to defendant as rental therefor the amounts which plaintiff testified that she had paid; and that, at the time the rental agreement was made and thereafter, the maximum rental fixed by the Office of Price Administration for the dwelling house at 6672 Whitley Terrace, including a garage and "the pagoda," was $85 per month.

Appellant alleged in her answer that about January 1, 1946, plaintiff rented a portion of the house at said address for $85 per month; that on April 7, 1946, plaintiff rented the pagoda at said address for $50 per month; and that about September 7, 1946, plaintiff rented the garage for $5 per month. The court found that it was not true that plaintiff rented the pagoda for $50 per month; and that it was not true that plaintiff rented the garage for $5 per month.

Appellant contends that the evidence is insufficient to support the finding that the maximum rental for the premises was $85 per month. Appellant argues that the maximum rental for the entire premises was $135 per month, that is, $85 per month for the house and $50 per month for the pagoda. (She does not assert that the charge of $5 per month for the garage was proper.)

Plaintiff testified that when she rented the place appellant told her that the rent was $160 per month and that she wanted $450 cash in advance, to be applied in part each month on the $160 per month—after the payment of $85 each month; that appellant said she was renting the entire place to her if she paid $450 in advance. Plaintiff also testified as follows: that the entire place consisted of the house, the garage, and the pagoda; that appellant refused to give her a receipt for the $450 paid in January, 1946; that when appellant was showing the property to plaintiff, at the time they were negotiating relative to it, she took plaintiff into the garden where the pagoda was located and stated that she did not have a key to the pagoda; she told plaintiff that plaintiff should pay all the utilities; and that during the time plaintiff occupied the premises she took care of the garden, put in over 100 plants, and watered the lawn daily. Plaintiff also testified that after she had rented the premises and had paid the $450, appellant told her that she had reserved one room in the house because she had had a lawsuit with the O.P.A. and she had to pretend that she lived there; that appellant did not live there, but rented the "reserved" room and a bathroom to someone else. She also testified that about April 7, 1946, the appellant told plaintiff that she intended to put a shoemaker in the pagoda; that if plaintiff did not want him there she would have to pay appellant $50 a month additional; plaintiff replied that she would pay it because there were no bath facilities in the pagoda and she did not want an occupant of the pagoda to use the bath facilities of the house she had rented; about May, 1946, when plaintiff purchased an automobile, she told appellant that she needed the garage, and appellant replied that she wanted an additional $5 a month for the garage; and plaintiff agreed to pay said amount and did pay it commencing in July, 1946. Plaintiff testified further that on July 7, 1946, appellant demanded that plaintiff pay her an additional $450, and stated that if she wanted to stay there she would have to pay it; and plaintiff paid said $450 in addition to the $140 monthly rental.

Defendant denied that she demanded or received $450 in January or July, 1946, as a bonus, or as rent, or at all. About June, 1945, appellant signed and filed a registration statement with the Office of Price Administration covering the premises known as 6672 Whitley Terrace, and she stated therein that the rent on March 1, 1942 (the maximum rent date under the act), was $85, and that the "owner reserves one room."

On March 3, 1947 (after this action was commenced and about 11 months after she began collecting $50 per month for the pagoda), the appellant made application for the registration of two rooms at the rear of 6672 Whitley Terrace, in which application it was stated that the rooms were owner-occupied on the maximum rent date (March 1, 1942), and that they were first rented on April 7, 1946, for $50 per month. That application also recited that the rooms had no running or hot water, no toilet, and no bathroom. The record on appeal does not show the exact location of the two rooms at said address, but it will be assumed, from statements in the briefs, that this second application pertained to the pagoda referred to herein. With respect to the second application, the records of the O.P.A. show that on April 2, 1947, the area rent director notified appellant, in writing, that he proposed to decrease the maximum rent from $50 per month to $25 per month. No order had been issued concerning the proposed decrease in rent, prior to the trial of this case, for the reason that the director "had to make a determination as to whether subtenancy existed in the unit," and for the reason that the rent regulations, under which the notice had been given, had ceased to be in effect, and the director was required to issue a new order under the new rent control act of 1947. It therefore appears that in June, 1945 (about six months before renting any part of the place to plaintiff), appellant registered a dwelling house at 6672 Whitley Terrace for $85 per month, and she reserved one room and made no mention of the pagoda. It also appears that about a month after this action was commenced (which was about 14 months after renting to plaintiff, and about 11 months after appellant began collecting $50 per month for the pagoda), she applied for registration of the pagoda at $50 a month; and that, at the time of the trial, the director had not fixed the rental under that application. In support of her argument that the maximum rental for the premises was not $85 per month, she refers to the testimony of a representative of the Office of Price Administration that the maximum rental for the house was $85 per month, and that the maximum rental for the pagoda at the time of the trial was $50 per month; and she refers to records of that office.

On June 25, 1945, the area rent director made an "Order Determining Maximum Rent." At a place near the top of the order, immediately below the printed words, "Concerning (description of accommodations)," there were the following typewritten words: "6672 Whitley Terrace, Los Angeles, California." Below those words the director made the following order: "The Rent Director has duly considered the above matter and: * * * The Maximum Rent for the above-described accommodations is hereby fixed at $85.00 per month * * * the accommodations consisting of six room, furnished, with garage. Tenant supplies all utilities. This order is effective to establish the Maximum Rent as of November 1, 1942." The dwelling house at said address consists of six rooms.

It appears from a memorandum of the trial judge that the judgment for plaintiff, which was for $2895, consisted of the following items: $450 bonus, paid on January 7, 1946; $450 bonus, paid about July 11, 1946; $1350, being treble the alleged overcharge of $50 per month for the pagoda for 9 months (April, 1946, to January, 1947, inclusive—except July); $55, being the alleged overcharge for July for the pagoda and garage (not trebled); $90, being treble the overcharge of $5.00 per month for the garage for 6 months (August, 1946, to January, 1947, inclusive); and $500 for attorney's fee.

[1] The evidence was sufficient to support the findings of the court that plaintiff paid the two bonuses mentioned. However, the $450 bonus which was paid on January 7, 1946, should not have been included as a part of the judgment for the reason that this action to recover it was not commenced within one year from the date the bonus was paid. This action was commenced February 4, 1947. Section 205 (e) of the Emergency Price Control Act of 1942, as amended, 50 U.S.C.A.Appendix, § 925(e), provides: "If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price * * * the person who buys such commodity * * * may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. * * *" No exception, applicable to the present case, is thereinafter provided which affects said provision relative to commencing the action within one year. Section 925(e) of the act also provides that "the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity * * *."

[2] Also, the $450 bonus which was paid about July 11, 1946, should not have been included in the judgment for the reason that no price-control statute was in effect at the time such payment was made. During the period of time between June 30, 1946, and July 25, 1946, there was no price-control statute—the President had vetoed a proposed bill to extend the Emergency Price Control Act beyond June 30, 1947, and it was not until July 25, 1946, that a revised bill continuing the act in effect was approved. It appears that the trial court allowed recovery of the two bonuses upon the basis of money had and received, as alleged in the 11th cause of action. Except for the provisions of the price-control statute, plaintiff would have had no cause of action for the recovery of any money paid to defendant, pursuant to the contract between them, for rent or for the privilege of renting defendant's property. As above stated, the provisions of the price-control statute precluded the recovery of the bonus paid more than a year before the commencement of the action; and there was no price-control statute when the bonus was paid in July, 1946. The theory of money had and received is not applicable in the matter of the bonuses under the circumstances herein.

[3-5] The item of $1350, which was treble the amount of the alleged overcharges for the pagoda for the 9 months (not including July), should not have been included in the judgment. The records of the Office of Price Administration show, as above indicated, that the area rent director recognized the belated registration of the pagoda as a registration of a rental unit separate and apart from the dwelling house. The director did not reject that registration, but on the contrary his act in giving notice of his intention to decrease the rent of the pagoda from $50 to $25 indicates that, although he did not approve the amount stated as rental in the registration, he did approve the registration of that building as a rental unit. Also, the order of the rent director made on June 25, 1945, above referred to, fixed the maximum rent for the accommodations at 6672 Whitley Terrace at $85 per month, and stated that the accommodations consisted "of six rooms, furnished, with garage." The pagoda was not mentioned in that order, and there were, as above stated, six rooms in the dwelling house at said address. Although the evidence, as to the rental terms which the parties themselves actually agreed upon, was sufficient to support the finding of the trial court that the pagoda was included in the rental agrement, it must be concluded by this court that the rental director did not include the pagoda

as a part of the accommodations for which he fixed the maximum rent at $85 per month. A rent director, acting as agent of the Price Administrator, has the exclusive right to determine the maximum legal rent that may be charged for housing accommodations, and a state court does not have jurisdiction to enjoin the issuance of a rent order by the rent director, but does have concurrent jurisdiction with the federal courts in civil enforcement suits under the Price Control Act. Bowles v. Willingham, 321 U.S. 503, 512, 64 S.Ct. 641, 646, 88 L.Ed. 892, 901, 902. A state court has no jurisdiction with respect to a maximum rent order of a rent director other than to enforce the ceiling price. Thompson v. Taylor, D.C., 60 F.Supp. 395, 397. Findings of fact which are "in conflict with the records, findings and orders," of the Office of Price Administration and the rent director are erroneous. Zaker v. Lapa, 332 Ill.App. 602, 611–612, 76 N.E.2d 521, 526. In the last cited case, it was stated, page 612 of first citation, and page 526 of second): "The special findings of the trial judge were undoubtedly predicated on what he considered the obvious equities of the case. However, in making these findings the trial judge ignored and disregarded the records, findings and orders of the Office of Price Administration and its Rent Director, which constituted the only competent evidence in the record on the question as to whether defendants overcharged plaintiffs $20 a month for 35 months." It therefore appears, from the order of the rent director fixing the maximum rent for the dwelling at $85 per month without including the pagoda, and from the act of the director in permitting the registration of the pagoda as a rental unit, that the pagoda was not a part of the accommodations for which the maximum rent was fixed at $85. Therefore the charge of $50 per month for the pagoda was not an overcharge for the accommodations included in the maximum rent of $85 per month.

[6] A question arises as to whether plaintiff was entitled to recover the $50 per month charged for the pagoda, under the circumstances here, where the defendant had not registered the pagoda before the action was commenced and where the rent director had not approved that amount (at the time of the trial) as a proper charge. Under the provisions of the act and the rent regulations the defendant was required to file a registration statement within 30 days after the pagoda was rented. Her failure, however, to register the property within said time did not make the rental of $50 per month unlawful, but she had the right to collect as rental for the pagoda, subject to readjustment by the rent director, a rental of $50 per month fixed by herself. In the case of Woods v. Stone, 333 U.S. 472, 68 S.Ct. 624, 92 **L.Ed. 815,** the owner of a house rented it for $75 per month, but did not register the property with the rent director. Eight months after renting the property the owner sold it, and the new owner registered the property, thereby bringing to the notice of the rent director the fact that the former owner had rented the property without complying with the registration requirement. The rent director thereupon reduced the rental from $75 to $45 per month, effective from the date of the first rental, and ordered that the former owner refund the excess to the tenant. The court therein said, at page 476 of 333 U.S., at page 626 of 68 S. Ct., at page 820 of 92 L.Ed.: "The landlord failed to register the property. His rental operations escaped notice of the authorities until fortuitously disclosed. He *collected as he had a right to do, but subject to readjustment, a rental fixed by himself* that was found on inquiry to exceed by 66⅔% what was fair rental value of the property. He was ordered to refund the excess. He now contends that he can keep all of it that he collected upwards of a year before the action was commenced, upon the ground that the one-year statute of limitations runs, not from the date of his default in obeying the refund order, but from the date of each collection of rental. We cannot sustain his contention. The statute and regulations made his *rentals tentative but not unlawful. Until the contingency of readjustment occurred, the tenant could have had no cause of action* for recovery of any part of the rental exacted by the landlord." (Italics added.)

In the present case it appears, as above stated, that no readjustment of the rental fixed by the landlord had occurred at the time the action was filed or at the time it was tried. It therefore appears that plaintiff herein had no cause of action for recovery of any part of the $50 per month for the pagoda, which was collected by the landlord. (It may be noted here that on July 25, 1947, two weeks after the trial, the rent director made an order changing the pagoda rent from $50 to $25 per month, effective the next rent date,—there was no order that any refund be made.)

The item of $55 for rent of the pagoda and garage for July, 1946, should not have been included in the judgment for the reason there was no price-control statute in July at the time that payment was made.

[7] It was proper to include in the judgment the item of $90, being treble the overcharge of $5 per month for the garage for 6 months. The order of the rent director, made on June 25, 1945, fixing the maximum rent for 6672 Whitley Terrace at $85 per month, specifically stated that the garage was included as a part of the accommodations. Defendant overcharged plaintiff $5 per month for the garage for 6 months.

[8, 9] The total of the items, above mentioned, which should not have been included in the judgment is $2305. The judgment should be modified by deducting said amount therefrom. The only item of the judgment remaining after such deduction, other than the item of $500 for attorney's fees, is $90 which is treble the overcharges for the garage. In determining the amount to be allowed as attorney's fees, the trial court of course considered, among other things, the amount for which the judgment was rendered. Since the amount of the judgment is to be reduced on appeal as above indicated, the amount allowed for attorney's fees should be reduced to $250. In fixing such amount for attorney's fees, consideration is given, among other things, to the fact that attorney's fees are allowed under the provisions of the act as a penalty. Garcia v. Ebeling Motor Co., 89 Cal.App.2d 688, 201 P.2d 854.

The judgment is modified by reducing it from $2895 to $340, and as so modified the judgment is affirmed. Each party to pay her own costs.

SHINN, P. J., and VALLEE, J., concur.

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90 Cal.App.2d 705

CITY OF BURLINGAME v. SAN MATEO COUNTY et al.

PEOPLE ex rel. FERRANTI v. CITY OF BURLINGAME et al.

Civ. 13840, 13841.

District Court of Appeal, First District, Division 2, California.

March 18, 1949.

Hearing Denied May 16, 1949.

1. Municipal corporations 🔑29(4)

Valid annexation of land to city would preclude later inclusion of same lands within boundaries of another proposed municipality. Gen.Laws, Act 5162.

2. Municipal corporations 🔑33(2)

Under statute providing that owner of annexed territory should not be liable for existing indebtedness without his written consent, annexation was not void because annexation ordinance provided that annexed land should be proportionately subject to burdens and obligations existing at date of annexation, notwithstanding that no written consent had been given by owner. Gen.Laws, Act 5162, § 10.

3. Municipal corporations 🔑33(5)

Provisions in petition for annexation that properties after annexation should be proportionately subject to burdens and obligations of city, in amount of $1 an acre per year until public improvements were installed as agreed upon by petitioners and city, could be disregarded as without legal effect, and annexation upheld.

4. Municipal corporations 🔑29(4), 63(1)

Under statute requiring that territory which it is proposed to annex be contiguous to city, contiguity does not depend on extent of property annexed and question whether city should annex certain territory is political rather than judicial. Gen.Laws, Act 5162, § 2.

5. Municipal corporations ⚷29(4)

Annexation was not invalid for want of contiguity because annexed strip was a mere 100 feet wide and enclosed an unincorporated area of 730 acres, nor was it invalid because the 730 acres could not be incorporated into any other municipal corporation unless it were formed inside so-called "horseshoe strip". Gen.Laws, Act 5162, § 2.

6. Municipal corporations ⚷63(1)

The extent and shape which annexed territory shall take is a political and not a judicial question. Gen.Laws, Act 5162.

7. Municipal corporations ⚷63(1)

Wisdom or expediency of annexation is not a concern of the courts as long as existing laws are complied with. Gen. Laws, Act 5162.

8. Courts ⚷91(1), 95(1)

Cases from other jurisdictions conflicting in principle with position taken by Supreme Court of California could not be considered by District Court of Appeal.

9. Municipal corporations ⚷63(1)

Motives of city council in annexing territory could not be inquired into by the court so long as council proceeded according to established law. Gen.Laws, Act 5162.

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Appeal from Superior Court, San Mateo County; James L. Atteridge, Judge.

Proceeding by the City of Burlingame, petitioner, against the County of San Mateo etc., and others for writ of review, consolidated on appeal with a quo warranto proceeding by the People of the State of California, on the relation of Robert E. Ferranti, against the City of Burlingame, etc., and others.

From a judgment dismissing the petition for review, the City of Burlingame appeals; from a judgment in the quo warranto proceeding, holding the annexation of certain territory to the City of Burlingame to be void, the City of Burlingame and other defendants in that proceeding appeal.

Judgments reversed with directions.

I. Karmel, of San Francisco, Kirkbride & Wilson and Arthur J. Harzfeld, all of San Mateo, O'Melveny & Myers, Louis W. Myers and Jas. L. Beebe, all of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., J. W. Coleberd and Richard P. Lyons, both of So. San Francisco, and Gilbert D. Ferrell, Dist. Atty. San Mateo, of Redwood City, for respondent.

DOOLING, Justice.

Two appeals are here consolidated, one from a judgment in a quo warranto proceeding, entered in favor of the State of California on relation of Robert E. Ferranti holding the annexation to the appellant City of Burlingame of certain uninhabited territory to be void, and the other from a judgment dismissing a petition for writ of review filed by appellant City of Burlingame against the County of San Mateo and its board of supervisors to test the jurisdiction of proceedings looking to the incorporation of the City of Millbrae.

On August 1, 1946, Mills Estate, Inc., filed a petition pursuant to the Annexation of Uninhabited Territory Act of 1939, Act No. 5162, Deering's General Laws, Stats. 1939, p. 1567, with the city council of Burlingame for the annexation to the City of Burlingame of certain uninhabited lands belonging to it. The procedural steps required by the statute were duly taken and an ordinance of annexation was adopted. After the proceedings for annexation to Burlingame were instituted a petition was filed with the board of supervisors looking to the incorporation of the City of Millbrae and including within the boundaries of this proposed municipality the same lands which were the subject of the proceedings for annexation to Burlingame. The litigation thus grows out of the rivalry arising from the efforts to incorporate these lands into one or the other municipality.

[1] Appellant City of Burlingame entered court first with its petition for writ

of review seeking a judgment that by reason of its annexation to Burlingame the board of supervisors exceeded their jurisdiction by attempting to include the same property within the proposed limits of Millbrae. It is undisputed that if the annexation to Burlingame was valid this claim was correct since the first proceeding in point of time excludes the jurisdiction of the later one. People v. City of Monterey Park, 40 Cal.App.715, 181 P. 825. However in the quo warranto proceeding, tried first though filed later, the respondent State of California attacked the validity of the annexation proceedings and obtained a judgment declaring the annexation to be void. Since the judgment in that proceeding was on the merits we will address ourselves first to the appeal from that judgment.

[2] Section 10 of the Annexation of Uninhabited Territory Act of 1939, as amended in 1945, Stats.1945, p. 707, provides "that no property within such annexed territory shall ever be taxed to pay any portion of any indebtedness or liability of such municipal corporation contracted prior to or existing at the time of such annexation; provided, however, that such annexed territory may be so taxed in the event the owner * * * thereof shall consent in writing thereto and said written consent shall have been filed with the clerk * * * prior to the adoption of the ordinance approving such annexation." The annexation ordinance provided that the annexed land "shall be proportionately subject to all of the burdens and obligations and benefits existing at the date of said annexation." No written consent had been given by Mills Estate, Inc., that the annexed territory should be taxed to pay a portion of the existing indebtedness of Burlingame, and the trial court concluded that by reason of the quoted provision of the annexation ordinance the annexation was rendered void.

This conclusion is directly contrary to the principle announced in the only California case on this question. In People v. City of Los Angeles, 9 Cal.App.2d 431, 50 P.2d 101, the court considered the validity of a consolidation proceeding wherein the question had been presented to the voters as to whether the annexed city should assume a proportion of the liability for a certain indebtedness of the annexing city where the consolidation act made no provision for the assumption of a debt of that character. The court held the consolidation proceeding valid, saying on the particular question, 9 Cal.App.2d at pages 439, 440, 50 P.2d at page 105:

> "Appellant's final contention has to do with the fact that certain bonds submitted to the electors of the city of Tujunga at the consolidation election were not incurred or authorized for any municipal improvement. Reference is had to the funding bonds of the city of Los Angeles incurred by that city for the settlement of damage claims arising out of the St. Francis dam disaster. As to this issue there can be no doubt that the act does not provide any method by which the city of Tujunga might assume to pay its share of these bonds. Even though the voters agreed to assume them, no tax can be lawfully levied concerning them. No decision has been cited wherein a consolidation or similar proceeding has been nullified because an attempt was made to include more than the law authorized. We prefer to adopt the reasoning indicated in State v. Town of Hessville, 191 Ind. 251, 131 N.E. 46, 132 N.E. 588, that an attempt to do more than the law authorizes does not result in invalidity of that which was authorized, but invalidates only that for which there was no statutory authority. So here, the inclusion of a bond issue for which the statute makes no provision results simply in the invalidity of the proceedings as to that single issue, leaving the authorized issues untainted by any stigma of illegality."

Substitute "city council" for "electors" and the cases are on all fours. We see no occasion for discussing cases from other jurisdictions since on this point the quoted portion of the opinion is controlling and compels the conclusion that the trial court was in error. This is the only ground on which the trial court decided in respondent's favor but respondent urges the following grounds in support of the judgment although on each the trial court ruled against respondent.

[3] The petition for annexation contained the following conditions:

"In consideration of the annexation * * * the said properties after the annexation shall be proportionately subject to all the burdens and obligations of the City of Burlingame in the amount of One ($1.00) Dollar an acre a year for acreage and unimproved areas until such time as public improvements are installed * * *.

"The determination of the services of public utilities to be installed as hereafter agreed upon by the petitioners and the City of Burlingame."

It is conceded that these conditions could not be legally imposed and an officer of Mills Estate, Inc., testified that that corporation knew that they could have no legal effect at the time that the petition was prepared. These conditions may be disregarded and the balance of the petition fully complies with the statute. The principle of People v. City of Los Angeles, supra, 9 Cal.App.2d 431, 440, 50 P.2d 101, 105, is equally applicable to this situation, to requote: "an attempt to do more than the law authorizes does not result in invalidity of that which was authorized, but invalidates only that for which there was no statutory authority."

Section 2 of the annexation act provides: "Any such territory so proposed to be annexed to a municipal corporation must be contiguous thereto."

[4] Two parcels of land were herein sought to be annexed to the City of Burlingame. Parcel No. 1 was a 100 foot strip of land running from the City Limits of Burlingame northwest for 4600 feet, then northeast for 7800 feet and then southeast for 2550 feet, rejoining the City Limits at the termination thereof. Both the beginning and the end of the strip joined into the municipal corporation of Burlingame. Every other portion of the strip is immediately accessible to and from Burlingame's boundary without the necessity of crossing any unincorporated territory or any territory incorporated into another municipal corporation. Respondent's principal contention is that the annexed territory is not contiguous to Burlingame for the reason that the strip is a mere 100 feet wide, that the strip encloses an unincorporated area of 730 acres, and that Mills Estate, Inc., sought to have the strip annexed to Burlingame so that the 730 acres could not be incorporated into any other municipal corporation. Contiguity does not depend on the extent of the property annexed and the question whether a municipal corporation should annex certain territory is political rather than judicial.

[5, 6] This question is ruled by People v. City of Los Angeles, 154 Cal. 220, 97 P. 311. In that case the City of Los Angeles annexed a strip sixteen miles in length and about half a mile in breadth. The court said, 154 Cal. at pages 224–226, 97 P. at page 312:

"It will be observed from these provisions of the act that there is no limitation whatever expressed in the statute as to the extent or form of the territory to be annexed, and there is nothing from which any limitation can be implied. It has plainly left the matter of the annexation of any territory to a municipality to be determined by the people—the voters of the municipality and the territory proposed to be annexed. The Legislature itself in the very nature of things could not lay down any rule as to the extent, shape, or character of territory which might be annexed to any given municipality. This must necessarily depend on very many reasons—questions of expediency and policy—affecting the various municipalities, and adjacent territory to be annexed, in different ways. Hence it was doubtless concluded by the Legislature in conferring a power of annexation in the general terms used in the statute that the voters in a municipality could best determine whether its growth and the conditions surrounding it called for an extension of its municipal limits by the increase of additional territory and its extent, and that the voters of the territory proposed to be annexed could with equal wisdom determine whether it was of advantage to them to become a part of the municipality to the extent and in the form as proposed. With the wisdom of their determination in the matter the courts cannot interfere. They only interfere where some substantial provision of the law has been violated or where fraud was perpetrated in the matter of the boundaries or the extent of the annexed district. That the extent and shape which the annexed territory shall take is a political, and not a judicial question, is clear from the conclusion announced by this court in the case of People v. Town of Loyalton, 147 Cal. 774, 82 P. 620. * * * So in the case of the annexation of territory the power to fix its boundaries is conferred by the Legislature directly upon the voters of the territory to be annexed and the annexing municipality, and no authority is conferred on any legislative body or judicial tribunal to review or interfere with their election upon the subject merely because of the form or extent of the territory annexed."

The only limitation imposed by the statute in our case is that the annexed property must be contiguous to Burlingame. The "horseshoe strip", as respondent calls it, is contiguous to, i. e. has a common boundary with, Burlingame for an aggregate distance of 200 feet and "the extent and shape which annexed territory shall take is a political, and not a judicial question."

Equally political, and not judicial, is the fact that 730 acres are cut off by the "horseshoe strip" from ever being incorporated into any city other than Burlingame (unless the 730 acres or some part of them should be incorporated into a newly formed municipality inside the "horseshoe strip"). We quote again from People v. City of Los Angeles, supra, 154 Cal. 220, 227, 97 P. 311, 314:

"It may be said, too, that the claim of plaintiff that the effect of the extension of the limits of Los Angeles along the westerly boundary of the city of Wilmington is to prevent the natural expansion of the latter city is, in fact, more fanciful than real. San Pedro Bay naturally prevents expansion southerly, but there is nothing to prevent its expansion to the northward and eastward. It has still unlimited power of extension in those directions. And, while it is restricted in its extension to the westward, there is no law which prohibits another municipality, when its present municipal necessities require it, from extending its boundaries by annexation because such extension may possibly prevent future expansion of another municipality. The contiguity of the boundaries does not affect the integrity of the present city of Wilmington, and that it might in the future, if not restricted by proximity to another city, extend in a given direction, is no reason why that other city, one of larger and increasing growth, whose practical and political necessities call for an extension of territory so as to bring it in touch with the seacoast, should be precluded from doing so merely, because at some future time the natural extension of the smaller city might possibly trend in the direction of the annexed territory."

[7] The wisdom or expediency of the annexation of this territory is not a concern of the courts. We can go no further than to see that the existing laws are complied with. The supreme court said in People v. City of Los Angeles, supra, 154 Cal. 220, 228, 97 P. 311, 314:

"If it be unwise legislation to grant the power to voters in the respective localities as broadly as it is conferred under the Annexation Act, appeal must be made to the Legislature itself. That body has the constitutional power to confer the authority on them to do so and has done it, and, whether it was wise or not, the courts cannot inquire into."

[8] Later California cases are cited by respondent but it is needless to discuss them since they decide other questions and do not overrule People v. City of Los Angeles, supra, 154 Cal. 220, 97 P. 311. Much time is devoted by counsel to Brown v. City Council of City of Long Beach, Cal. App., 258 P. 693. A hearing was granted in that case by the Supreme Court and if anything said in that opinion conflicts with People v. City of Los Angeles, supra, 154 Cal. 220, 97 P. 311, it cannot stand as an authority. Likewise cases from other jurisdictions cannot be considered which conflict in principle with the position taken by the Supreme Court of this State.

[9] The motives of the city council of Burlingame, 5 Cal.Jur. 640, or of Mills Estate, Inc., 1 Cal.Jur. 336, cannot be inquired into so long as they proceeded according to established law.

The petition in the review case was dismissed pursuant to a stipulation that if the quo warranto action was decided in favor of the State that might be done. The reversal of the judgment in the quo warranto action necessitates the reversal of the judgment of dismissal in the review case since it depends on that judgment.

Both judgments are reversed with directions to the trial court to amend its findings in the quo warranto case in accordance with the views expressed in this opinion and to enter judgment in that case in favor of defendants.

NOURSE, P. J., and GOODELL, J., concur.

Hearing denied; CARTER, J., dissenting.

90 Cal.App.2d 712

RIFF v. MAYHEW et al.

Civ. 16518.

District Court of Appeal, Second District, Division 1, California.

March 18, 1949.

As Modified on Denial of Rehearing April 12, 1949.

Hearing Denied May 16, 1949.

1. Appeal and error 🔑1010(1)

Where the material findings and judgment of the trial court are supported by substantial evidence, a reviewing court will not weigh the evidence or interfere with the trial court's decision.

2. Escrows 🔑15

Evidence sustained findings that agreement was entered into to enable buyer to acquire and operate an on-sale liquor and general merchandise establishment, that sellers were unable to obtain transfer of liquor license to buyer, and that buyer, through no fault of his own, was unable to obtain license, entitling buyer to rescind agreement and recover deposit.

3. Escrows 🔑15

Where it was impossible for buyer of cocktail lounge and restaurant business to conduct on premises in accordance with terms of escrow agreement an on-sale liquor and general merchandise business because sellers were unable to transfer liquor license to buyer and because he was unable to obtain a license, buyer was excused from further performance of contract and was entitled to recover money deposited in escrow. Civ.Code, § 1598.

4. Escrows 🔑15

Where no consideration was received by buyer of an on-sale liquor license, cocktail lounge, and restaurant equipment because sellers were unable to transfer liquor license, and because buyer was unable to obtain a license, buyer was not precluded from recovering $25,000 deposited with escrow holder under escrow agreement because buyer did not deposit balance of $7,500 under escrow agreement.

5. Escrows 🔑15

Buyer of on-sale liquor license, cocktail lounge and restaurant equipment was not required to return or tender to sellers of stock of liquor which was paid for outside of escrow, or to account for operation of premises during brief period of his occupancy as a condition precedent to recovering $25,000 paid under escrow agreement when sellers were unable to transfer liquor license to buyer and when buyer was unable to obtain a license.

6. Escrows 🔑8(1)

The holder of an escrow is agent for all parties up to the time that escrow is closed.

7. Escrows 🔑15

Deposit of money in escrow by buyer was as much in possession of buyer as sellers, and therefore in action by buyer to recover money deposited because of default of sellers, buyer was not entitled to interest.

8. Appeal and error 🔑1151(2)

Where respondent conceded in his brief that trial court's award of $525 in addition to $25,000 properly awarded "finds no support in the evidence", trial court's judgment for respondent would be modified on appeal to extent that respondent recover judgment only for $25,000, and, as so modified, would be affirmed.

Appeal from Superior Court, Los Angeles County; Joseph M. Maltby, Judge.

Action by George G. Riff against Peter L. Mayhew, Boyd B. Ashcraft and others to recover $25,000 paid by plaintiff in escrow to Peter L. Mayhew in accordance with an agreement with Boyd B. Ashcraft and others, and to recover $525 paid by plaintiff for renewal of a liquor license, wherein defendants filed a cross-complaint against the plaintiff and two others. From a judgment for plaintiff for $25,000 and $525, Boyd B. Ashcraft and others appeal, and the plaintiff cross-appeals.

Judgment modified to allow plaintiff recovery of only $25,000, and, as modified, affirmed.

Archie G. Cope and Julian P. Van Dyke, both of Long Beach, and E. O. Leake and J. J. Leake, both of Los Angeles, for appellants.

Ball, Hunt & Hart and Joseph A. Ball, all of Long Beach, for respondent.

DORAN, Acting Presiding Justice.

The plaintiff, George G. Riff, filed the present action for the recovery of $25,000.00 deposited with the defendant Peter L. Mayhew, as escrow holder. The escrow instructions involved herein relate to the purchase by plaintiff and sale by the appellants of a certain "Cocktail Lounge and Restaurant Business known as 'The New Army and Navy Club'", located at 1800 East Ocean Boulevard in the City of Long Beach.

The record discloses evidence to the effect that prior to October, 1946, one Einar Petersen had operated the "Army and Navy Club" at the address in question; that appellant Van Dyke and associates then purchased the liquor license and equipment from Petersen. According to the Van Dyke testimony, appellant Boyd Ashcraft was the manager thereof, and "We sold liquor and food to anybody we could sell it to". It also appears that the area where the place was located was zoned for apartment house use; that while social clubs were permitted, the ordinance did not permit public places of entertainment, restaurants or cafes. Van Dyke and Ashcraft sought to obtain an entertainment cafe license; this was opposed by the City Director of Planning; the applicants then secured a continuance of the hearing until November 26, 1946, and a further continuance until December 10, 1946, which, it may be noted, was the date when the escrow was opened for the sale of the place to Riff. Appellant Van Dyke, an attorney at law, also filed a petition on behalf of the owner of the real estate for a special permit to operate a cocktail bar on the premises; this was noticed for hearing on December 19, 1946, and was denied by the Planning Commission. On January 7, 1947, the City Council also denied the appellants' application for an entertainment cafe license. "Anticipating the success of his petition to rezone the property", states respondent's brief, so as to permit a general sale of liquor, "Van Dyke and associates entered into a contract to sell to the plaintiff", and opened an escrow for that purpose.

The escrow agreement, dated December 10, 1946, and hereinbefore referred to, provided for the sale by appellants to Riff of the on-sale alcoholic beverage license, the cocktail lounge and restaurant equipment, stock of liquors, etc., of the "New Army and Navy Club". The liquor stock was inventoried and paid for outside of escrow. Riff agreed to and did pay into escrow the sum of $25,000.00, and was to pay a further balance of $7,500.00 on or before January 7, 1947, which latter amount was not paid. According to the escrow instructions, it was "understood and agreed * * * that the personal property aforementioned * * * are purchased * * * for the purpose of operating and conducting an on-sale Distilled Spirits, Liquor, Beer, Wine, Beverages and General Merchandise establishment, and to engage in the sale of such Liquors and Beverages in accordance with the above mentioned license(s)".

The plaintiff Riff entered into immediate possession of the premises pursuant to oral agreement and operated the cocktail bar from December 10, 1946 to January 7, 1947. On the latter date a police officer informed the plaintiff that public sale of liquors at that location was in violation of a Zoning Ordinance, after which time the place was not open to the general public, and was finally closed on February 28, 1947. After conference with defendant Ashcraft, operation of the place as a social club was suggested; an entertainment permit was applied for but was refused by the Long Beach City Council.

On February 28, 1947, the State Board of Equalization denied the application of appellants to transfer to plaintiff a liquor license covering the location in question, on the stated grounds that Riff was not the real party in interest and that the application had contained misrepresentations.

On February 28, 1947, the same day that the application for transfer of the liquor license was denied, plaintiff gave notice to appellants of "Election to Terminate Escrow", which notice was "upon the ground and for the reason that the undersigned Vendee and Intended Transferee has been unable to obtain and has been refused by the State Board of Equalization the transfer from Vendors and Licensees to Vendee and Intended Transferee and Licensees have failed to obtain the transfer of that certain On-Sale General License described in said escrow agreement". The notice further demanded return from the escrow holder of all sums deposited by the plaintiff. On the same day Riff abandoned the premises, taking away such liquors as had not been sold during operation of the business.

Plaintiff's complaint for rescission is based upon the denial of the application for transfer of the liquor license, and also alleged that appellants were in default in failing to deliver into escrow a valid sublease or assignment of lease, and that appellants had no interest which could be transferred by assignment or sublease. Appellants' answer admitted plaintiff's payment of the $25,000.00 in escrow; denied that any final determination as to transfer of the license had been made and alleged that a further hearing thereon before the Board of Equalization had been set for April 8, 1947. The answer also alleged that plaintiff had failed to comply with the escrow agreement in that the balance of $7,500.00 had not been deposited.

A cross-complaint was filed in which defendants alleged that two other parties, James Blankenship and Claude Bolling, named with Riff as cross-defendants, were copartners in the purchase of the "New Army and Navy Club"; that Riff had neglected and refused to disclose such names to the Board of Equalization, which fact resulted in denial of the application for transfer of the liquor license.

The trial court found that the escrow agreement had been entered into as hereinbefore related for the purpose of enabling Riff to acquire and operate an on-sale liquor and general merchandise establishment; that the sellers were unable to obtain a transfer of the general on-sale liquor license to plaintiff, and that the latter was unable to secure such a license. It was further found that although plaintiff did misstate certain facts to the Equalization Board and did not disclose the financial interest of Blankenship and Bolling in the proposed business, this was not done for the purpose of preventing the transfer of the license; that the transfer of the license was not "denied solely by reason of the fact that George G. Riff withheld information * * * and misrepresented material facts"; that the property in question was so zoned that sale of liquors to the general public could not be there conducted.

There were also findings to the effect that the appellants were in default in failing to provide a valid sublease to the premises; that the major lease thereto had been null and void since January 7, 1947, since which date appellants had no interest in and to said premises; hence that appellants were unable to comply with the agreement; that by reason of these facts there had been a material failure of consideration. Judgment was entered in plaintiff's favor, for the recovery of the $25,000.00 plaintiff had deposited in escrow, plus $525.00 which plaintiff had paid out for a renewal of the license.

According to appellants' brief, "The sole question involved in this case is: Did Riff have the right to rescind the escrow agreement on February 28, 1947, by reason of the denial of the (license) transfer on that date?" It is submitted that plaintiff had no right to rescind for several reasons;

first, "Riff was in default * * * by reason of the fact that he failed to deposit in escrow, * * * the sum of $7500 on or before January 7, 1947"; second, "Riff failed to offer to return and restore the property received and retained by him as part of the transaction, to wit, the stock of liquor", etc., and that Riff "failed to account * * * for the operation of said premises from the period of December 10, 1946, to February 28, 1947". As a third reason it is urged that plaintiff had no right to rescind because "The transfer of the liquor license was refused solely and only because of the fraud and deceit of Riff in his application for the transfer and was not occasioned by any fault or act of defendants".

The plaintiff Riff, according to respondent's brief, "sets forth facts showing a material failure of consideration in that the sellers were unable to obtain an assignment to him of the liquor license, and were unable to transfer to him an interest in the real property upon which the leasehold improvements were located by either assignment or sublease". In this connection respondent calls attention to the fact that under the zoning law, no transfer of the general liquor license could be made, and that "nothing Riff did or could have done changed the situation." Also mentioned, as found by the trial court, is the fact that since the stock of liquors was sold and paid for by Riff under an oral agreement outside of escrow, such completed transfer required no offer to restore the merchandise as a prerequisite to plaintiff's right to rescind. It is urged that the judgment entitling plaintiff to recover the $25,000.00 deposited in escrow, is supported by substantial evidence and should be affirmed. In reference to the further judgment of $525.00 in plaintiff's favor, respondent concedes that this finds no support in the evidence.

George G. Riff, as cross-appellant, contends that "Upon the termination of an escrow for failure of consideration, the purchaser (Riff) is entitled to recover back his deposit with interest thereon". In opposition, cross-respondents call attention to the fact that the $25,000.00 deposit at all times remained in the custody of the escrow holder as the agent of both parties and never reached the hands of the sellers.

[1, 2] A survey of the record discloses that, although the evidence is in some conflict in reference to certain phases of the controversy, nevertheless, the material findings and judgment of the trial court in favor of the plaintiff, are supported by substantial evidence. In that state of the record the rule is well established that a reviewing court will not weigh the evidence or interfere with the decision of the trial judge. Such rule is particularly applicable to the findings that there was a complete failure of consideration and that the objects contemplated by the escrow agreement were impossible of fulfillment. Under those circumstances it would be contrary to both law and equity to permit defendants to retain the $25,000.00 deposited in escrow by the plaintiff.

[3] The impossibility of conducting on the premises, "an on-sale Distilled Spirits, Liquor, Beer, Wine, Beverages and General Merchandise establishment", specified in the escrow instructions as the express "purpose" of the transaction, would undoubtedly be of sufficient materiality to excuse the plaintiff from further performance of the contract. There is, moreover, substantial evidence to support the finding that this impossibility did not result "solely" from the plaintiff's actions or representations, as contended by the defendants. Under the zoning regulations in force, operation of a retail liquor establishment on the premises was prohibited. As commented upon in respondent's brief, Section 1598 of the Civil Code provides that "where a contract has but a single object, and such object is unlawful, whether in whole or in part, or wholly impossible of performance, * * * the entire contract is void."

Cases cited by appellants holding that a purchaser who, without right, refuses to go on with the contract, are, of course, only applicable in connection with appellants' contention that plaintiff's alleged default was solely responsible for collapse of the proposed transaction. In view of the evidence supporting the trial court's conclusion to the contrary, the principles enunciated therein are without point. The various contentions of the appellants, seeking to retain the plaintiff's $25,000.00 deposit, are not persuasive, and cannot prevail.

[4, 5] Appellants' argument that the plaintiff's recovery is precluded by reason of the latter's failure to deposit in escrow the balance of $7,500.00 called for by the agreement is without merit;—plaintiff had already paid in $25,000.00 for which no consideration was received. Likewise untenable is the contention that, as a condition precedent, plaintiff was obliged to return or tender to defendants the stock of liquor which was paid for outside of escrow, or to account for the operation of the premises during the brief period of Riff's occupancy. As respondent's brief avers, "The defendants cannot complain of this completed transaction as they received payment in full for the liquors at the price set by them".

[6, 7] A further question is presented by Riff as cross-appellant; namely, whether after termination of an escrow by reason of the failure of consideration, the purchaser is "entitled to interest on his moneys from the date of the termination". Cases cited by cross-appellant as justifying such an award of interest herein are Allen v. Globe Grain & Milling Co., 156 Cal. 286, 104 P. 305, Hayt v. Bentel, 164 Cal. 680, 130 P. 432, and Blank v. Olcovich Shoe Corporation, 20 Cal.App.2d 456, 67 P.2d 376. However, as pointed out by cross-appellees, none of these cases involve a state of facts similar to that here presented; the purchase price in those cases paid directly to the sellers and not deposited in escrow. And, under the holding in Early v. Owens, 109 Cal.App. 489, 293 P. 136, 138, "It is the well-settled law in California that the holder of an escrow is agent for all parties up to the time that the escrow is closed." In legal contemplation, therefore, the deposit of $25,000.00 in the hands of the escrow holder was as much in plaintiff's possession as in that of the defendants, since the actual custodian, the escrow holder, was the agent of both plaintiff and defendants. No dereliction on the part of Mayhew, the escrow holder, is claimed. The trial court was correct in not making an award of interest.

[8] Since it is conceded in respondent's brief that the trial court's additional award of $525.00 paid by plaintiff for renewal of the liquor license "finds no support in the evidence", the judgment of the trial court in plaintiff's favor is hereby modified to the extent that plaintiff recover judgment only in the sum of $25,000 less the escrow expenses of Peter L. Mayhew, and as so modified is affirmed. Respondent to recover costs on appeal.

WHITE, J., concurs.

90 Cal.App.2d 580

BEHNEMAN et al. v. INTERNATIONAL CEMENTERS, Inc., et al.

Civ. 3739.

District Court of Appeal, Fourth District, California.

March 14, 1949.

Hearing Denied May 12, 1949.

1. Automobiles 🔑244(12, 35, 44, 58)

Evidence that damages sustained by automobile and occupants when truck which they were passing turned left to enter side road, were result of contributory negligence of automobile driver, and that truck driver was free of negligence with respect to look out, speed and giving turn signal, supported judgment exonerating truck owner and driver of liability.

2. Automobiles 🔑246(58)

In motorists' action for injuries sustained when automobile while passing collided with truck which turned left into side road, court properly charged that vehicle may not be driven on left side of road approaching intersection under pleadings and evidence to which no objection was made showing that side road was a public road and the junction, an intersection. Vehicle Code, § 530.

3. Trial 🔑296(4)

In motorists' action for injuries sustained when automobile while passing collided with truck which turned left into side road, charge that a driver may pass to right of another only when second is about to make a left turn was not objectionable as telling jury that driver of automobile was guilty of contributory negligence for failing to pass to right of truck in view of other instructions given at motorists' request. Vehicle Code, § 529.

4. Automobiles 🔑246(58)

In motorists' action for injuries sustained when automobile drawing trailer collided with truck, court properly charged that jury could consider mechanical condition and loading of automobile and trailer in determining whether motorist met duty to keep equipment under control in view of evidence tending to show negligence with respect to loading and mechanical condition of trailer.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Wilma B. Behneman and Harold M. F. Behneman against International Cementers, Inc., a corporation, Olonzo H. Smith and others, for damages arising out of an automobile-truck collision. From the judgment, plaintiffs appeal.

Judgment affirmed.

Hoyt Klinck and John L. Flynn, both of Los Angeles, for appellants.

Borton, Petrini, Conron & Borton, of Bakersfield, for respondents.

BARNARD, Presiding Justice.

This is an action for damages arising out of an automobile collision. The plaintiffs have appealed from the judgment entered in accordance with a jury's verdict for the defendants.

The accident happened about four miles east of Maricopa on a highway called the "Maricopa Cut-off", at a point where an "oiled road" enters the highway from an oil field to the south. The surrounding country is level and open, with no trees, buildings or other obstructions to the view. The Maricopa Cut-off, which runs east and west, is paved and divided into two lanes with "black top" shoulders on the sides. The "oiled road", which comes in from the south, is of general average width, the oiled portion in the center being about 13 feet wide. There is a fence along each side of the "oiled road" and a line of telephone poles along its east side. There was an iron post with a "Richfield sign" 16 feet east of the entrance to the "oiled road". Where the "oiled road" entered the highway there was a well defined "Y" indicating that heavy traffic passed into and from it both to the east and to the west.

The accident happened about 6:00 p. m. on May 25, 1946. The sky was overcast but visibility was good and the pavement dry. The defendants' truck, which was equipped with a tank and cement mixing and pumping machinery, was proceeding west on this highway. An automobile driven by the plaintiff husband was also traveling west on this highway and approaching the truck. This automobile was towing a trailer loaded with household equipment weighing from 2,000 to 3,000 pounds. The driver of the automobile pulled over into his left lane and attempted to pass the truck while at the same time the driver of the truck was turning south into this "oiled road". The right front corner of the automobile came into contact with the left rear corner of the truck, resulting in considerable damage to the automobile and its occupants, and practically no damage to the truck.

Three witnesses, who were on the "oiled road" a short distance south of the highway, testified as to the surrounding circumstances, in addition to the two drivers. There is evidence that the truck driver looked in his rear view mirrors and saw nothing coming; that he put up his mechanical signal arm for a left turn; that he changed to a lower gear; that he slowed down from about 40 miles an hour to 15 miles an hour; that he again looked in the rear view mirrors just before starting to make the left turn; and that he heard no sound of a horn. There is also evidence that the truck was half-way through the turn when the sound of brakes on the plaintiffs' car was heard by the other witnesses, and that when that sound was heard the plaintiffs' car was 150 feet down the highway. After the brakes on the plaintiffs' car were applied the tires left skid marks for a distance of 138 feet or, as one witness said, 148 feet leading to the point of impact.

[1] The plaintiffs first contend that the verdict is contrary to the evidence because it clearly appears that the truck driver was negligent, and there is no evidence to support the implied finding that the driver of the automobile was guilty of contributory negligence. Whether the truck driver took proper precautions in looking for approaching traffic before and during the making of this turn into the "oiled road", and whether a sufficient signal was made, were questions of fact for the jury. The question of whether the driver of the automobile was guilty of contributory negligence was purely one of fact and not of law. It presented a number of questions with respect to the speed at which he was traveling, his observation of things which should have been seen, his equipment, the weight of his trailer load and its effect upon his movement, his attempt to pass the truck at this particular place and under the conditions then existing, and the like. While the evidence would have supported a finding that the driver of the truck was negligent, it not only is sufficient to support a contrary finding but it is amply sufficient to support a finding of contributory negligence on the part of the driver of the automobile.

[2, 3] It is next contended that the court committed prejudicial error in giving two instructions at the request of the defendants. The first of these informed the jury that section 530 of the Vehicle Code provided, in part, that no vehicle should be driven to the left side of the roadway "* * * when approaching within one hundred feet of or when traversing any intersection * * *," and the second told the jury that section 529 of this code provided in part that the driver of a motor vehicle may overtake and pass to the right of another vehicle only when the vehicle overtaken is making or is about to make a left turn. With respect to the first of these instructions it is argued that there was no intersection here since this "oiled road" was a private road and the sections of the Vehicle Code apply only to public roads or highways. It is argued that the second of these instructions, in effect, told the jury that the plaintiff husband was not entitled to pass to the left of this truck but should have passed to its right, and that he was, therefore, guilty of contributory negligence.

While plaintiffs' counsel said in his opening statement that this "oiled road" was a private road no serious effort was made to prove that fact. The only evidence in the record concerning the status of this road appears when a worker for an oil company testified that he knew the road because he worked for one of the oil companies. Counsel for plaintiffs then asked: "And who owns that road?" He replied, "It belongs to the oil companies." While this may have been this worker's opinion, no effort was made to establish the actual fact. On the other hand, there is ample evidence in the record, including photographs, to indicate that this road was similar in appearance to ordinary country roads which are publicly owned. It was of similar width, there were fences on the sides, there was a line of telephone poles along one side, it was oiled, it appeared as a well-traveled road, and it had a "Y" effect as it entered the highway. It rather clearly appears that the case was tried on the theory that this was an ordinary intersection. Counsel for the defendants in his opening statement said that the accident happened at "the intersection made by this road to these oil wells." Counsel for plaintiffs asked a motor patrol officer whether there was anything there to indicate that this was an intersection. He replied that there was no sign posted there stating that it was an intersection. Several witnesses referred to it as an intersection and testified as to what occurred in the intersection, the center of the intersection, and the like. After one of these witnesses had thus several times referred to the intersection plaintiffs' counsel asked him "What do you mean by the intersection?" He replied: "That is where the two roads join, right through the center of the white line." The question of whether certain moving pictures, taken immediately after the accident, should be shown to the jury was argued in the absence of the jury. The court then remarked that the last pictures showing "the intersection" of these two roads would show the intersection and the situation "better than it could be described." After the jury returned the pictures were shown and the court said: "The latter part of the film shows the general view of the intersection." It was then stipulated, "that the second series of intersection shots were taken" at a certain time. No objection was made at any time during the trial to the many references thus made to this "intersection" as the scene of the accident.

At the request of the plaintiffs the court also gave an instruction defining an intersection in the language used in section 86 of the Vehicle Code, and another instruction in the language of section 540 of the Vehicle Code, stating how the driver of a vehicle intending to turn at an intersection shall do so. The court also gave other instructions, embodying the provisions of sections 525, 528 and 540 of the Vehicle Code. The instructions covered, generally, the rules applying to passing to the left and passing to the right, as well as passing at intersections. Nothing in the instructions told the jury that the driver of the automobile should have passed to the right or that he violated the law in failing to do so. The instructions covered the issues as presented by the pleadings and the evidence and no prejudicial error appears in this connection.

[4] The last contention made is that the court erred in instructing the jury that it is the duty of the driver of a motor vehicle to keep his vehicle under such control as to enable him to avoid eventualities that would be anticipated by prudent drivers in a like position; that in determining whether or not this duty was complied with the jury is entitled to take into consideration the mechanical condition of the vehicles, the weight with which they may be loaded, as well as such other conditions as would affect a person of ordinary prudence in a like position; and that it is unlawful to operate on any highway any vehicle or combination of vehicles which is in an unsafe condition, which is not equipped as required by law, or which is not safely loaded. As plaintiffs' counsel concede, a great deal of evidence was produced in an effort to establish negligence on the part of the driver of this automobile, in respect to the loading of the trailer and the braking and mechanical condition of his equipment. While it is argued that this evidence was not sufficient to establish any negligence the question was one for the jury, and no prejudicial error appears in connection with the giving of these instructions.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

90 Cal.App.2d 779

SORENSEN v. SAND.

Civ. 3755.

District Court of Appeal, Fourth District, California.
March 22, 1949.

1. Appeal and error ⚷1011(1)

Where judgment for defendant was based on findings of trial court made on conflicting evidence, judgment would not be disturbed on appeal.

2. Sales ⚷181(11)

In action for failure of defendant wholesale nurseryman to fill entire order for grape rootings, evidence did not establish that weather conditions over which defendant had no control prevented his filling entire order so as to preclude recovery under provision of order blanks voiding orders should injury befall defendant's stock from causes over which defendant had no control.

◆

Appeals from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by L. P. Sorensen against T. A. Sand, doing business as Del Rancho Fortuna, on a contract for delivery of grape rootings. From the judgment, defendant and plaintiff appeal.

Judgment affirmed.

Philip M. Wagy, of Bakersfield, for appellant.

Siemon, Maas & Siemon, Alfred Siemon, Walter L. Maas, Jr. and Bennett Siemon, all of Bakersfield, for respondent.

MUSSELL, Justice.

In this action on a contract for delivery of grape rootings, defendant appeals from the judgment in favor of plaintiff, and plaintiff appeals from a part of the same judgment.

Plaintiff L. P. Sorensen was a retail nurseryman engaged in the purchase and resale of grapevines and other nursery stock to growers. The defendant, T. A. Sand, was a wholesale nurseryman engaged in the growing of nursery stock in large quantities, most of which he sold to retailers such as the plaintiff. From time to time, during the latter part of 1944 and the early part of 1945, plaintiff placed orders with defendant for large numbers of various varieties of grape rootings to be furnished and delivered to plaintiff in the latter part of 1945 or the early months of 1946.

A large number, but not all of the vines ordered by plaintiff were delivered by defendant. Plaintiff was charged with and paid for those actually delivered, however, he rejected a substantial number as being undergrade. Some of the rejected vines were replaced and as to such replacements there is no controversy, and some credits were allowed for rejected vines, and there is no controversy as to such credits.

[1] Plaintiff's first cause of action is based on his contention that defendant did not replace nor credit plaintiff with all of the undergrade vines, and he claims damages to the extent of the agreed purchase price of the vines not replaced nor credited. Defendant in his answer denies any failure to replace or credit plaintiff with the price of all undergrade vines, and further alleges an accord and satisfaction. The trial court in its findings and judgment sustained defendant's position on plaintiff's first cause of action and plaintiff appeals from that part of the judgment. Plaintiff alleged in his first cause of action that 530,000 Thompson Seedless rootings were purchased from defendant; that large quantities were rejected by many of plaintiff's customers and replaced by defendant; that defendant refused to replace 32,191 vines which had been rejected by plaintiff's customers on account of being offgrade and that plaintiff was compelled to purchase replacements for his customers in the open market. The trial court recited in its findings that it was unable to find from the evidence that plaintiff's contention as to rootings being undergrade were true and therefore found it to be untrue that the deliveries to the customers in question included any subgrade or defective rootings which defendant refused to replace. The evidence is in sharp conflict as to the number of rootings for which adjust-

ment was made by the defendant and the testimony relied upon by plaintiff to prove the number of subgrade or defective rootings consisted largely of estimated percentages arrived at by partial inspections of a very few vines. The court further found on conflicting evidence that the parties had settled and compromised the dispute between them as to whether defendant was obligated to make any further replacements of subgrade or defective rootings by an agreement whereby defendant agreed to and did deliver 17,000 rootings of various varieties which plaintiff agreed to and did accept in full satisfaction of his demand. Under the circumstances shown we cannot disturb the judgment of the trial court in favor of the defendant on the first cause of action stated in plaintiff's complaint.

Plaintiff's second cause of action is for damages on account of unfilled portions of orders for grape rootings placed with defendant between December 1, 1944, and September 1, 1945. Plaintiff claims damages in an amount equal to the difference between the contract price and the market price at the time delivery was to have been made. It is admitted that defendant failed to fill all of plaintiff's orders in full and there seems to be no contention that the amount of damage suffered by plaintiff, and as set forth in the judgment, is incorrect, however, defendant contends that he was excused from performance of the contract by reason of the provisions printed on the order blanks or sales slips furnished by defendant and which in most instances were signed by the parties or their agents. The printed portion of the order blanks material here is as follows:

"We accept all orders on condition that same shall be void, should injury befall our stock from fire, frost, floods, drouth or any other cause which could not be prevented and over which we have no control." Defendant testified that he had planted more than enough vines to supply plaintiff and his other orders in a normal growing season, and offered to prove that the shortages in deliveries were due solely to weather conditions over which he had no control. The sole question as stated by defendant is whether the court erred in sustaining an objection to the offered evidence.

Defendant in his answer admitted the shortages in deliveries and alleged that the failure of the defendant to deliver occurred by reason of his failure and inability to grow and produce said rootings in the quantity specified and that his failure in this respect was solely by reason of causes which could not be prevented by him and over which he had no control. No facts are alleged to support the conclusion alleged and it is not claimed either in the answer or the evidence that any injury befell defendant's stock "from fire, frost, floods or drouth". No facts are alleged showing "weather conditions over which defendant had no control". The evidence indicated that defendant produced a quantity of vines greatly in excess of the number required to fill his commitment to plaintiff; that out of 4,500,000 vines planted defendant produced about 2,700,000 and that he sold and delivered vines to a large number of customers other than plaintiff; that the average of No. 1 vines which would be obtained normally from the cuttings planted would be about sixty percent. This testimony supports an inference that defendant could have grown a sufficient number of vines to supply all his orders if he had correctly estimated the number of plantings necessary.

[2] Defendant's contention that weather conditions excused him from performance of the contract for delivery of the vines is without merit. While it is conceivable that a contract might be so drawn as to provide an excuse for performance in the event of unusual weather conditions, in the instant case the printed term on the order blank "other causes over which we have no control" has no settled meaning, Fleuti v. Appledorn, 86 Cal.App. 209, 213, 260 P. 601, and no facts are alleged which excuse performance. Defendant does not seek to declare the orders void as provided in the printed clause of the contract but seeks to avoid partial performance while accepting compensation for part of the vines furnished. The evidence shows that grape rootings of the kind here involved

could have been obtained in the open market and it is not shown that defendant was unable to fill all of plaintiff's orders.

Judgment affirmed. Each party to bear his costs on appeal.

BARNARD, P. J., and GRIFFIN, J., concur.

90 Cal.App.2d 801

PEOPLE v. BELLEW.

Cr. 4292.

District Court of Appeal, Second District, Division 3, California.
March 23, 1949.

1. **False pretenses** 🔑22

Rule of caveat emptor has no application to a criminal charge based upon false representation.

2. **False pretenses** 🔑49(1)

Evidence sustained conviction of grand theft for selling two zircons on representation that they were genuine diamonds.

◆

Appeal from Superior Court, Los Angeles County; William R. McKay, Judge.

John Walter Bellew was convicted of grand theft, and he appeals.

Affirmed.

Horace H. Appel, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen. and Dan Kaufman, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Appellant Bellew was charged jointly with Adam Pfaff and Bob Hano with the offense of grand theft committed in selling two zircons to Walter Chung and Albert Hing for the sum of $600, under representations that they were genuine diamonds and of the value of $1,000. Upon the trial of defendants' case to the court, it was stipulated that the case of the People might be presented in the form of the transcripts of testimony taken in the preliminary hearings of Bellew and Pfaff, and that additional testimony might be introduced. Appellant did not testify at the preliminary hearing but did take the stand upon the trial. He admitted having made the sale but claimed he was selling the stones for Hano, and believed them to be diamonds. He appeals from the judgment of conviction and from an order denying his motion for new trial, urging as the sole ground for reversal alleged insufficiency of the evidence to establish the crime charged.

Evidence was introduced of the following facts: Bellew and Pfaff met a poolroom acquaintance of Pfaff's, one Hano, and through him were introduced to Chung and Hing at the office of Chung, who was the manager of a paper company in Los Angeles. After introducing his friends, Hano departed. Bellew took from his pocket a piece of paper, and from the paper two stones which he exhibited to the proposed purchasers. He stated to them not once, but several times, that the stones were genuine diamonds, without flaws, and were worth $1,000. He asked Chung for some dry ice, stating that when the stones were placed on the ice there would be a buzzing sound which would prove that the stones were real diamonds. No dry ice was available. Appellant invited Chung to have the stones appraised. Chung endeavored to call a jeweler friend for that purpose but was unable to reach him. Appellant insisted that it was necessary for him to make a quick sale of the stones. Chung and Hing did not have $1,000 between them, and appellant asked them how much they did have. They counted their money which amounted to only $565, and appellant finally agreed to sell the stones for $600, $565 to be paid immediately and $35 on the following day. The transaction was closed on this basis and the stones were delivered to Chung, who gave one of them to Hing. The stones were produced at the trial and it was stipulated that they were zircons of the retail value of $40. Both Chung and Hing testified that they had slight knowledge of diamonds and that they parted with their money in reliance upon appellant's representations.

[1, 2] The argument advanced on the appeal is that since Chung and Hing inspected the stones before they made the purchase, the trial court should have determined under the doctrine of caveat emptor that they relied entirely upon their own judgment as to the nature of the stones and their value. The rule has, of course, no application to a criminal charge based upon false representation. People v. Smith, 3 Cal.App. 62, 84 P. 449; People v. Cummings, 123 Cal. 269, 55 P. 898. The claim that the trial court should have believed appellant rather than his victims does not present a question of law.

The judgment and order denying the motion for new trial are affirmed.

WOOD and VALLÉE, JJ., concur.

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90 Cal.App.2d 656

CORPORATION OF PRESIDING BISHOP OF CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS v. CITY OF PORTERVILLE et al.

Civ. 3734.

District Court of Appeal, Fourth District, California.

March 17, 1949.

Rehearing Denied April 13, 1949.

Hearing Denied May 12, 1949.

1. Municipal corporations 🔑601(7)

A zoning ordinance, when reasonable in object and not arbitrary in operation, constitutes a justifiable exercise of police power.

2. Municipal corporations 🔑601(7)

The establishment, as a part of comprehensive and systematic plan, of districts devoted to strictly private residences or single-family dwellings from which are excluded business or multiple building structures, is a legitimate exercise of police power.

3. Municipal corporations 🔑601(7)

Zoning ordinance establishing, as a part of comprehensive zoning plan, strictly private residential districts from which churches were excluded, was valid.

4. Evidence 🔑5(2), 21

It is a matter of common knowledge that people in considerable numbers assemble in churches and that parking and traffic problems exist where crowds gather.

5. Constitutional law 🔑84

Where zoning ordinance established, as part of comprehensive zoning plan, strictly private residential district from which churches were excluded, application of ordinance to religious organization which owned land in such district and denial of building permit were not objectionable as an unwarranted restriction of religious worship.

6. Constitutional law 🔑46(2)

Where petition alleged that zoning ordinance as applied to petitioner so as to prevent petitioner from erecting a church on property in residence district was unreasonable and that ordinance deprived petitioner of property without due process of law, but did not state facts necessary to support the legal conclusions alleged, the petition did not state cause of action for writ of mandate to compel issuance of building permit.

7. Municipal corporations 🔑122(1)

In proceeding for writ of mandate to compel issuance of permit for construction of church notwithstanding zoning ordinance, burden was on petitioner to allege and prove physical facts from which court could conclude as a matter of law that ordinance was unreasonable and invalid.

8. Municipal corporations 🔑122(2)

In enacting zoning ordinances, municipality performs a legislative function and every intendment is in favor of validity of such ordinances.

9. Municipal corporations 🔑122(2)

Presumption exists that zoning ordinance as a whole is justified under police power and adapted to promote public health, safety, morals, and general welfare.

10. Municipal corporations ⚷63(1), 601

Action of municipality in prescribing buildings which may be erected and constructed in zone established for single-family residences is justifiable, and wisdom of prohibitions and restrictions is matter for legislative determination.

11. Pleading ⚷225(2)

Where plaintiff elected to stand on allegations of petition and declined to amend it, informing court that amendment would be futile, sustaining of demurrer to petition without leave to amend was not an abuse of discretion.

◆

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Proceeding by Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, a Utah corporation sole, against the City of Porterville and others, for a writ of mandate to compel defendants to issue a permit for the construction of a church. From a judgment dismissing the petition, the plaintiff appeals.

Affirmed.

Johnson, Harmon, Stirrat & Henderson, of San Francisco, and Jamison & Jamison, of Porterville, for appellant.

Waldo E. Burford, City Atty., of Porterville, and William MacKenzie Brown and Leon Thomas David, both of Los Angeles, for respondents.

MUSSELL, Justice.

This appeal is from a judgment dismissing plaintiff's petition for writ of mandate. The judgment was based on an order sustaining the demurrer of defendants to the petition without leave to amend, dismissing the same and quashing the alternative writ of mandate theretofore issued.

The plaintiff, by its petition for a writ of mandate, sought to compel the defendants to issue a permit for the construction of a church on property owned by plaintiff in the City of Porterville. Plaintiff alleged that its application to erect a church upon its property was duly filed with the proper city officials and that defendant city building inspector refused to issue a permit for the erection of the church on the ground that the property involved was zoned by the city solely for the erection of single family dwellings.

A copy of the zoning ordinance of the City of Porterville was attached to the petition. By its provisions, as far as applicable here, the city was zoned as follows: R–1, wherein buildings are restricted to single family residences; R–2, to duplex or two-family residences; R–3, to multiple residences, and R–4, to permit unlimited residences. In R–1, only single family dwellings may be erected; in R–2, there are permitted all uses that are permitted under R–1, plus duplexes and two family residences; in R–3, all uses of R–1 and R–2 are permitted, plus apartment houses, multiple family dwellings, hotels, boarding and lodging houses, clubs, fraternities, sororities, hospitals, etc. In R–4, called "unlimited residence," all uses of the preceding zones are permitted, plus libraries, museums, schools, churches and religious institutions, etc.

At the time the property was acquired by plaintiff it was partly within the city and thereafter was taken within the city limits and included in an area limited in its use to single family dwelling units, being zone R–1. Plaintiff's application for a building permit stated that the use and occupancy to which the building was to be put was "to provide a chapel and classrooms for religious worship and study and accommodations for youth activities and other church activities."

[1, 2] Plaintiff's contention is that the zoning ordinance as applied to plaintiff to prevent its construction of a church for religious worship upon its property is invalid because, as so applied, it bears no substantial relation to the public health, safety, morals and general welfare and thus is beyond the police power of the State to enact, and further, because the application of the ordinance to petitioner results in a restriction of religious worship in the absence of any grave or imminent danger justifying such a restriction. The precise question of whether or not there may be established, as a part of a comprehensive zoning plan, strictly private residential

districts from which churches are excluded and in which they are prohibited, has apparently not been decided in this State, however, it has been held that general business enterprises, apartments, tenements and like structures may be excluded and prohibited in private residential districts. Miller v. Board of Public Works, 195 Cal. 477, 490, 234 P. 381, 38 A.L.R. 1479. As was said in Wilkins v. City of San Bernardino, 29 Cal.2d 332, 337, 175 P.2d 542, 547:

"It is well settled that zoning ordinances, when reasonable in object and not arbitrary in operation, constitute a justifiable exercise of police power, and that the establishment, as part of a comprehensive and systematic plan, of districts devoted to strictly private residences or single family dwellings from which are excluded business or multiple dwelling structures, is a legitimate exercise of the police power. See Jones v. City of Los Angeles, 211 Cal. 304, 307, 295 P. 14; Miller v. Board of Public Works, 195 Cal. 477, 490, 234 P. 381, 38 A.L.R. 1479. * * * Every intendment is in favor of the validity of the exercise of police power, and, even though a court might differ from the determination of the legislative body, if there is a reasonable basis for the belief that the establishment of a strictly residential district has substantial relation to the public health, safety, morals or general welfare, the zoning measure will be deemed to be within the purview of the police power. (Citing cases.)"

In Miller v. Board of Public Works, supra, 195 Cal. at page 492, 234 P. at page 386, 38 A.L.R. 1479, it was said:

"There are some decisions which do not uphold the validity of a zoning ordinance establishing strictly residential districts. We are of the opinion, however, that the better reasoned cases are in favor of the validity of comprehensive zoning which establish strictly private home districts, and that the most which can be said of the cases to the contrary is that they merely show that this is a question upon which reasonable minds may differ."

[3, 4] We are in accord with this view and we conclude that since the city had power to zone the property herein affected, strictly for single family dwellings, there was no abuse of the power in prohibiting the erection and construction of church buildings therein. It is a matter of common knowledge that people in considerable numbers assemble in churches and that parking and traffic problems exist where crowds gather. This would be true particularly in areas limited to single family dwellings. There necessarily is an appreciable amount of noise connected with the conduct of church and "youth activities." These and many other factors may well enter into the determination of the legislative body in drawing the lines between districts, a determination primarily the province of the city.

A single family residence may be much more desirable when not in an apartment house neighborhood or adjacent to a public building such as a church. The municipal legislative body may require that church buildings be erected to conform to health and safety regulations as provided in its building code and we see no reason to hold that churches may be erected in a single family residential area when a duplex, triplex, or other multiple dwelling can lawfully be excluded therefrom. The provision in the ordinance for a single family residential area affords an opportunity and inducement for the acquisition and occupation of private homes where the owners thereof may live in comparative peace, comfort and quiet. Such a zoning regulation bears a substantial relation to the public health, safety, morals and general welfare because it tends to promote and perpetuate the American home and protect its civic and social values.

[5] We find no merit in plaintiff's contention that the application of the ordinance to the plaintiff results in an unwarranted restriction of religious worship. The petitioner is not a congregation, but holds his property as a corporation sole, the existence of which depends upon the laws of the State. Having such right from the State, the enjoyment of the property is subject to reasonable regulations. The denial of a building permit did not prohibit any one from religious worship and there is

nothing in the record before us to indicate that the church building could not be erected if located in the area zoned for that purpose.

[6] The petition fails to state a cause of action in that the facts alleged do not show that the ordinance in question is unreasonable and void as applied to plaintiff. The allegations are:

> "That said zoning ordinance as applied to your petitioner so as to prevent your petitioner from erecting a church on the above mentioned property, is unconstitutional and void, in that said ordinance is arbitrary and unreasonable and is without any substantial relation to the public health, safety, morals or general welfare; that said ordinance is not based upon a finding by the governing body of the city of Porterville that such zoning is necessary to the public health, safety, morals or general welfare of the community. That said ordinance * * * is not based on the general welfare of the community and does not tend to preserve or promote the public health, safety, or morals, and constitutes an arbitrary exclusion of a church * * *. That said ordinance * * * constitutes a deprivation of petitioner's property without due process of law * * *."

Matters of fact necessary to support the legal conclusions alleged are not stated, and the petition therefore states no cause of action. Wilkins v. City of San Bernardino, supra, 29 Cal.2d 332, at page 344, 175 P.2d 542.

[7] The burden is upon the plaintiff to allege and prove physical facts from which the court could conclude as a matter of law that the ordinance was unreasonable and invalid. Wilkins v. City of San Bernardino, supra, 29 Cal.2d 332, at page 338, 175 P.2d 542.

[8, 9] In enacting zoning ordinances, the municipality performs a legislative function and every intendment is in favor of the validity of such ordinances. Jardine v. City of Pasadena, 199 Cal. 64, 72–73, 248 P. 225, 48 A.L.R. 509. It is presumed that the enactment as a whole is justified under the police power and adapted to promote the public health, safety, morals, and general welfare. Lockard v. City of Los Angeles, 33 Cal.2d 453, 202 P.2d 38.

[10] There is reasonable justification for the action of the defendant city in prescribing the buildings which may be erected and constructed in the zone established for single family residences and in such cases the wisdom of the prohibitions and restrictions is a matter for legislative determination. Lockard v. City of Los Angeles, supra, 33 Cal.2d 453, 202 P.2d 38.

[11] Plaintiff argues that the trial court should not have sustained the demurrer to the petition without leave to amend. The plaintiff, however, did not request leave to amend and the judgment contains a recital that petitioner "advised the Court that leave to amend would be futile." Plaintiff's contention in the trial court was as stated in his reply brief—"That the prohibition of churches in virtually all residential zones is on its face not a proper exercise of the police power, and that it violates the constitutional immunity of freedom of religious worship."

Where, as here, plaintiff elected to stand on the allegations of the petition, and declined to amend it, informing the court that amendment would be "futile," it cannot be held that there was an abuse of discretion in the ruling of the trial court.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; SHENK and CARTER, JJ., dissenting.

In re SARGAVAK'S ESTATE.

OHANNESON et al. v. LAMBRINIDOU et al.

Civ. 16661.

District Court of Appeal, Second District, Division 2, California.
March 22, 1949.

Hearing Granted May 19, 1949.*

1. **Wills** ⇐93

An instrument is presumed to have been executed cum animum testandi when a testamentary intent is clearly deducible from writing which meets other formalities required for a will, although such presumption is rebuttable when an issue has been made that when executed it was not intended to operate as a will.

2. **Wills** ⇐93

Where instrument purporting to be a will is free from ambiguity on its face, oral evidence is inadmissible to show that maker thereof intended it to operate as an instrument of a type different from that which on its face it purports to be.

3. **Wills** ⇐99, 130

Holographic instrument addressed to "whom it may concern," reciting that writer was acting of her own free will, that writer "leaves everything she has" to named persons and gave them power of attorney to divide what was left of her belongings "to them" was unambiguous and plainly disclosed testamentary intent, so as to justify its admission to probate as a codicil to writer's will, notwithstanding writer's attempt to give beneficiaries power of attorney to divide what was left of her belongings.

4. **Wills** ⇐81

The fact that there are nontestamentary provisions along with testamentary provisions does not render the latter inoperative as a will.

5. **Wills** ⇐466

Where codicil recited that testatrix left everything she had to two named persons and that she gave such persons power of attorney to divide what was left of her belongings "to them", the word "them" could not be construed as referring to beneficiaries in will.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Them".

6. **Wills** ⇐93

Where codicil to will was unambiguous and a testamentary intent was plainly shown by language used, extrinsic evidence to establish that decedent intended document as a power of attorney rather than as a testamentary disposition was properly excluded.

◆

Appeal from Superior Court, Los Angeles County; Kurtz Kauffman, Judge.

Proceeding in the matter of the estate of Ruby Sargavak, deceased, on the petition of J. G. Ohanneson and others, for the probate of an holographic instrument executed by deceased, as a codicil to her will which had been previously admitted to probate, contested by Adrine Lambrinidou and others. From a judgment admitting the codicil to probate, contestants appeal.

Affirmed.

Robert M. Dulin and Melvin E. Fink, both of Beverly Hills, and Schell & Delamer, of Los Angeles, for appellants.

C. W. Byrer, of Los Angeles, for respondent J. G. Ohanneson.

WILSON, Justice.

This appeal is from a judgment admitting to probate a holographic instrument, executed by Ruby Sargavak, as a codicil to her will which had been previously admitted to probate. Appellants were devisees under the original will. They enumerate nine grounds of appeal, all of which may be resolved by a determination of the question: Was the instrument written with testamentary intent?

For more than forty years prior to the deaths of decedent and her predeceased husband they were on intimate, friendly relations with respondent Ohanneson, the proponent of the codicil, and with respondent Mahdesian, who is named as executor of decedent's will. The Sargavaks never had children and Mrs. Sargavak often referred to Samuel Mahdesian as "my son" and to Mr. Ohanneson as "my good friend and attorney."

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* Subsequent opinion 216 P.2d 850.

In 1943 and again in 1945 Mr. and Mrs. Sargavak executed mutual wills. He died in May, 1946, and the probate of his estate is now pending. Mrs. Sargavak died March 22, 1947.

Under the will executed by Ruby Sargavak on July 9, 1945, which was admitted to probate on June 16, 1947, one half of her estate was left to Sarah Avakian and Zaruhi Avakian, sisters of Samuel Mahdesian, and the remainder to Arkoohi Sargavakian, Adrine Lambrinidou and Meline Nakashian.

The instrument in question is dated September 29, 1946, and reads as follows:

"1566 W–29th St.
"Los Angeles 7, Cal.
"Sep. 29, 1946
"Sunday Evening

"To Whom It May Concern:

"I the writer—Mrs. Ruby Sargavak wants everyone to know that she is writing these lines of her own free will—no one is putting her or urging her to do it. She leaves everything she has to her Boy Sam Mahdesian & her layer, J. G. Ohanneson—she gives them power of Attorney to divide what is left of her Belongings to them. She specially advises to give nothing whatsoever to Mrs. Lillian Shooshan—she is no relation nor friend of hers—Mrs. Sargavak has been more than kind to her, just because she begged us to help her for a little time—Mrs. Sargavak would rather help her very own nieces & grand nieces & perfect strangers who are truly in need of help. God has been good to us, she did not appreciate the goodness of the Lord to her. All honor & glory unto his High and Holy Name!

Mrs. Ruby Sargavak.

"P. S. It is 8 o'clock, I am very tired —Ruby Sargavak."

All parties concede that an instrument is not entitled to be probated as a codicil unless it was executed with testamentary intent.

Appellants, in an endeavor to show the document was not written with testamentary intent but was intended as a power of attorney and was to be used solely for the purpose of removing Mrs. Shooshan from the house, introduced without objection testimony to the effect that Mrs. Lillian Shooshan was a niece of Mr. Sargavak; she and her daughter came to live with the Sargavaks in 1945 and they continued living in the house after his death; Mrs. Shooshan constantly provoked quarrels with Mrs. Sargavak and there were frequent bickerings between Mrs. Shooshan and her daughter in Mrs. Sargavak's presence, which upset the latter; on the afternoon of September 29, 1946, Mrs. Sargavak telephoned Samuel Mahdesian and asked him to come to her home immediately and later she had her nurse call him with the same request; Mahdesian stated he would come if possible; when he had not arrived by evening, Mrs. Sargavak wrote the instrument in question; when Mahdesian came the next morning she told him she wanted him to get Mrs. Shooshan out of the house "right away," that she could not stand her any more, that Mrs. Shooshan was always quarreling with her and nagging her because her uncle did not leave her anything in his will; Mrs. Sargavak gave Mahdesian the paper she had written and said, "As I told you, Mrs. Shooshan has been bothering me and demanding money from me, and I am writing this, and I want you to take it and any time you need it to use it * * * you are executor of Harry's estate and also you are executor in my will, and Mr. Ohanneson is our attorney. I want you folks to prepare and take care of my estate, my affairs, in the way that you know I want it. And whenever Lillian Shooshan ever gives any trouble, I want you to have this."

The trial court found that the instrument purports to and does make testamentary disposition of the property of decedent and the intent to make such testamentary disposition existed at the time of the execution of the instrument.

Appellants contend that the court must consider the circumstances surrounding the writing of an instrument, the previous conduct, statements and explanations of the decedent and all other extrinsic circumstances in order to determine whether the document was written with testamentary intent.

[1] A presumption arises that an instrument was executed cum animo testandi when a testamentary intent is clearly deducible from the writing which meets the other formalities required for a will. This presumption is rebuttable when an issue has been made that when executed it was not intended to operate as a will. 1 Page on Wills, 3d Ed., secs. 50–53, 59; In re Estate of Siemers, 202 Cal. 424, 435, 261 P. 298. Thus a will valid on its face written for the purpose of satisfying one who had persistently importuned the testator to make a will in her favor was held to be lacking in testamentary intent where the testator executed it simply for the purpose of bringing to an end such importuning. In re Estate of Siemers, supra. A similar situation would exist if a will were written in jest or as a model. 1 Page on Wills, 3d Ed., sec. 53.

[2] If an instrument is free from ambiguity on its face, oral evidence is inadmissible to show that the maker thereof intended it to operate as an instrument of a type different from that which on its face it purports to be. 1 Page on Wills, 3d Ed., sec. 59; In re Estate of Pagel, 52 Cal.App.2d 38, 42, 125 P.2d 853; In re Estate of Kisling, 68 Cal.App.2d 163, 167, 156 P.2d 57.

The cases cited by appellants are not to the contrary. In Re Estate of Hughes, 140 Cal.App. 97, 35 P.2d 204, the court stated that taking the instrument in question in its entirety without the aid of any extraneous circumstances, it could not be said with any degree of certainty that it was intended by the writer as a testamentary disposition and therefore in its construction the court was forced to an examination of the conditions under which it was written and other extraneous circumstances which would have a bearing on the testamentary question. Similarly, in Re Estate of Dotta, 18 Cal.App.2d 763, 64 P.2d 741; In re Estate of Meade, 118 Cal. 428, 50 P. 541, 62 Am St.Rep. 244; In re Estate of Kelleher, 202 Cal. 124, 259 P. 437, 54 A.L.R. 913, and In re Estate of Logan, 29 Cal.App.2d 60, 84 P.2d 245, the language in the instrument under consideration was uncertain and ambiguous.

[3-5] There appears to be nothing ambiguous in the language of the instrument under consideration. It is addressed "To Whom it may Concern" and the writer begins by saying she "wants everyone to know that she is writing these lines of her own free will," that no one is urging her to do it. This is clearly language which a lay person might use in stating that she was not acting under undue influence. Next she states she "leaves everything she has" to her boy Sam Mahdesian and her lawyer, J. G. Ohanneson. The testatrix could hardly have expressed a testamentary disposition in any plainer language. She gives them power of attorney to divide what is left of her belongings "to them." The latter two words could refer only to Mahdesian and Ohanneson since they are the only persons who had been named. She then wants it understood that Mrs. Shooshan is to have nothing and adds that she would rather help her own nieces and nephews and perfect strangers who are in need of help. The fact that there are nontestamentary provisions along with the testamentary does not render the latter inoperative as a will. In re Estate of Button, 209 Cal. 325, 331, 287 P. 964. Mrs. Sargavak's attempt to give Mahdesian and Ohanneson power of attorney to divide what is left of her belongings does not change the character of the document. Appellants contend that by the word "them" decedent referred to the beneficiaries in her will. But nowhere has she referred to those beneficiaries or to her will, whereas to construe the word as referring to Mahdesian and Ohanneson is consistent with the preceding language by which she leaves everything she has to them.

[6] The instrument being unambiguous and a testamentary intent plainly shown by the language used, extrinsic evidence may not be considered as proof that the decedent intended the document as a power of attorney rather than as a testamentary disposition.

Appellants further contend that the proponent of the codicil failed to meet the burden of proof in establishing that the instrument was written with testamentary intent. Since the language is neither uncertain nor ambiguous, and since a testamentary intent is clearly deducible therefrom, no further evidence is necessary to establish it and the proponent has sustained the burden of proof required of him.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

90 Cal.App.2d 748

PEOPLE v. HAGEMANN.

Cr. No. 4273.

District Court of Appeal, Second District, Division 1, California.
March 22, 1949.

1. Homicide ⇨188(4), 300(9)

In murder prosecution, evidence was insufficient to take to jury issue of self-defense, so that court's failure to instruct thereon and exclusion of evidence of deceased's bad character and reputation for peace and quiet and her uncommunicated threats against defendant were not erroneous.

2. Criminal law ⇨814(3)

An instruction having no application to facts of case is erroneous, though correctly stating a principle of law.

3. Criminal law ⇨814(3)

A charge to jury on issue not predicated on theory logically deducible from evidence is erroneous as presenting for consideration a question not properly determinable by jurors.

◆

Appeal from Superior Court, San Luis Obispo County; Ray B. Lyon, Judge.

Edward Will Hagemann was convicted of manslaughter, and he appeals.

Affirmed.

Buck & O'Reilly, of San Luis Obispo, for appellant.

Fred N. Howser, Atty. Gen. and James A. Doherty, Deputy Atty. Gen., for respondent.

DORAN, Acting Presiding Justice.

This is an appeal from the judgment and order denying a new trial.

Defendant was charged by information with murder and was found guilty by a jury of manslaughter. The victim was defendant's wife. As recited in appellant's brief, "Recurrent quarrels and separations between them culminated on the night of February 22, 1948, or early morning of February 23, 1948, when the defendant fatally shot his wife and seriously wounded himself at their home near Oceano, California. No third persons were present at the time of the shooting, and the affair was not discovered until some ten hours later.

"At the trial the defendant admitted the shooting, but contended that he acted in self-defense. He testified that he and his wife had been drinking quite heavily the evening of the tragedy, although he less than his wife, and the deceased in particular was considerably intoxicated and belligerant. His accounting of the immediate circumstances leading up to the fatal event was that during the continuation of an argument between them at their home as to whether they should resume normal married relationship, the deceased procured a revolver from another room, whereupon the defendant ran out the front door." Defendant returned about 30 minutes later; "* * * at this point the defendant testified, his wife started to rise up out of the chair, at the same time pulling a gun from her purse and saying to him, 'I'll kill you this time for sure, you son-of-a-bitch', whereupon he lunged for her, grappled for the gun, and obtained it and fired five shots in rapid succession into the woman's body. Approximately 10 or 15 minutes later, as near as the defendant could recall, he shot himself twice in an apparent attempt to take his own life."

According to Officer Hardman, who was first to visit the scene, "I asked him what happened and he said—well, he says, 'I lost my head, I guess, and shot my wife and shot myself.'

"Q. And what did you reply, if anything? A. I just said, 'Ed, what did you do that for?' Well, he says, 'We was drinking and I lost my head.'"

In a statement made by defendant to the district attorney the day following the shooting, defendant answered in reply to the following questions as follows:

"Q. Had you and she both been drinking? A. Yes.

"Q. How much? A. We had about four drinks.

"Q. What led to the actual using of the gun? A. More or less the liquor. I wasn't exactly afraid of her, but my wife, she was a pretty husky woman, and it takes a pretty good man to handle her. I have a scar here where she hit me not long ago.

"Q. Yes, I heard about that. A. Well, there's nothing much to it.

"Q. Did you have the gun with you or in the house? A. In the house.

"Q. One that you've had right along? A. For four years.

"Q. What kind of a gun is it? A. Smith and Wesson.

"Q. At what time did you shoot her? A. At 1:00 o'clock in the morning.

"Q. Just you and she there? A. Yes.

"Q. Had she said anything to you? A. No, she said that she was going to make a decision. 'I'll be up at San Luis so pick me up'.

"Q. There wasn't much argument to it then—she must have told you that she w*an*'t going to come back? A. She said, 'I'm not going to make a decision yet.'

"Q. Did you have the gun in your pocket? A. No, it was in the kitchen. I went after it.

"Q. Was she looking at you? A. Yes, she just said it was the best way out.

"Q. How many drinks did you have? A. About four drinks.

"Q. What were you drinking? A. Bellows Whiskey, straight, and I made hers into a Highball with some ice.

"Q. What did the doctor say about your condition? A. 50–50 chance. They operated last night and took both bullets out of me.

"Q. How long after you shot her that you shot yourself? A. Ten minutes apart.

"Q. You shot five at her and then reloaded? A. Yes, I'm sure I did."

At the trial, defendant testified:

"Q. After you took the gun away from Mrs. Hagemann, why did you shoot her? A. I don't know.

"Q. I'm sorry, I didn't hear your answer. A. I said I didn't know.

"Q. Were you fearful at that time that she would do bodily injury to you? A. Not maybe at that time. I didn't give it a thought.

"Q. You merely took the gun away from her and shot her, is that correct? A. That's correct.

"Q. And you shot her how many times? A. Five times."

It is contended on appeal (1) that the court erred in failing and refusing to instruct the jury on the issue of self-defense; (2) that "The trial court erred in excluding evidence of prior uncommunicated threats by the deceased against the defendant and of the general reputation of the deceased for quarrelsomeness, turbulence and violence."; and (3) that "The trial court erred in admitting in evidence the contents of a file pertaining to an action for divorce against the defendant."

Appellant argues that "The chief question on this appeal is simply whether there was any evidence before the jury which fairly raised the issue of self-defense. If there was such evidence, the failure of the trial court to give requested instructions on the law of self-defense amounted to prejudicial error."

At the time the issue of self-defense was argued at the trial the trial court commented as follows:

"There must be, however, in every case at least some evidence tending to support Defendant's belief in that danger, and the Defendant himself must actually and honestly entertain such a belief, before self-defense becomes an issue and before such evidence is admissible.

"But that is not the factual situation in this case. It is apparent from the Defendant's own testimony in this case that he did not honestly beliefe himself in danger after he took the gun away from his wife. His exact words were, on cross-examination, as follows, and I quote:

"'Q. And after you took the gun away from Mrs. Hagemann, why did you shoot her? A. I don't know.

"'I'm sorry; I didn't hear your answer. A. I said, I didn't know.

"'Q. You were fearful at that time that she would do bodily injury to you. A. Not maybe at that time; I didn't give it a thought.

"'Q. You merely took the gun away from her and shot her, is that correct? A. That is correct.'

"The defendant's testimony is clear and unequivocal. There can be no doubt about the matter, and it leaves nothing for the jury to decide in this case on the issue of self-defense. In fact, self-defense ceases to be an issue in the case at all. Therefore, evidence of deceased's bad character and bad reputation for peace and quiet, and evidence of uncommunicated threats will not be admitted."

[1-3] That the trial court was correct both as a matter of fact and as a matter of law there can be no question. "It is error to give an instruction which, although correctly stating a principle of law, has no application to the facts of the case. * * * To charge the jurors as to an issue not predicated upon some theory logically deducible from the evidence presents for consideration a question not properly determinable by them." People v. Eggers, 30 Cal.2d 676, 687, 185 P.2d 1. And in People v. Chapman, 76 Cal.App.2d 651, 659, 173 P.2d 860, 865, appears the following, "* * An examination of * * * cases (cited by the defendant) * * * leads to the conclusion that while it may be error to refuse or to fail to give such an instruction where the facts of the particular case reveal a theory or a factual situation wherein the right to pursue and slay is actually involved, no such situation exists in the present instance. * * *. "There was no evidence produced herein which would require an instruction on the right of pursuit, and although the trial court would not have gone astray in giving such an instruction, it was not legally required to do so, and no prejudicial error resulted from its refusal to so instruct the jury." See, also, People v. Coston, 82 Cal.App.2d 23, 42, 185 P.2d 632; People v. Kellogg, 6 Cal.2d 448, 57 P.2d 1305; People v. Connelly, 195 Cal. 584, 234 P. 374; People v. Donnelly, 190 Cal. 57, 210 P. 523; People v. Mohammed, 189 Cal. 429, 208 P. 963.

Appellant concedes that "If the issue of self-defense is resolved against the defendant as a matter of law, then it is true that no errors in the admission or exclusion of evidence can now be said to have harmed the defendant, since he admitted the shooting and was convicted of manslaughter." This disposes of appellant's contentions 2 and 3 above mentioned.

There being no errors in the record, the judgment and order are affirmed.

WHITE, J., concurs.

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90 Cal.App.2d 586

LESSER v. McCULLOUGH et al.

Civ. 3754.

District Court of Appeal, Fourth District, California.

March 14, 1949.

1. **Appeal and error 🔑930(1)**

Evidence of location of an object or particular pathway or condition, dependent on testimony which locates it by means of a diagram not in the record, must be assumed on appeal to have been most favorable to the view that supports the findings or verdict.

2. **Appeal and error 🔑930(1)**

Where a diagram on a blackboard was used in action against owner of automobile for death of pedestrian, by several witnesses in explaining location of pedestrian's body and conditions of roadway, and much of their testimony could not be fully interpreted on appeal because of failure to produce a photostatic copy of the diagram, testimony of such witnesses would be assumed to have been most favorable to the view supporting the findings and verdict.

3. Automobiles 🔑245(72, 90)

In action against owner of automobile for death of pedestrian who was struck at night while walking on or along pedestrian's right side of the paved portion of highway, questions as to where pedestrian was walkat the time, whether he was violating statute providing that a pedestrian shall walk close to his left-hand edge of "roadway", and whether such violation, if any, contributed proximately to his death, were for jury. Vehicle Code, § 564.

4. Appeal and error 🔑1064(4)
Trial 🔑228(3)

In action against owner of automobile for death of pedestrian who was struck at night while walking on or along pedestrian's right-hand side of paved portion of the highway, inadvertent use of word "and" instead of "or" in instruction giving statutory definition of a "roadway" as that portion of the highway improved, designed, "and" ordinarily used for vehicular travel, was error, but not prejudicial in view of other instructions given. Vehicle Code, §§ 81, 83, 564.

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action by Fred Lesser against Harry M. McCullough and Harry M. McCullough, Jr., to recover for the death of plaintiff's minor son, struck by an automobile owned by Harry M. McCullough and driven by Harry M. McCullough, Jr. From a judgment for plaintiff, the defendants appeal.

Judgment affirmed.

Mack, Werdel & Bianco and Mack & Bianco, all of Bakersfield, for appellants.

Dorris, Fleharty & Phillips, of Bakersfield, for respondent.

GRIFFIN, Justice.

Plaintiff brought this action against defendant Harry M. McCullough and Harry M. McCullough, Jr., who was the driver of his father's car, for damages as a result of an automobile accident involving the death of plaintiff's minor son, Fred Lesser, Jr., then aged 17 years. The verdict of the jury resulted in a judgment for plaintiff and against the defendant father for $5,000, and against the defendant son for the sum of $6,000.

South H Street runs southerly from the city limits of Bakersfield. It is a straight level road, paved with asphalt, and has a dim white center line at the point of the accident. The distance from the center line to the westerly edge of the pavement is 9 feet. From the edge of the pavement westerly the roadway consists of sand, gravel and a little oil for about 13 feet. The roadway is bordered by lawns at the property line of the adjacent homes. In front of one of these homes and near the property line is located a mail box and tall telephone pole. There are no paved sidewalks. The easterly side of South H Street is paralleled by an irrigation canal. Cecil Bruner Drive is the first street south of the scene of the accident and Belle Terrace is the first street north of that point. Each street formed a "T" intersection with South H Street.

Fred Lesser, Jr., was walking south on South H Street somewhere near the westerly edge of the roadway when he was struck and killed by defendants' car proceeding in the same direction. He was dressed in dark blue "Levi's", light blue sweater, and brown leather jacket. The night was dark. It had been raining, but was not at the time. Young McCullough's deposition was read into evidence. From it it appears that he was a truck driver by occupation and lived a few blocks south of Cecil Bruner Drive. He borrowed his father's car to go on an errand. As he was returning he drove south on South H Street in a "drizzling rain." His 1936 Ford sedan was equipped with only one windshield wiper on the side of the driver's seat. The lights were on low-beam. As he approached the scene of the accident the lights of two cars coming north blinded him. He was driving about 25 miles per hour with his left wheels about 18 inches west of the center line. Driving conditions were very difficult. He said he did not see the boy at all because he was watching the white line and the oncoming cars; that when he felt the impact he went home, "hollered" for his mother to call an ambulance. His father returned with him to the scene of the accident. Fred Lesser, Jr. was found lying dead near the mail box and in the dirt. The crown of the right front fender on defendants' car was impacted and the right headlight was turned sideways a little. At the coroner's inquest he testified that the boy's body was lying about six or seven feet off of the pavement when he returned. Plaintiff's witness, Mrs. Webster, who lived on South H. Street where the mail box was located, testified that as she was going into her house she saw the boy "coming walking on the shoulder by the highway," which she described as a "pathway" about 9 or 10 feet away from the west edge of the highway "out here towards the pavement" and about 33 feet north of her driveway; that she could hear his shoes "squeaking in the sand"; that she looked north on South H Street, saw the lights on the car "coming fast"; that before she could open the door she heard the impact of the car striking the body of the boy; and that she "turned around and saw what had happened and the car was leaving." She testified that there was no other traffic in view at the time of the accident and she could not tell whether the car that struck the boy was on the pavement or over on the 9-foot strip, but the pathway adopted by the boy was straight south and parallel with the center line of South H Street and the body was carried to a point about two steps west of the pavement and close to, but a little south of, the mail box. According to the evidence the boy's head was pointed northerly and the body was lying parallel with the center line of South H Street.

Traffic officers testified that they examined the surface of the roadway and found no marks of any kind; that they examined defendants' car and found it was in safe working order; that this particular point on the roadway was outside of a business or residence district.

The principal point raised on this appeal is that, under the evidence, decedent was guilty of contributory negligence as a matter of law which proximately contributed to his death because it is conclusively shown that he was walking upon a roadway other than close to his left-hand edge thereof, in violation of section 564 of the Vehicle Code.

[1, 2] Apparently a blackboard was used by the several witnesses in explaining the location of the body, the conditions of the roadway, etc., and much of their testimony cannot be fully interpreted because of the failure to produce a photostatic copy of the diagram referred to. Defendants should have had such diagram photographed and reproduced in the record on appeal if they wished to rely on testimony referring to the diagram as substantiating their argument. Evidence of the location of an object or particular pathway or condition dependent upon testimony which locates it by means of a diagram not in the record must be assumed to have been most favorable to the view that supports the findings or verdict. Jackson v. Southern Pacific Co., 11 Cal.App. 101, 103 P. 1098; Haase v. Central Union High School District, 27 Cal.App.2d 319, 80 P.2d 1044; Pascoe v. Payne, 124 Cal.App. 528, 12 P.2d 1091.

[3] It is defendants' contention that the boy must have been on the paved portion of the roadway because Harry McCullough, Jr. was driving about 18 inches from the center line. It is apparent that the question as to where the boy was walking at the time, whether he was in fact violating sec. 564 of the Vehicle Code, and whether such violation, if any, contributed proximately to the cause of his death, were factual questions for the determination of the jury. Summers v. Dominguez, 29 Cal.App.2d 308, 311, 84 P.2d 237; Scalf v. Eicher, 11 Cal.App.2d 44, 52, 53 P.2d 368.

Defendants attempt to distinguish the cited cases because it is claimed that in those cases, unlike the present case, there was a conflict in the evidence as to where the deceased was walking, or because there was no evidence to dispel the presumption of due care. It is apparent from the evidence and circumstances related in the instant case that there was a conflict in this regard and that the evidence produced by the plaintiff did not, as a matter of law, dispel the presumption of ordinary care. Lam Ong v. Pacific Motor Trucking Corporation, 16 Cal.App.2d 274, 60 P.2d 480; Duehren v. Stewart, 39 Cal.App.2d 201, 102 P.2d 784.

The court gave, at plaintiff's request, an instruction on the subject of presumption of due care, as approved in Gorman v. County of Sacramento, 92 Cal.App. 656, 268 P. 1083; and Little v. Yanagisawa, 70 Cal.App. 303, 233 P. 357. The only objection maintained is that since the evidence shows that the deceased was guilty of contributory negligence as a matter of law, it was error to give such an instruction, citing Westberg v. Willde, 14 Cal.2d 360, 365, 94 P.2d 590. The former determination of this question adversely to defendants' contention disposes of the objection. Casalegno v. Leonard, 40 Cal.App.2d 575, 105 P.2d 125; Shannon v. Thomas, 57 Cal.App.2d 187, 134 P.2d 522.

[4] The last claim of error involves an instruction given by the court, at plaintiff's request. One instruction was properly given in the language of sec. 81 of the Vehicle Code defining a "highway." Then follows the objectionable one defining a "roadway" as being that portion of the highway "improved, designed *and* ordinarily used for vehicular travel." Sec. 83 of the Vehicle Code uses the word *or* rather than the word *and*. Plaintiff concedes that the word *and* was inadvertently used instead of *or* but argues that this inadvertence did not amount to prejudicial error because there was no contention by defendants that the pathway upon which plaintiff claims the deceased was walking was "ordinarily used for vehicular travel." This instruction was followed by an instruction in the language of sec. 564 of the Vehicle Code that "No pedestrian shall walk upon any roadway outside of a business or residence district otherwise than close to his left hand edge of the roadway." The jury was then instructed: "The terms 'highway' and 'roadway' therefore do not have the same meaning and are not synonymous. The law does not require a pedestrian to walk upon the left-hand side of the highway. It is only the walking upon the left-hand side of that portion of a *highway* that is improved, designed, *and* ordinarily used for vehicular travel that is prohibited by section 564 of the Vehicle Code." The use of the conjunctive rather than the disjunctive in defining a roadway under sec. 83 of the Vehicle Code was error. Robinson v. Southern Pacific Co., 105 Cal. 526, 543, 38 P. 94, 722, 28 L.R.A. 773. However, the instruction complained of, when fairly construed, could only mean to the jury that it was the walking upon the *roadway* that brought section 564 of the Vehicle Code into operation, and that the *roadway* was that portion of the highway ordinarily used for vehicular travel. We do not believe that the jury was misled, to defendants' prejudice, by the error complained of or that its verdict would have been any different had the instruction been given in the exact language of the section of the Vehicle Code involved, or that the giving of the instruction in the form mentioned was so prejudicially erroneous as to require a reversal of the judgment. Shuey v. Asbury, 5 Cal.2d 712, 713, 55 P. 1160; Guay v. American President Lines, 81 Cal.App.2d 495, 184 P.2d 539; Barlow v. Crome, 44 Cal.App.2d 356, 112 P.2d 303; Astone v. Oldfield, 67 Cal.App.2d 702, 155 P.2d 398; Sills v. Forbes, 33 Cal.App.2d 219, 91 P.2d 246.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

AINSWORTH v. BRYANT et al.

No. 13928.

District Court of Appeal, First District,
Division 1, California.
March 16, 1949.
Hearing Granted May 12, 1949.[*]

1. Licenses 🔑3

The power to license and regulate includes the power to impose privilege or occupation taxes even for revenue only.

2. Intoxicating liquors 🔑10(4)

Failure of the state to exercise its power under section of constitution to license and regulate the sale and purchase of intoxicating liquor within the state, does not grant a municipality such power. Const. art. 20, § 22.

3. Licenses 🔑28

The Retail Sales Tax Act imposes an excise tax on the retailer and not on the consumer.

4. Intoxicating liquors 🔑15

Ordinance of the city and county of San Francisco imposing an excise tax of one and one-half per cent on retail purchase of tangible personalty, is invalid insofar as it attempts to impose a tax on the sale of intoxicating liquor in view of constitutional provision giving the state the exclusive right to license the sale of intoxicating liquors. Const. art. 11, § 6; art. 20, § 22.

5. Municipal corporations 🔑121

Retail seller of alcoholic liquors was entitled to question validity of ordinance of the city and county of San Francisco imposing an excise tax of one and one-half per cent on retail purchase of tangible personalty, insofar as it attempted to impose a tax on sale of intoxicating liquor, and right to question validity of ordinance was not limited to a consumer. Const. art. 11, § 6; art. 20, § 22.

Appeal from Superior Court, City and County of San Francisco; Thos. M. Foley, Judge.

Action by Walter Ainsworth against Edward F. Bryant, tax collector of the city and county of San Francisco, and Thomas A. Brooks, chief administrative officer of the city and county of San Francisco, to enjoin the collection of certain taxes under an ordinance of the city and county of San Francisco. From a judgment sustaining a general demurrer to the complaint, the plaintiff appeals.

Judgment reversed.

John J. O'Toole, City Atty., and Thos. J. Blanchard, Deputy City Atty., both of San Francisco, for respondents.

Samuel W. Wicklow, of San Francisco, for appellant.

BRAY, Justice.

In an action by plaintiff, a retail seller of alcoholic liquors, to enjoin the collection of certain taxes under an ordinance of the city and county of San Francisco, a general demurrer to the complaint was sustained by the superior court. From the judgment thereon, plaintiff appeals.

The main question presented is the constitutionality of Ordinance No. 4537, adopted in July, 1947, by the board of supervisors, when applied to retailers of intoxicating liquors. This ordinance is one "imposing [an] excise tax on the retail purchase, use or other consumption of tangible personal property, providing for the registration of retailers, for the levy and collection of such tax and prescribing penalties for the violation of the provision [thereof]." The ordinance imposes "an excise tax at the rate of one-half of one per cent of the purchase price * * * on the purchase by any person of tangible personal property from any retailer in the City and County of San Francisco, and on the use or other consumption of tangible personal property in said City and County purchased from any retailer for use or other consumption therein." It requires that every retailer making sales of tangible personal property shall, at the time of making such sales, collect the said tax from each purchaser; also, such retailer, before engaging in business, must register with the tax collector and set forth certain data on the registration form. Within five days the tax collector shall issue without charge to the registrant a certificate of authority to collect the tax, which certifi-

[*] Subsequent opinion 211 P.2d 564.

cate must be displayed in the registrant's place of business. The tax is "due and payable from the purchaser at the time of purchase from a retailer in this City and County or, if not purchased, at the time of using or otherwise consuming tangible personal property in this City and County." The registrant must keep records in the form prescribed by the tax collector and make quarterly returns. Any violation of the ordinance is made a misdemeanor.

It is contended that insofar as this ordinance attempts to collect a tax from the sale, purchase or use of intoxicating liquor, it is in violation of article XX, section 22, of the Constitution of California, which provides: "The State of California, subject to the Internal Revenue Laws of the United States, shall have the exclusive right and power to license and regulate the manufacture, sale, purchase, possession and transportation of intoxicating liquor within the State * * *."

While the ordinance is of general application to all commodities sold, purchased or used within the city and county, we are concerned only with the validity of its application to intoxicating liquors. Its validity depends upon whether the state has reserved to itself exclusively the power attempted to be exercised under this ordinance. The exact question has not been passed on in California. However, somewhat analogous questions have been decided.

In Los Angeles Brewing Co. v. Los Angeles, 8 Cal.App.2d 391, 48 P.2d 71, 73, the city had sought to impose upon and collect from plaintiff company a license tax upon its business of manufacturing and distributing beer and wine within the city. The court, after holding that the power to "license and regulate" necessarily included the power to impose and collect a license tax for revenue, stated 8 Cal.App.2d at page 396, 48 P.2d at page 73: "We therefore conclude that when section 22 of article XX of the Constitution provided that the state 'shall have the exclusive right and power to control, license and regulate the manufacture, sale, purchase, possession, transportation and disposition of intoxicating liquor within the State' *it took away from the political subdivisions of the state the right to impose a license tax for the purpose of revenue upon any such business.*" (Emphasis added.) The ordinance imposing the tax was declared invalid. See Vitale v. City of Los Angeles, 13 Cal. App.2d 704, 57 P.2d 993, to the same effect.

It is interesting to note that the court in the Los Angeles Brewing Co. case, supra, was passing on the provisions of section 22 as it stood in 1933. In 1934 the section was amended and there was added, among other provisions, the following: "The State Board of Equalization shall have the exclusive power to license the manufacture, importation and sale of intoxicating liquors in this State, and to collect license fees or occupation taxes on account thereof * * *." "The Legislature shall provide for apportioning the amounts collected for license fees or occupation taxes under the provisions hereof between the State and the cities, counties and cities and counties of the State, in such manner as the Legislature may deem proper." The reasoning in that case, applied to the section as amended, makes even stronger the position that the state was reserving to itself the power attempted to be used here.

In Roehm v. County of Orange, 32 Cal. 2d 280, 196 P.2d 550, the county had assessed as personal property plaintiff's on-sale general liquor license issued by the State Board of Equalization. The court held that such licenses were not to be regarded as personal property for ad valorum taxation purposes because not included in the list of intangibles specified in section 14 of article XIII of the Constitution and in section 111 of the Revenue and Taxation Code. It then stated, 32 Cal.2d at page 290, 196 P.2d at page 556: "Although liquor licenses are not taxable as property *and the licensees are not subject to local license or occupation taxes for the selling of intoxicating liquor* (Cal.Const. article XX, section 22; Los Angeles Brewing Co. v. Los Angeles, 8 Cal.App.2d 391, 48 P.2d 71), cities, counties, and cities and counties receive substantial revenue from the fees imposed for such licenses." (Emphasis added.)

In Three G Distillery Corp. v. County of Los Angeles, 46 Cal.App.2d 498, 116 P.2d 143, plaintiff brought suit against the county to recover taxes assessed and paid on a large amount of intoxicating liquors stored in its distillery and warehouse. The court upheld the power of the county to levy such a tax because article XX, section 22 of the Constitution made no mention of "ownership" of intoxicating liquors. The court said, 46 Cal.App.2d at page 502, 116 P.2d at page 145: "The very fact that article XX, section 22, reserves to the state the exclusive right and power to license and regulate 'the manufacture, sale, purchase, possession and transportation of intoxicating liquor within the State' and the significant failure to include as well the power to license and regulate the ownership thereof, i. e., omission of a reservation of power to the state with regard to the common and usual basis of assessment and taxation, is most significant against appellant's contention herein that the reservation also includes a reservation of the power to tax." It is apparent from this decision that had the section included the word "ownership" with "manufature, sale, purchase," etc., the tax would not have been upheld.

[1] In California it has uniformly been held that the power to license and regulate includes the power to impose privilege or occupation taxes even for revenue only. Ex parte Frank, 52 Cal. 606, 28 Am.Rep. 642, stated that a statute giving the board of supervisors of San Francisco the power to license and regulate "callings, trades, and employments" 52 Cal. at page 609, included the power to exact license fees for purposes of revenue, although it held the ordinance imposing a "Sample-Sellers' Ordinance" void on other grounds.

In Re Nowak, 184 Cal. 701, 195 P. 402, the contention was made that the city of Los Angeles did not have the power under its charter to levy an occupation tax upon retail grocers. It was contended that the charter expressly restricted the city's power in this respect to licensing and regulating. The court upheld the tax holding that a grant by the Legislature of authority to "license and regulate" includes "authority to impose a license tax for revenue only." 184 Cal. at page 705, 195 P. at page 403.

The decision in Re Galusha, 184 Cal. 697, 195 P. 406, is not contrary to our holding. There, the court held that the state had delegated to municipalities "the power to impose a tax for the privilege of following the practice of the profession." 184 Cal. at page 699, 195 P. at page 407, of law, by a provision in the Los Angeles charter which provided that the city might "license and regulate * * * any lawful business or calling" and that "the power 'to license and regulate' includes the power to impose a tax for revenue purposes only." 184 Cal. at page 700, 195 P. at page 407.

City of Coos Bay v. Aerie No. 538, 179 Or. 83, 170 P.2d 389, held that the authority granted to the city by the Oregon Legislature to impose an occupational or privilege tax did not include the right to levy such tax upon a bona fide social club, on the ground that such a club is not a "business." The court at some length stated that the ordinance requiring an occupational tax from retail liquor dealers was not repugnant to the Oregon Liquor Control Act, which provided for the issuance of liquor licenses, and that the control act was purely a regulatory measure involving the exercise of the police power. There was no constitutional question involved, as the court held that by the enactment of the prohibition amendments to the state Constitution, the original section dealing with intoxicating liquors had been repealed and was not revived by the repeal of the amendments. This holding as well as that in Bardon v. Nudelman, 369 Ill. 214, 15 N.E.2d 836, 117 A.L.R. 683, referred to in the Coos Bay case (and in which likewise no constitutional question was involved), is directly contrary to that in Los Angeles Brewing Co. v. Los Angeles, supra, 8 Cal.App.2d 391, 48 P.2d 71, and hence must be disregarded. That a city occupational tax on liquor retailers is invalid in California is impliedly recognized by defendants, by the fact that they insist that the tax here is not an occupational one, but is one on the purchaser alone.

[2] Section 22 gives the state the exclusive power to license and regulate the

sale and purchase of intoxicating liquor within the state. The tax here is imposed upon the privilege of selling or purchasing intoxicating liquor in San Francisco, which power is expressly reserved to the state under its exclusive power to license and regulate such purchase and sale. The state has the right to levy such tax but not a municipality. It is not and could not be contended that the mere failure of the state to exercise this power reserved to it, grants the municipality such power.

Defendants contend that the tax here is a municipal affair and that the power to impose it is conferred on the municipality by section 6, article XI, of the Constitution, and site the following language in West Coast Advertising Co. v. San Francisco, 14 Cal.2d 516, 524, 95 P.2d 138, 143: "No doubt is entertained upon the proposition that the levy of taxes by a municipality for revenue purposes, including license taxes, is strictly a municipal affair." To the same effect, Ex parte Braun, 141 Cal. 204, 74 P. 780. This same argument was made in Los Angeles Brewing Co. v. Los Angeles, supra. The court said that prior to the operative date of section 22 of article XX of the Constitution the licensing of businesses within a chartered city for the purpose of revenue had always been held to be a municipal affair, citing section 6 of article XI, but then went on to say: "There is no precise, lasting, and inflexible definition of a municipal affair. Changes in the circumstances of life may transfer that which is strictly a municipal affair today into something of general state-wide concern tomorrow. [Citing cases.] It is logical to conclude that in adopting section 22 of article 20 of the Constitution the people intended to and did change the power to impose a license tax for revenue upon those engaged in the liquor business from a municipal affair to one of general state-wide concern, and therefore removed such power from the protection of section 6 of article 11 of the Constitution when they gave the state '*exclusive* right and power to control, license and regulate' such business."

Defendants further argue that the exclusive power reserved by the state under section 22 is primarily a police power, and quote language in Yosemite Park & Curry Co. v. Collins, D.C., 20 F.Supp. 1009, to the effect that the primary purpose of California's Alcoholic Beverage Control Act "is the regulation of the intoxicating liquor business" and that the measure "cannot bestow upon California the power to collect license taxes from plaintiff for the importation and sale of liquors." 20 F.Supp. at page 1015. This language, however, was based not upon a construction of either section 22 or the Alcoholic Beverage Control Act but upon the holding that any exercise of police or other power within Yosemite Park was beyond the jurisdiction of the state, jurisdiction of the park having been assumed by the United States in 1902. But if the language in the Yosemite Park case is to be given the construction placed upon it by defendants, it is contrary to the holding in the later case of Empire Vintage Co. v. Collins, 40 Cal.App.2d 612, at page 620, 105 P.2d 391, at page 395, where the court stated: "Bearing in mind that the Act of 1935 [the Alcoholic Beverage Control Act] was a revenue act, that the very gist of it was to collect revenue * * *."

Cases cited by defendants such as Wiggins Ferry Co. v. East St. Louis, 107 U.S. 365, 2 S.Ct. 257, 27 L.Ed. 419, and Ramaley v. City of St. Paul, 226 Minn. 406, 33 N.W.2d 19, to the effect that immunity and exemption from taxation are not to be presumed, have no application here, as this is not a question of either immunity or exemption from taxation, but rather whether the state has reserved to itself the exclusive right to tax.

Defendants call the tax in question an excise, purchase and use tax, and point out that it is purely for revenue purposes covering all lines of retail business within the city, and that retailers of intoxicating liquors become subject to it, not because they sell intoxicating liquor, but because they sell tangible personal property. What the tax is called is unimportant, but even under defendants' own definition the tax is imposed because plaintiff sells a certain type of tangible personal property, to wit, alcoholic liquors, and as before pointed out, the Constitution reserves the licensing and regulation of the *sale* and *purchase* of intoxicating liquors, and such reservation includes the right to tax.

The retailer of intoxicating liquors is in a different category than other retailers. The fees or taxes which he pays to the state under the liquor control act are returned in some degree to the city and county. The fact that other retailers who are not in his classification are subject to the San Francisco tax does not in any way affect the power of the state to reserve to itself all taxation concerning the purchase and sale of the commodity which the liquor retailer dispenses.

[3, 4] Defendants say further that the tax is not on the retailer but on the purchaser, and therefore is neither a license nor an occupational tax, citing Mouledoux v. Maestri, 197 La. 525, 2 So.2d 11, and Blauner's, Inc., v. Philadelphia, 330 Pa. 342, 198 A. 889. These cases held that a retail sales tax imposed by a municipality is not a tax on the retailer but on the purchaser. However, California has not adopted that theory in connection with sales taxes. The Retail Sales Tax Act, Stats.1935, pp. 1252, 1253, sec. 3 provides "For the privilege of selling tangible personal property at retail a tax is hereby imposed upon retailers * * *." As said in De Aryan v. Akers, 12 Cal.2d 781, 783, 87 P.2d 695, 696: "The cases definitely establish that the Retail Sales Tax Act of California imposes an excise tax on the retailer and not on the consumer. They are referred to in National Ice & Cold Storage Co. v. Pacific Fruit Express Co., supra [11 Cal.2d 283, 79 P.2d 380], and other decisions. [Citing cases.] In view of those decisions the question is no longer an open one." Again the reservation includes *purchase* as well as *sale*.

The ordinance, in its application to those engaged in the liquor business, is invalid in another respect. It attempts to impose certain regulations which conflict with the power to regulate reserved to the state under section 22. The retailer is required to register with the tax collector, procure a certificate of authority to collect the tax, display it prominently in his store, to keep records, receipts, invoices and "other pertinent papers" in such form as required by the collector, make quarterly returns, and is guilty of a misdemeanor for violating any provision of the ordinance, or failing to render a return, or a supplemental return, if required by the collector. In Standard Oil Co. v. Brodie, 153 Ark. 114, 239 S.E. 753, the court said that a state tax on the purchase of gasoline was twofold: (1) to impose a tax on the purchaser of gasoline, and (2) to regulate the business of the dealer by requiring him to collect the tax and pay it over to the county treasurer. In discussing a Washington sales tax in Morrow v. Henneford, 182 Wash. 625, 47 P.2d 1016, page 1020, the court said: "It is within the legitimate power of the Legislature to impose the duty of collecting upon the retailer as a reasonable regulation of his business."

Cases like McGoldrick v. Berwind-White Co., 309 U.S. 33, 60 S.Ct. 388, 84 L.Ed. 565, 128 A.L.R. 876, and Felt & Tarrant Mfg. Co. v. Gallagher, 306 U.S. 62, 59 S.Ct. 376, 83 L.Ed. 488, cited by defendants as holding that sales taxes are not regulatory, in the sense we are considering here, do not so hold. In the McGoldrick case the court was considering a sales tax of the city of New York in its relation to the commerce clause of the United States Constitution. It held that its only relation to interstate commerce was the fact that immediately preceding transfer of possession to the purchaser, the merchandise had been transported in interstate commerce and "brought to its journey's end." 309 U.S. at page 49, 60 S.Ct. at page 394, 84 L.Ed. 565, 128 A.L.R. 876, and that the tax was valid and not an undue burden on interstate commerce. The same is true of the decision in the Felt case, where the court refused to find that the California Use Tax Act did not interfere with interstate commerce as the tax was " 'upon the privilege of use after commerce is at an end.' " 306 U.S. at page 67, 59 S.Ct. at page 378, 83 L.Ed. 488.

Plaintiff May Question the Validity of the Ordinance.

[5] Defendants contend that plaintiff is not entitled to question the validity of the

ordinance because the tax is paid by the purchaser. Among other cases cited by defendants on this point is Meyer Const. Co. v. Corbett, D.C., 7 F.Supp. 616. There plaintiffs were contractors having contracts with the United States to construct certain buildings at the Hamilton Field bombing base. They sued the California State Board of Equalization raising the constitutionality of the Retail Sales Tax Act as it applied to materials purchased for use at Hamilton Field. The court held that they could not raise the issue that the act affects the United States as they were not an agency or instrumentality of it; secondly, that the act was a tax on the retailer and not on the consumer, and as plaintiffs were not retailers they were not proper persons to be heard. The court went on to say 7 F. Supp. at page 618; "If the tax is imposed upon retailers for the privilege of selling tangible personal property at retail, calling for sale and delivery into, or sale in, territory within the exclusive jurisdiction of the federal government, the person whose constitutional right might be affected is the retailer whose privilege of doing a retail business is being taxed." In view of our holding that the tax here is one on the privilege of selling intoxicating liquors, this case is authority for the proposition that plaintiff is a proper party to contest its validity. Moreover, plaintiff is affected by the many regulations governing the collection of the tax, which are so interrelated with the tax itself that he is entitled to attack the ordinance, even though the consumer is the one who, in fact, pays the tax. In Mountain Timber Co. v. Washington, 243 U.S. 219, 37 S.Ct. 260, 61 L.Ed. 685, Ann.Cas.1917D, 642, the Supreme Court of the United States upheld the right of an employer to attack the validity of a Workmen's Compensation Act, even as to its allegedly unfair application to employees, since the employer's exemption from liability to private action was "an essential part of the legislative scheme." 243 U.S. at page 234, 37 S.Ct. at page 263.

The judgment is reversed.

PETERS, P. J., and WARD, J., concur.

90 Cal.App.2d 753

ROSSON v. CRELLIN.

Civ. No. 16716.

District Court of Appeal, Second District, Division 2, California.

March 22, 1949.

Hearing Denied May 19, 1949.

1. Husband and wife ⚷30

A husband and wife may enter into contracts with each other respecting their property rights as though unmarried, subject to rules controlling actions of persons occupying confidential relations with each other. Civ.Code, §§ 158, 159.

2. Husband and wife ⚷30

Property settlement agreements between husband and wife for support and mutual releases import an adequate consideration. Civ.Code, § 1614; Code Civ.Proc. § 1963, subd. 39.

3. Husband and wife ⚷34

Defendant husband challenging validity after remarriage of divorced wife of agreement between husband and wife during their marriage for property settlement, support and mutual releases had burden of showing want of consideration. Civ.Code, § 1615.

4. Husband and wife ⚷31(2)

Provision for support in property settlement agreement executed by husband and wife during marriage was enforceable against husband after wife's divorce and remarriage, notwithstanding statute providing that husband is not obligated to provide for support after remarriage of wife, where support provision of agreement was without qualification as to wife's remarriage. Civ.Code, § 139.

Appeal from Superior Court, Los Angeles County; Paul Nourse, Judge.

Action on property settlement agreement by Yvonne Rosson against Curtis V. Crellin. From the judgment, the defendant appeals.

Affirmed.

Roland Maxwell and Paul H. Marston, both of Pasadena, for appellant.

Burr & Smith and James G. Dempsey, all of Los Angeles, for respondent.

WILSON, Justice.

Plaintiff, who was once the wife of defendant, brought this action to recover an amount owing to her under an agreement entered into between the parties while they were husband and wife. From a judgment in her favor defendant has appealed.

On or about June 6, 1934, but under date of June 1, the parties executed a property settlement, agreement for support, and mutual release, and on the same day executed a supplementary agreement dated June 1. At the same time and as a part of the same transaction defendant executed and delivered to plaintiff, who was at that time his wife, a writing dated June 5, 1934, stating in part as follows: "Supplementing the property settlement agreement for support and mutual release and the supplemental agreement entered into between you and myself in regard to your support and the support of our two children, Anne and Edward, will state that I will sign the necessary papers as soon as prepared agreeing to give you $50.00 per month in addition to the amounts set forth in the above described agreements during your life time * * *" The "necessary papers" referred to in the last mentioned document apparently were not prepared until the following December. Under date of December 5, 1934, defendant signed and gave to plaintiff a writing in which he referred to their agreement and supplemental agreement dated June 1, 1934, and stated that "* * * supplementing said agreements, I hereby agree to pay you in addition to the amounts set forth in the two above described agreements the sum of Fifty Dollars ($50.00) per month, to be paid on the first day of each and every month so long as you shall live; * * *" The latter agreement is the subject of this action.

Under date of March 18, 1935, the parties executed a new property settlement, agreement for support, and mutual release, wherein they agreed that the first instrument executed on June 6, 1934, should be of no further force or effect, that the 1935 agreement should be substituted in place of the former agreement, and that the supplemental agreement executed on June 6, 1934, should remain in full force and effect in conjunction with the new agreement of March 18, 1935. At the same time and as a part of the same transaction, and to assure that there was no uncertainty as to their intention, the parties signed and annexed to the agreement of December 5, 1934, a further agreement reciting that the agreement of March 18, 1935, "takes the place of" the agreement of June 1, 1934, and that in addition to the agreement of March 18, 1935, the agreement of December 5, 1934, remains in full force and effect.

On April 10, 1935, plaintiff obtained an interlocutory decree of divorce and a final decree on April 15, 1936. After the entry of the final decree and before the commencement of this action plaintiff remarried.

Defendant contends that the property settlement agreement is qualified by the provision of section 139 of the Civil Code, that the agreement requiring defendant to support plaintiff after her remarriage is contrary to good public policy, and that the agreement sued on is not supported by a valid consideration.

The court found that the writing of June 5, 1934, quoted above, was executed by defendant and delivered to plaintiff at the same time and as a part of the same transaction as the two agreements executed on June 6, under date of June 1, 1934, and that in pursuance of such agreements defendant executed and delivered to plaintiff the written agreement of December 5, 1934, sued upon herein and above quoted, which is confirmed by the agreement of March 18, 1935.

[1] A husband and wife may enter into contracts with each other respecting their property rights as though unmarried, subject to the rules controlling actions of persons occupying confidential relations with each other. Civil Code, secs. 158, 159; Ettlinger v. Ettlinger, 3 Cal.2d 172, 178, 44 P.2d 540; Baxter v. Baxter, 3 Cal.App.2d 676, 681, 40 P.2d 536; cases cited in Note 2, 14 So.Cal.Law Rev. 373.

[2, 3] The agreements executed by plaintiff and defendant import an adequate consideration. Civil Code, sec. 1614; Code

Civ.Proc., sec. 1963, subd. 39. Since defendant is challenging the validity of the agreement the burden rests upon him of showing a want of consideration. Civil Code, sec. 1615.

The court found that the agreement was made for a good and valuable consideration; that the parties never intended that the same should be released and it never was released or cancelled. There is evidence to support the finding and none to the contrary.

[4] The agreement for support is enforceable in the same manner as any other agreement and plaintiff is entitled to collect the amounts agreed to be paid by defendant. Sanborn v. Sanborn, 3 Cal.App.2d 437, 441–442, 39 P.2d 830; Roberts v. Roberts, 83 Cal.App. 345, 351, 256 P. 826. See 14 So.Cal.Law Rev. 376.

Finally defendant contends that the agreement which binds him to make payments to plaintiff notwithstanding her remarriage is qualified by section 139 of the Civil Code* and is contrary to good public policy. The second paragraph of section 139 provides that upon the remarriage of the wife the husband is no longer obligated to provide for her support. Although defendant was not "obligated" to support plaintiff after her remarriage, nevertheless, as a part of the transaction in which their property rights were settled he agreed without qualification as to her remarriage or otherwise to make monthly payments during her lifetime.

By reason of section 139 a court is powerless to compel a husband to provide support for his wife after her remarriage; however, where he agrees to do so such agreement will be enforced if it is a part of the property settlement agreement or is otherwise supported by a valuable consideration. Rich v. Rich, 44 Cal.App.2d 526, 530, 112 P.2d 780; Landres v. Rosasco, 62 Cal.App.2d 99, 105–106, 144 P.2d 20.

The cases cited by defendant, Cohen v. Cohen, 150 Cal. 99, 88 P. 267, 11 Ann.Cas. 520; Atlass v. Atlass, 112 Cal.App. 514, 297 P. 53; McClure v. McClure, 4 Cal.2d 356, 49 P.2d 584, 100 A.L.R. 1257, do not involve the construction of a property settlement agreement but relate to support ordered by the court. In the Cohen case the court said that good public policy does not compel a divorced husband to support his former wife after she has become the wife of another except under extraordinary conditions, but the courts recognize as a qualification to this rule that a remarriage would not authorize the vacation of a decree for support where it is given as a substitute for or in lieu of the wife's rights in the husband's property or in the community property. The Atlass case followed the Cohen decision. In the McClure case the husband had not entered into an agreement to support his wife but was ordered so to do by the decree of divorce. The court there held that section 139 of the Civil Code conferred jurisdiction on the court to modify or vacate its order for support after the remarriage of the wife.

By defendant's unqualified agreement to make payments to plaintiff during her lifetime he assumed an obligation which the court could not have imposed upon him. The finding of the trial court, supported by the evidence, that the agreement was a part of the same transaction as that in which the parties settled their property rights, brings the action within the doctrine of the Rich and Landres cases, and the Cohen, Atlass and McClure decisions are not applicable.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; TRAYNOR and SCHAUER, JJ., dissenting.

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* Sec. 139: "Where a divorce is granted for an offense of the husband, the court may compel him to provide for the maintenance of the children of the marriage, and to make such suitable allowance to the wife for her support, during her life or for a shorter period as the court may deem just, having regard to the circumstances of the parties respectively; and the court may from time to time modify its orders in these respects.

"Remarriage. Upon the remarriage of the wife, the husband shall no longer be obligated to provide for her support but such remarriage shall not affect his duty to provide for the maintenance of the children of his marriage."

90 Cal.App.2d 603

RILCOFF v. STATE BOARD OF MEDICAL EXAMINERS OF DEPARTMENT OF PROFESSIONAL AND VOCATIONAL STANDARDS et al.

Civ. No. 16568.

District Court of Appeal, Second District, Division 1, California.

March 15, 1949.

1. Mandamus ⚿187(9)
Physicians and surgeons ⚿11(3)

Whether emergency existed which would justify county hospital medical director's employment of unlicensed practitioners in practice of medicine was for determination in first instance by State Board of Medical Examiners suspending physician's and surgeon's certificate of director because of such employment, and decision of trial court reviewing Board's suspension of director's certificate in mandamus proceeding that evidence supported Board's determination that no such emergency existed would be upheld on appeal. Business and Professions Code, § 2144.

2. Physicians and surgeons ⚿11(3)

State Board of Medical Examiners suspending physician's and surgeon's certificate of county hospital medical director for employment of unlicensed practitioner in practice of medicine did not abuse its discretion in limiting director's proof of emergency justifying such employment to conditions existing in the county. Business and Professions Code, § 2144.

3. Physicians and surgeons ⚿11(2)

Physician's and surgeon's certificate of county hospital medical director employing unlicensed practitioners in practice of medicine was properly suspended by State Board of Medical Examiners. Business and Professions Code, §§ 2144, 2392.

◆

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Mandamus proceeding by Nicolai N. Rilcoff against State Board of Medical Examiners of the Department of Professional and Vocational Standards of the State of California and others. From the judgment, Nicolai N. Rilcoff appeals.

Affirmed.

Passin & Ziskin, of Los Angeles, George J. Coffaro, of Bakersfield, and Joseph Passin, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and J. Albert Hutchinson, Deputy Atty. Gen., for respondents.

DORAN, Acting Presiding Justice.

This is an appeal from a judgment denying a writ of mandate and recalling an alternative writ of mandate theretofore issued in a proceeding brought against respondent Board of Medical Examiners of the State of California to secure a review of the suspension of appellant's physician's and surgeon's certificate by said board.

The record reveals that appellant was, and had been since April 15, 1945, the Medical Director of the Kern General Hospital and the Public Health Director of Kern County. In February, 1947, an accusation was filed with the Board of Medical Examiners of the State of California "charging appellant with employing certain unlicensed practitioners in the practice of medicine and aiding and abetting an unlicensed practitioner in the practice of medicine". The hearing before the board lasted several days. There appears to have been no dispute as to the facts. As stated by appellant's counsel at the hearing, quoting from the record:

"Mr. Petrini (appellant's counsel): But I mean there has been no effort in this case to deny the fact these doctors were employed at the hospital. There has been no effort to deny that—where is the accusation? Just take one at a time. There has been no effort to deny any of these specific allegations of fact. I suppose in this case of Victoria Pruett something was done. The record shows it was done. Somebody claims it was practicing medicine. We claim it was not practicing medicine. We have the Patterson case. Somebody says certain things were done and they call it practicing medicine. There is no denial of that. All the testimony is to the effect that specific factual matters are true." But,

"Mr. Petrini: Well, Mr. Flynn, there has been no dispute about that. There is no dispute these specific things were done at the hospital; there is no dispute on that.

There is no contention these specific things were not done.

"Mr. Hutchinson: Then I have been laboring under a misapprehension.

"Mr. Petrini: No, you have not been laboring under a misapprehension. Our defense of these things is two: First, there is a serious question as to whether or not anything Doctor Rhoden did constituted practicing medicine. We do not deny the specific things that he did and the specific allegations or detail of things that he did. That is the first defense."

The board found in part:

"That during the period specified opposite their respective names the respondent selected, appointed, continued the employment of and prescribed, assigned, and directed the duties and the performance thereof of the persons hereinafter named, and knowingly permitted and directed such persons in the practice of medicine and the treating of the sick and afflicted and the diagnosis of the mental and physical condition of human beings in the County of Kern, State of California; that at all times in this paragraph specified, each and every one of such persons was unlicensed and did not hold a certificate to practice as a physician and surgeon in the State of California; that such persons, and the period of time during which they performed such services, are as follows:

Name	From	To
Alfred Edward Rosenbaum also known as Alfred Edward Rhoden	May 7, 1945	February 14, 1947
Daniel Lee Bernie	July 5, 1945	December 31, 1946
Zale Chaffin	July 1, 1946	February 14, 1947
Francis B. Schuler	July 1, 1946	February 14, 1947
Glee A. Renick, Ch.	July 1, 1944	July 31, 1945
Glenn Edward Velia	November 8, 1945	January 14, 1946
John E. Affeldt	August 15, 1946	November 20, 1946
Sanford Stevens	April 8, 1946	September 30, 1946
Len Hughes Andrus	July 1, 1945	March 15, 1946
Martin F. Anderson	October 2, 1945	March 20, 1946

"That on or about the 27th day of June, 1945, one Alfred Edward Rosenbaum, also known as Alfred Edward Rhoden and hereinafter referred to as A. E. Rhoden, acting under the direction and control of and with the knowledge and consent of respondent, diagnosed the physical condition of one Victoria Pruett, a human being, for cancer; * * * on or about the 29th day of January, 1947, * * * diagnosed the physical condition of Jean Marchand, a human being, for cancer by performing an autopsy upon the body; * * * on or about the 22nd day of August, 1946, * * * diagnosed the physical condition of Turner Duncan, a human being, for cancer; * * on or about the 29th day of February, 1946, * * * diagnosed the physical condition of Agatha Elda Bacacao, a human being, for retino blastoma; * * * on or about the 26th day of May, 1946, * * * diagnosed the physical condition of William George McCarley, a human being, for chronic myelied leukemia; that in performing said acts said A. E. Rhoden carried out the duties assigned and prescribed for him by respondent, and used, under the direction and control of respondent, the facilities of the Kern General Hospital; that at said time and place said A. E. Rhoden was, and was known to respondent to be, an unlicensed practitioner under the laws of the State of California."

Accordingly, "Appellant was found guilty by the board of unprofessional conduct as defined in Section 2392 of the Business and Professions Code of the State of California as charged in Counts I, and III through VIII of the accusation. His physician's and surgeon's certificate was suspended for a period of one year and he was placed on probation for a period of five years, the period of probation commencing at the termination of the one year suspension."

At the trial of the action the evidence consisted of "the transcript (consisting of 836 pages) and exhibits introduced in the administrative disciplinary proceeding before respondent Board, without the offering or receipt of any other evidence."

The trial court found for respondent board and denied the relief sought by petitioner, appellant herein.

It is contended on appeal that "The evidence is insufficient to support the verdict or judgment"; that "The verdict is against the law"; and that "The board erred in limiting appellant's proof of an emergency to conditions existing in Kern County".

The appeal is without merit.

[1] With regard to "emergency", Sec. 2144 of the Business and Professions Code provided that "Nothing in this chapter prohibits service in the case of emergency"; it is this provision upon which appellant relies. Assuming that the foregoing provision applies, whether an emergency existed was for the board to determine in the first instance. If the determination of such question was supported by the evidence which in effect the trial court has decided, such decision by the trial court must be upheld on appeal. Respondents' argument in this connection, which is supported by the record, is as follows:

"Similarly, the testimony before the Board failed to support any honest claim of 'emergency' of any kind. According to appellant himself, he, notwithstanding his suggestion of the grievous emergency he claims, ceased personally so to do, and devoted his time to administrative matters not requiring a license from and after the time of his becoming Director of Health and Superintendent of the Hospital. Appellant further, for purposes of policy adopted by himself for the first time, required—literally forced—the cessation of services in the hospital by the local practitioners who theretofore had constituted the visiting staff and had rendered services to the patients in the hospital throughout the years. This policy was apparently peculiar to appellant, insofar as the record indicates, and, we are informed, is unique as an attempt to operate a county hospital service without the assistance of local practitioners.

"Even appellant cannot possibly contend that the availability of physicians had not improved by March 22, 1947, although he continued to employ unlicensed persons until the very last day of the Board hearing—during the investigation of many months and the pendence of the disciplinary proceeding for weeks before that date. Notwithstanding the claimed 'emergency' appellant did finally, upon the last date mentioned, remove from the hospital and the health service all unlicensed persons, personally testifying:

" 'Q. Are there any unlicensed men at the Kern General Hospital at the present time? A. No, there are not'."

[2] As to the alleged error of the board limiting the evidence on the issue of "emergency", it is evident from a review of the record that there was no abuse of discretion in this regard.

[3] The law supports the action of the board in every respect, as found by the trial court, and the evidence abundantly supports the judgment.

The judgment is affirmed.

WHITE, J., concurs.

90 Cal.App.2d 723

NIX v. HEALD et al.

NIX et al. v. HEALD et al.

Civ. 16747.

District Court of Appeal, Second District, Division 2, California.

March 21, 1949.

1. Contracts 🔑300(3), 312(2)

A building contractor, whose delay in notifying plumbing sub-contractors to commence operations caused sub-contractors' delay in installation of plumbing, had no right to declare forfeiture of sub-contractors' rights to fulfill their contract and was liable to them for damages proximately caused by building contractor's hiring of another plumber to complete sub-contract.

2. Contracts 🔑316(1)

Plumbing contractors, by commencing work on receipt of delayed notice from building contractor to commence operations, did not concede building contractor's right to break sub-contract by subsequently hiring another plumber to complete project, nor preclude sub-contractors from suing building contractor for such breach, even if commencement of sub-contractors' work waived building contractor's default in giving sub-contractors tardy notice to commence performance.

3. Contracts 🔑299(1)

Where plumbing sub-contractors' defense to, and cross-complaint in, building contractor's assignee's action for breach of sub-contract, were not predicated on builder's initial delay in notifying plumbers to commence work, but founded on builder's subsequent breach of sub-contract by hiring another plumber to complete project, sub-contractors' belated commencement of plumbing work was not breach of mere independent covenant.

4. Contracts 🔑321(1)

Where plumbing sub-contractors guaranteed availability of plumbing materials for only 45 of 100 houses involved, their lack of materials for remaining houses did not establish their inability to complete sub-contract, and hence did not bar their recovery of damages for building contractor's breach of sub-contract by hiring another plumber to complete project, as sub-contractors could have resorted to open market for supplies as they did for work in first 45 houses.

5. Appeal and error 🔑1062(1)
Trial 🔑352(12)

Submission to jury of special interrogatories as to whether provision of plumbing sub-contract that sub-contractors guaranteed availability of all materials for 45 of 100 houses involved meant that sub-contractors had possession of all plumbing materials for 45 houses or that they were in position to obtain such materials immediately by using priorities furnished by corporate building contractor was erroneous, but not prejudicial to building contractor and its assignee, suing sub-contractors for breach of contract, in view of testimony that builder promised to and did furnish such priorities.

6. Appeal and error 🔑1062(1)

In action by building contractor's assignee for plumbing sub-contractors' breach of contract in failing to install plumbing in some of houses involved within contractual time, error in submitting to jury interrogatory as to whether provision of sub-contract that sub-contractors guaranteed availability of materials for houses wherein they completed plumbing installation meant that they had possession of all plumbing materials therefor or were in position to obtain them immediately by using priorities to be furnished by building contractor was cured by jury's finding that no delay was proximately caused by builder's failure to furnish priorities.

7. Contracts 🔑313(2)

Plumbing sub-contractors' telegram and letters to building contractor, stating that sub-contractors were unable to complete contract as per schedule, that delays were occasioned by building contractor's delay in giving notice to commence plumbing work, and that sub-contractors offered to perform balance of work for specified consideration as matter of compromise, did not constitute refusal to complete sub-contract before builder's reletting thereof to another plumber, so that judgment on jury's negative answer to special interrogatory as to whether documents constituted such refusal was proper, though they should not have been submitted to jury for interpretation.

8. Trial 🔑51

Admission of hearsay evidence, subject to verification by defendants' books, on question of their damages, recoverable under cross-complaint, for plaintiff's assignor's breach of contract, was not error, where such verification was made on same day, plaintiff's counsel stated that he had no further questions respecting books, and confusion and apparent contradictions in witness' testimony as result of questioning by plaintiff's counsel were promptly eradicated by court's questions.

9. Appeal and error 🔑1047(1)

In action by building contractor's assignee for breach of plumbing sub-contract, admission of defendants' testimony concerning matters of which plaintiff maintained that court should have taken judicial notice was not error, where court expressly limited testimony to what was then custom in plumbing business and did not permit witness to testify as to law respecting priorities required to obtain plumbing materials.

10. Trial 🔑227

Time consumed in instructing jury is immaterial, if court's charge is clear, fairly discusses issues, and correctly applies law.

11. Appeal and error 🔑1068(1)

Instructions as to matters concerning which jury found in appellants' favor by answers to special interrogatories were not prejudicial.

12. Contracts 🔑323(3)

The question whether plumbing sub-contractors' delay in completing work came within terms of sub-contract relating to causes beyond sub-contractors' control was properly submitted to jury by instruction.

13. Appeal and error 🔑1068(1)

An instruction as to consequences, if jury believed either of two witnesses' contradictory testimony on question of parol modification of written instrument, was not erroneous, in view of jury's affirmative answer to special interrogatory as to whether plumbing sub-contractors' delay in completing work was proximately caused by building contractor's failure to commence work or make it possible for sub-contractors to do so on specified date, such answer rendering determination of question of parol modification unnecessary to verdict for sub-contractors.

14. Trial 🔑191(3), 296(2)

In action by building contractor's assignee for breach of plumbing sub-contract, instruction to jury that plaintiff was not obligated to accept compromise offer by sub-contractors, if they were in default at time, was not erroneous as implying that plaintiff was obligated to accept offer if plumbers were not in default, especially in view of instruction that if plumbers were not behind in performance of sub-contract, there would be no justification for notices which were subject of instruction.

15. Appeal and error 🔑1033(5)

In action by building contractor's assignee for breach of plumbing sub-contract, instruction to jury that building contractor's delay in carrying out contract constituted no defense, if defendant sub-contractors represented to builder that they had all plumbing materials on hand or contract required them to have materials on hand, was free from error and favorable to plaintiff and builder appealing from judgment for defendants on jury's verdict.

16. Appeal and error 🔑1064(1)

An instruction to jury respecting litigant's failure to produce stronger evidence than that offered by him was not prejudicial to either party, in absence of showing that there was any stronger evidence than that produced by either of them.

17. Appeal and error 🔑1064(1)
Contracts 🔑353(8)

In action by building contractor's assignee for breach of plumbing sub-contract, instruction to jury that if builder prevented sub-contractors' performance, such performance was excused, was proper and harmless to plaintiff.

18. Appeal and error 🔑1064(1)

Where original written sub-contract between building contractor and plumbers and evidence of contemporaneous oral agreement, subsequent written and oral modifications of contract, oral modification of written modification, executed oral modification, offer of compromise by sub-contractors, and final contract with new plumber, employed to complete sub-contractors' work, were produced during trial, trial court's submission to jury of all such evidence, with instruction that sub-contractors were relieved of obligation to perform sub-contract, if it was broken by builder, was harmless to builder and its assignee.

19. Contracts ⚿=353(8)

In action by building contractor's assignee for breach of plumbing sub-contract by delay in performance thereof, evidence on questions whether there was subsequent agreement and compliance therewith, causing additional delay, and whether such delay was excused, required instruction to jury that defendants could not be held to strict compliance with sub-contract, if builder insisted on substantial change in manner of performance of material portion thereof and such change required defendants to expend additional time and money.

◆

Appeal from Superior Court, Los Angeles County; Allen W. Ashburn, Judge.

Action by R. J. Nix against Roger G. Heald and others, doing business under the fictitious firm name of Sam Heald Company, and others, for breach of named defendants' plumbing sub-contract with the Community Building Company, plaintiff's assignor, in which named defendants filed a cross-complaint against plaintiff and assignor for breach of contract. Judgments for named defendants and cross-complainants, and plaintiff and assignor appeal.

Affirmed.

Walker, Meyers, Ingram & Moser and Alfred R. Meyers, all of Los Angeles, for appellants.

Vern E. Garten, of Long Beach, for respondents.

MOORE, Presiding Justice.

Plaintiff was denied damages for an alleged breach of contract while defendants were awarded damages for plaintiff's violation of the same contract. Plaintiff and his assignor, the cross-defendant, appeal.

Community Building Company, a corporation, sometimes referred to herein as builder, was at the time of executing the contract engaged in constructing and selling single residence homes in Los Angeles. Respondents were then subcontracting plumbers. On July 7, 1945, the builder and the plumbers executed a writing whereby the latter agreed to do all the necessary plumbing in 100 homes to be constructed by the builder.

Under the terms of the contract the builder was obliged to notify the plumbers to commence delivery "approximately August 1, 1945." Instead, it did not give them notice until September 5, 1945, whereupon respondents immediately began to install the plumbing. Such delay of 35 days was serious. It caused respondents to lose their war-time priorities for plumbing supplies and equipment, necessitating their resort to the open market in an effort to obtain the required materials greatly in demand and scarce in quantity. The unavoidable results were respondents' delay in the installation of the plumbing, and their inability to comply with their agreement "to supply material and install same at rate of one house per day." Although tardy, respondents completed the installation of the plumbing in 45 houses and were paid in full therefor. Having asserted that respondents were in default under the contract, in October, 1945, the builder employed another plumber to complete the plumbing subcontract. At no time did respondents refuse to carry out their contract prior to the builder's employment of the other concern. On September 4, 1946, the builder assigned its contract to appellant Nix who sued to recover as damages the excess of the amount paid the new plumber for completing the installation over the price to have been paid under the contract. Respondents filed a general denial and their cross complaint.

The theory of appellant's action was that respondents' performance was not a substantial compliance with the contract in that they had failed to complete the plumbing at the rate of one house per day.

Therefore, they contended, they were justified in terminating the contract, in employing another plumber, and in recovering damages in the amount suffered by reason of the employment of the new sub-contractor. The theory of respondents' answer was that if they were behind their prescribed schedule, the delay was occasioned by the builder's tardiness in notifying respondents to commence operations; the builder could not take advantage of its own delinquency to declare the contract at an end. By their cross complaint respondents alleged and thereafter contended that since the builder could not invoke the termination clause of the contract, it was not warranted in employing another plumber, thereby depriving respondents of anticipated profits.

The trial court submitted eleven special interrogatories to the jury for answer, and of these, number 7 and the answer thereto are alone sufficient to sustain both judgments.

"(7) If defendants were behind schedule on either of the said dates [September 21 or October 18, 1945], was their delay proximately caused by failure of Community Building Company to commence work or to make it possible for defendants to commence work on or about August 1, 1945, with resultant loss of frozen plumbing materials? Answer *Yes.*"

[1] Inasmuch as respondents' delay was in turn caused by the builder's delay, the latter was in no position to declare a forfeiture of respondents' rights to fulfill the contract. It follows that since the builder's hiring of another plumber was in derogation of respondents' contractual rights, Community Building Company was properly held to answer for damages proximately caused thereby.

Appellants contend that the jury's answers to other special interrogatories demonstrate that respondents' judgment on their cross complaint rests only upon an alleged oral modification of the written contract. Not so. Admittedly the jury found that the contract had been modified in that the builder waived the right to terminate the contract for any and all delays of respondents in consideration of respondents' doing additional work. But the same judgments could have been entered even if the jury had found that there was no oral modification. Assuming as appellants contend that there was no waiver of the covenant permitting the builder to procure other plumbers if respondents were too slow, still the builder would have been in no position to invoke that provision because the jury found that the delay which would have permitted its invocation was caused by the building company. Thus, the builder could not say, "We are terminating this contract because you are not complying" for the good reason that the builder itself was the cause of respondents' noncompliance.

[2, 3] Appellants contend that respondents by commencing work under the contract waived any default of the builder caused by its tardy notification to commence performance. Admitting such contention, arguendo, yet respondents' waiver of one default did not concede to appellants the right subsequently to breach the contract by hiring another plumber. Nor would respondents' waiver of the builder's first default preclude respondents' action against the builder for a subsequent breach of the contract. Also, appellants contend that respondents' allegedly belated commencement of installing the plumbing was a breach of a mere independent covenant. This is not sustained by a fair construction of the issues. Neither respondents' defense to the original action nor their contentions on the cross complaint were predicated on the builder's initial delay. Both were founded on the builder's breach of the contract by hiring another plumber to complete the project.

[4] Appellants contend that respondents should not have been permitted to recover on their cross complaint because there was no showing that the plumbers were able to complete their contract. To buttress this argument appellants cite the testimony of Jerome Heald to the effect that respondents did not have the materials wherewith to finish the remaining 55 houses. But by the contract respondents guaranteed the availability of materials for only the first 45 houses. It does not

follow that because respondents did not have materials on hand they were unable to complete their contract. They could as in the construction of the first 45 houses resort to the open market, such as it was in 1945, to procure their supplies.

[5, 6] Appellants next contend that the court improperly permitted the jury to interpret the terms of the contract by submitting special interrogatories 1 and 12 and by giving instructions pertinent thereto.

Special Interrogatory 1 and the Answer

"Referring to the contract phrase 'Subcontractor guarantees he has all the materials available for forty-five (45) houses at this time,' did the parties intend (A) this language to mean that defendants then had in their possession all plumbing materials for 45 houses, or (B) did they intend it to mean that defendants were then in position, by use of priorities furnished by Community Building Company, to obtain such materials immediately? Answer *(B) Yes.*"

At the trial President Diller of the Community Building Company testified without objection that the builder promised to give respondents what priorities the builder had and that he "furnished them the priorities on the first 45 houses." Mr. Jerome Heald testified to the same fact. Mr. Diller's subsequent testimony that the parties had agreed that no priorities would be necessary was obviously rejected by the jury.

The question submitted by interrogatory 1 and answered by the jury was a harmless procedure in view of the uncontradicted testimony that appellants promised to, and did, give respondents priorities for materials on the first 45 houses. Such amusement or exaltation as the jury may have enjoyed in considering what was meant by the phrase quoted in interrogatory 1 neither adds to nor subtracts from the meaning of the phrase, since its meaning as conceived could add nothing to the proof that the builder gave respondents all priorities necessary for the acquisition of the materials on the first 45 houses. While it was error for the court to submit the task of interpreting any part of the contract to the jury, no prejudice resulted by reason of two facts, viz., (1) an interpretation was unnecessary in the light of Mr. Diller's testimony and (2) in entering the judgment the trial court either adopted the jury's view or acted upon the proof that the builder had promised to furnish respondents with the priorities for the essential materials. In either event the court committed no prejudicial error since it did not in fact rely upon the advice of the jury for a construction of the contract. The fact that the judgment reflects the same view as that expressed by the jury in its answer cannot be deemed to be conclusive that the court regarded itself as bound by the answer. The judgment was the determination of the court and we must consider it to be the result of the court's conclusion without regard to the result of the jury's deliberation. Furthermore, in answer to interrogatory 6, the jury determined that no delay was proximately caused by the builder's failure to furnish priorities. That answer completely repudiated respondents' contention that the delays in installing the plumbing were caused by builder's failure to furnish priorities. The same answer cured the error committed in submitting interrogatory 1. Moreover, the issue under consideration by the court and jury did not involve the construction of the 45 houses as to which respondents' guaranty of availability of materials had been given by the contract. On the contrary, the issue at stake pertained only to the remaining 55 houses, as to which no guaranty was given.

Interrogatory 12 and the Answer

[7] "Did the defendants by their telegram of September 25, 1945, Exhibit 3, or their letter of October 2, 1945, Exhibit 5, or their letter of October 23, 1945, Exhibit 7, or in any other manner, refuse to complete their contract at any time before Community Building Company relet the plumbing contract to State Plumbing Company on or about October 29, 1945? Answer *No.*"

A fair construction of the documents mentioned can lead to no conclusion other than that they do not constitute such refusal. Respondents in their telegram to builder, September 25, 1945, said, "We are unable to complete our contract as per schedule. If you so wish we are agreeable to terminate our contract with you with the understanding that neither party will claim damages. If you agree to this termination we will complete all houses on which we have started to install plumbing." The letter by respondents' attorney dated October 2, 1945, said in substance: the notification to have been given by you August 1, 1945, was in fact made by you on September 5, 1945, and the plumbers began to install plumbing September 6 and proceeded with diligence as to the 45 houses, and as to them we are in a position to and will perform to the best of our ability. But by reason of your delay in giving notice, conditions had so changed that delays beyond our control were occasioned. Any attempts of the builder to get other plumbers will be resisted. Respondents' letter of November 23, 1945, said, "As a matter of compromise and settlement only, we make the following offer: 'That we perform the balance of the 55 houses at $525 each.'"

Nothing in all or in any of these communications can be fairly construed as a refusal to complete the contract as alleged and contended by appellants. Of course, the court should not have submitted them to the jury for a finding of their significance. Their interpretation was a judicial function and their meaning should have been determined by the court and presented to the jury as a matter of law. Whether the court adopted the jury's construction or interpreted the documents independently of the jury's answer to interrogatory 12, it correctly determined their meaning as a basis for the decree. If appellants were dissatisfied with the judgment they owed it to the court to present their grievance by motion for a new trial. Although the task of interpreting the documents was one of judicial cognizance it must be presumed that at the time of ordering judgment to be entered on the verdict the court decided that by the three communications there was no refusal to complete the contract. Since appellant contends that the interpretation of respondents' three communications is strictly a matter of law, we adopt its thesis and now hold as the trial court determined and impliedly held in entering the judgment, that respondents at no time refused to complete the contract.

[8] Appellants contend that testimony pertaining to respondents' damages was hearsay and therefore improperly admitted. The trial court conceded that the evidence was hearsay, but for the purpose of expediting the trial admitted it subject to verification by respondents' books. Such verification was made the same day and appellants' counsel after an examination of the books stated, "I have no further questions with respect to the books." The confusion and apparent contradictions in the witness' testimony were the result of questioning by appellants' counsel and were promptly eradicated by subsequent questions propounded by the court.

[9] Appellants also object to respondents' testimony concerning matters of which, they maintain, the court should have taken judicial notice. But a refusal to take such notice merely places upon a proponent the burden of proving the fact which he has asked the court to accept without proof. The record discloses that the court expressly limited the testimony to what was then the custom in the plumbing business and did not permit the witness to testify as to what was the law in respect to priorities.

[10] Appellants' final assignment is concerning the instructions given. It is first contended that they were too long and confusing. This contention is utterly without merit. Time consumed in instructing a jury is immaterial if the court's charge is clear, the issues are fairly discussed and the law is correctly applied. While the jury did call the court's attention to an obvious error in interrogatory 4 and to discrepancies in interrogatories 10 and 11, the court removed all confusion arising therefrom by correcting 4, eliminating 10 and amending 11. While the instructions were somewhat involved they were as simple as the complicated issues would allow. The trial developed many contingencies for the jury's consideration. Of necessity they had to be instructed, and they were instructed, upon each of them in as concise a manner as the composite factual situation would permit. The resumé given by the court demonstrates that the court patiently and painstakingly presented to the jury a clear picture of the issues developed and the pos-

sible solutions thereto. Not a prejudicial utterance is to be found in the lengthy charge.

[11-19] It is contended that 14 specified instructions contain erroneous propositions of law. The contrary is true as will appear from the following comments upon them considered in their order as presented by appellant. (1) Those cited under (1) pertain to the resolution of ambiguities found in the contract and are elementary. (2 and 3) These were explanations of the significance of the contemporaneous collateral agreement and of the conflicting testimony concerning priorities. Appellants were in no way prejudiced by them if erroneous, because the jury by their answer to special interrogatory six found in appellants' favor on the points involved. (4) This instruction explained the significance of defendants' two alternative positions. The answers to interrogatories two, three and four were also in appellants' favor in respect to instruction 4. Therefore, the latter could not have been prejudicial. (5) This instruction merely submitted to the jury the question whether the delay of respondents came within the terms of the contract relating to "causes beyond the control of the subcontractors"—a question proper for jury determination. (6) This instruction told the jury the consequences which would necessarily follow if they believed the testimony of either of two witnesses contradicting each other. Although the testimony related to the question whether there had been a parol modification of a written instrument, the determination of that question was unnecessary to a verdict in favor of respondents, in view of the "yes" answer given to special interrogatory seven. If the answer had been "no," then a determination of the question of oral modification would have become a prerequisite to a proper disposition of the case. (7) This instruction involves the construction of the contract clause quoted in instruction (5) supra. (8) The criticism of this instruction is that it contains an "inference" prejudicial to appellants. The implication referred to arises from that portion of the instruction concerning the letters of respondents mentioned in interrogatory 12, supra, which advises the jury "that plaintiff was not obligated to accept any new offer from the defendants provided the defendants were in default at the time." Appellants contend that the quoted portion of the instruction implies that appellants would be obligated to accept a new offer if the plumbers were not in default. Such contention would be unwarranted even if the quoted sentence only be considered. But, conceding the asserted implication, the court eradicated it by the following: "If they [the plumbers] were not behind * * * then there would be no justification for such notices" which were the subject of the instruction. (9) Two of the instructions here complained of as confusing elucidate contingencies which the jury had to consider and thus viewed are lucid, clear and intelligible. In effect they advised the jury what conclusion they must derive upon finding which of two factual situations was true. The language employed is carefully chosen to enable the jury to comprehend the complicated issues. Appellants in the same connection complain of the instruction with reference to respondents' protracted delay. By the statements made the court in substance told the jury that the delay in carrying out the contract constitutes no defense if (a) the defendants have represented to the builder at the time of the contract that they had all the materials on hand or (b) if the contract required them to have the materials for the job on hand. Such language is not only free from error but was favorable to appellants. (10) This is the orthodox instruction on proximate cause and applies to actions ex contractu as well as ex delicto. The fact that it is more frequently employed in actions sounding in tort rather than in contract does not impair its propriety in the latter. (11) This is the customary instruction with reference to the failure of a litigant to produce stronger evidence than that which he has offered. Appellants complain of it on the ground that "it does not appear that there was any stronger evidence than that produced by either party." If so, it prejudiced neither party. (12) This instruction was that if the builder prevented respondents' performance, such performance was excused. This is an elemental proposition of law,

pertinent and harmless. (13) Appellants criticize the court's reference to "contract or contracts" in this instruction. In the course of the trial there was produced the original written contract, and evidence of a contemporaneous oral agreement, a subsequent written modification, a subsequent oral modification, a subsequent oral modification of the written modification, an executed oral modification, an offer of compromise and the final contract with the new plumber. From the midst of this jungle of conflicting evidence it would have been difficult for a Cardoza or a Holmes to hew a straight path to the ultimate fact. Since it was not the primary function of the trial court to make the findings, it submitted all the evidence of a contract received with this instruction that if the builder had breached its contract the defendants would be relieved of their obligation to perform,—a Hornbook principle. If there was error, it was harmless. (14) The gist of the criticism of the 14th instruction is that there was no evidence upon which to predicate it. The instruction is a definite direction to the jury that if "after entering into the formal contract" the builder insisted upon a substantial change in the manner of defendants' "performance of a material portion of said contract," and "should you find that said change * * * required defendants to expend additional time and money in effecting said change * * *" then defendants are not to be held to a strict compliance. The record reveals many pages of testimony bearing directly or indirectly upon the questions of whether there was a subsequent agreement, whether there was a compliance with it, whether such compliance caused additional delay, and whether the delay, if any, was excused. Such a plethora of evidence required the instruction.

The above considerations amply demonstrate that the special interrogatories submitted and the amplifying instructions given undoubtedly facilitated the jury in the discharge of its duty. It cannot be said that appellants suffered prejudice thereby.

The judgments are affirmed.

McCOMB, and WILSON, JJ., concur.

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90 Cal.App.2d 861

BISHOP et al. v. FREEMAN et al.

Civ. 16640.

District Court of Appeal, Second District, Division 1, California.

March 29, 1949.

1. Trusts ⚷89(2)

In action to establish that title to a dwelling house held by one defendant was held in trust for plaintiffs, evidence sustained finding that plaintiffs paid one-half of the purchase price and that defendants were to pay remainder of purchase price in monthly installments on behalf of themselves and not on behalf of plaintiffs as rent.

2. Appeal and error ⚷931(1), 1010(1)

The findings of the trier of fact can be disturbed on appeal only if, viewing evidence in the light most favorable to respondents, indulging in every legitimate inference in support of findings, result is a conclusion that there is no substantial evidence to support findings complained of.

3. Husband and wife ⚷270(8)

Evidence established that agreement whereunder a dwelling house was purchased in name of one of defendants, with community property of plaintiffs constituting the downpayment, and with defendants to pay remainder of purchase price in monthly installments, was valid as having been made with knowledge and consent of plaintiff husband.

4. Appeal and error ⚷882(3)

Judgment would not be reversed on appeal on a theory different from that on which action was based.

◆

Appeal from Superior Court, Los Angeles County; Robert Clifton, Judge.

Action by John L. Bishop and Lottie M. Bishop against Claude R. Freeman and Helen Freeman, to establish that realty, title to which had been taken in the name of defendant Claude R. Freeman, was held by him in trust for plaintiffs. From an adverse judgment, plaintiffs appeal.

Judgment affirmed.

Gaines Hon, Joseph W. Jarrett, and Joseph A. Zahradka, Jr., all of Los Angeles, for appellants.

Dee B. Tanner, of Los Angeles, for respondents.

WHITE, Justice.

This is an action by John L. and Lottie M. Bishop, husband and wife, against Claude R. Freeman, son of Mrs. Bishop by a former marriage, and his wife Helen Freeman, to establish that a parcel of real property, title to which had been taken in the name of Claude R. Freeman, was held by him in trust for Mr. and Mrs. Bishop. After trial without a jury, judgment was rendered that defendant Claude R. Freeman held the property in trust "jointly, that is, one-half for plaintiffs and one-half for defendants, subject to agreement that defendants will make all payments on the balance encumbrance executed by Claude R. Freeman to the original vendor." From such judgment plaintiffs have appealed.

Plaintiffs alleged in their complaint:

"On or about December 1st, 1943, plaintiffs, then residing in Santa Barbara, California, orally requested defendant Claude R. Freeman to negotiate a purchase for said plaintiffs of a certain parcel of real property on which was located a duplex residential building, * * * That this property is by street addresses more commonly known as 10302 Ilona Street, * * and 2333 Fox Hills Drive, West Los Angeles, California, which latter part has at all times herein mentioned been occupied by defendants as tenants. That for reasons of convenience it was orally agreed by plaintiffs and defendants that defendant Claude R. Freeman was to take title to said real property. That defendants orally agreed to convey title to said premises unto the plaintiffs upon their demand. That the purchase price of said property was $6500.00 one-half payable in cash, balance in monthly installments of $35.00 per month. That defendants and each of them orally agreed to pay plaintiffs for rental of one-half of said premises purchased, the sum of $35.00 per month, due the plaintiffs, directly to the mortgagee to apply on the balance due on the mortgage. That defendant, Claude R. Freeman, promises plaintiffs that he would complete the purchase negotiations for them. That said plaintiffs delivered to defendants the sum of $3682.73 to complete the purchase. That defendant, Claude R. Freeman, out of this sum paid the vendor $3250.00, the costs of escrow of an undetermined sum and took title to said real property in his own name as a married man. That neither of the defendants have contributed any part of the consideration which has been paid unto the vendor for the sale of said premises."

Plaintiffs further alleged that a relation of trust and confidence existed between plaintiffs and defendants; that defendants have refused upon demand to execute a deed to the premises.

It is undisputed that plaintiffs furnished the down payment of one-half of the purchase price, and that defendant Claude R. Freeman handled the negotiations and took title in his own name. Defendants by their answer, however, alleged that the agreement between the parties was that defendant Claude R. Freeman was to buy the property in his own name and each was to pay one-half of the purchase price; Mrs. Bishop was to furnish the down payment of $3250 and Claude R. Freeman was to execute a purchase-money trust deed for the balance, payable at the rate of $35 per month; that "each was to live in one-half of said double house as his or her own property so long as he or she and their respective spouses should live, further, that should Lottie M. Bishop ever desire to hold title in her own name, then and in that event, Claude R. Freeman would give a deed establishing title to said property in the plaintiffs and defendants as joint tenants, all of which the defendant Claude R. Freeman has now and at all times been ready and willing to do."

Defendants further alleged that they were willing to sell the property and divide the proceeds or give plaintiffs a deed to a one-half interest; and further pleaded that the agreement set forth in the complaint was invalid under the statute of frauds.

The trial court found that there was no agreement as pleaded in the complaint; that the plaintiffs paid one-half of the purchase price and the defendants were to pay $35.00 per month on the balance for and on behalf of themselves and not on behalf of the plaintiffs or as rent.

Appellants, while recognizing the well settled rule that the findings of the trier of fact, if supported by any substantial evidence, may not be disturbed on appeal, nevertheless urge that the judgment herein should be reversed on the ground of insufficiency of the evidence. They urge that Mr. Freeman stood in a position of trust with his mother and stepfather; that his explanation that he was to pay for his half interest by paying off the trust deed is unbelievable; that the son, despite receiving financial help from his mother throughout his life, has taken a mercenary attitude in attempting to enforce an agreement which if it existed was unconscionable, against his mother, who was so ill that the first trial of the cause resulted in a mistrial and two sessions of the second trial had to be held at her bedside. It is further pointed out that Mr. Freeman permitted the water service to be placed in the name of Mr. Bishop; that he had his mother registered as owner with the OPA in order that she might evict the tenant; that he and his wife each made a holographic will leaving the property to Mrs. Bishop. Appellants cite Schwarting v. Artel, 40 Cal.App.2d 433, 105 P.2d 380; in support of their proposition that the present cause discloses a breach of a fiduciary duty requiring that the judgment be reversed with directions to enter judgment for plaintiffs.

[1] Appellants' contention cannot prevail. The record discloses that the trial court was confronted with a problem in the veracity of witnesses, parties to the action, who directly contradicted each other as to their oral understandings. Mrs. Bishop testified that the son's payments of $35 per month actually constituted rent which for convenience he applied directly on the trust deed payments. Mr. Freeman, on the contrary, testified that the understanding was that each family was to own a one-half interest; that the plaintiffs furnished their half of the purchase price and left it up to him to arrange to pay his half any way he saw fit. The undisputed facts are that title was taken in Mr. Freeman's name with the consent of the plaintiffs; that he did in fact pay his half by executing the purchase-money note and trust deed as to which the plaintiffs assumed no liability.

[2] The findings of the trier of fact can be disturbed only if, viewing the evidence in the light most favorable to respondents, indulging in every legitimate inference in support of such findings, the result is a conclusion that there is no substantial evidence to support the findings complained of. Such conclusion cannot be reached on this appeal. In the circumstances presented by this cause, the finding of the trial court, supported by the only certain and uncontradicted evidence in the record, that a trust resulted only to the extent of the respective contributions of the parties toward the purchase price, must be upheld. The case of Schwarting v. Artel, supra, relied on by appellants, is not controlling here. That case was concerned with a breach of duty by an agent who made a secret profit from a transaction conducted on behalf of his principal. In this cause there was no concealment, and as the trial court found, no relationship of trust and confidence.

[3] Appellants' second point is that community property of appellants was used to purchase the duplex in question, and Mr. Bishop had the sole right of management and control, and therefore any dealings by Mr. Freeman with any one other than Mr. Bishop were of no force or effect. The record discloses substantial evidence, including the testimony of Mr. Bishop himself, that what was done was with Mr. Bishop's knowledge and consent.

[4] Appellants finally assert that "Respondents' alleged agreement that they were to care for appellants as long as they lived, was breached and fully disregarded by respondents even by their own testimony and therefore the consideration failed." Neither the pleadings nor the findings contain any reference to such an agreement. The agreement as testified to by respondents was that if respondents should care for the appellants until their deaths, then respondents should have all of the property. The

present action was not based on a breach of such assumed agreement.

For the foregoing reasons, the judgment is affirmed.

DORAN, Acting P.J., concurs.

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90 Cal.App.2d 757

STRAUSS v. STRAUSS.

Civ. 16822.

District Court of Appeal, Second District, Division 2, California.
March 22, 1949.

1. Judgment 🔑818(4, 5, 6, 7)

A foreign decree regular on its face is entitled to presumption of validity, but it is always open to person against whom judgment is attempted to be used, to show by evidence other than record of judgment, and even by evidence opposed to recitals contained in the record, that court purporting to give judgment was without jurisdiction either of cause or of parties; and if such lack of jurisdiction is made to appear judgment must be regarded as a nullity.

2. Judgment 🔑181(2), 185, 186

Motion for summary judgment presents question whether defendant has stated any facts which give rise to a triable issue or defense, and trial court in considering motion may not determine issue itself, but in passing upon motion, facts alleged in affidavits of parties against whom motion is made must be accepted as true; and affidavits to be sufficient need not necessarily be composed wholly of strictly evidentiary facts. Code Civ.Proc. § 437c.

3. Judgment 🔑181(15)

Where plaintiff brought action on foreign judgment alleging that defendant appeared and joined issue, and copy of judgment attached to complaint and made part thereof recited that defendant was personally served and represented by counsel, but defendant answered denying that he appeared or that any appearance was authorized and that he never was served and did not appear personally or through an attorney, triable issue as to foreign court's jurisdiction was raised and precluded summary judgment for plaintiff. Code Civ. Proc. § 437c.

Appeal from Superior Court, Los Angeles County; Stanley N. Barnes, Judge.

Action by Norman P. Strauss against Paul A. Strauss on a judgment obtained by plaintiff's assignor in another state. From the judgment, defendant appeals. Reversed.

William H. Brawner, of Los Angeles, for appellant.

Harry Sherr, of Los Angeles, for respondent.

WILSON, Justice.

From a summary judgment in the sum of $4,680, together with interest and costs entered against him pursuant to section 437c of the Code of Civil Procedure, defendant appeals.

This action is on a judgment obtained by plaintiff's assignor in the Superior Court of Cook County, Illinois. Plaintiff alleges in his complaint that defendant appeared and joined issue in the Illinois action. A copy of the judgment is attached to the complaint and made a part thereof; the judgment recites that defendant was personally served in Los Angeles and that he was represented in the proceedings by counsel, to wit, one Leonard W. Stearns, and that no answer or other pleading having been filed a default judgment was rendered against him.

Defendant filed an answer by which he denied generally and specifically the allegations set forth above. Plaintiff thereupon filed a notice of motion to strike the answer and for summary judgment. In opposition to this motion defendant filed an affidavit in which he alleges that he has a good defense on the merits to all plaintiff's claims; that he did not appear in the Illinois action; that the attorney alleged to have appeared on his behalf was unknown to him and any appearance of such attorney on his behalf was unauthorized and further that he was never served in said action and did not appear either personally or through an attorney.

Defendant contends that the trial court erred (1) in finding there was no triable issue of fact raised by the answer, and (2) in determining an issue of fact raised by the pleadings.

The complaint contains an allegation that defendant appeared in the proceedings in Illinois and the judgment, which was incorporated by reference, recites that due service had been made upon defendant and that he appeared in the action. By the denials in his answer defendant raises the issue as to whether he did in fact appear in those proceedings or was served with process.

[1] It may be conceded, as contended by plaintiff, that a foreign decree regular on its face is entitled to a presumption of validity. However, as stated in Re Estate of Hancock, 156 Cal. 804, 807, 106 P. 58, 59, 134 Am.St.Rep. 177, "* * * it is always open to the person against whom the judgment is attempted to be used to show by evidence other than the record of the judgment, and even by evidence opposed to recitals contained in such record, that the court purporting to give the judgment was without jurisdiction either of the cause or of the parties. * * * If such lack of jurisdiction is made to appear, the judgment must be regarded as a nullity." In re Estate of Pusey, 177 Cal. 367, 373, 170 P. 846; Mutual Life Ins. Co. v. Franck, 9 Cal.App.2d 528, 540, 50 P.2d 480; Mumma v. Mumma, 86 Cal.App.2d 133, 194 P.2d 24.

Section 437c of the Code of Civil Procedure requires that an affidavit in opposition to a motion for summary judgment shall set forth facts showing that the party has a good and substantial defense to plaintiff's action. By defendant's affidavits he asserts that he has a good defense to plaintiff's cause of action by reason of the fact that he was never personally served in the Illinois action, he did not appear and did not authorize anyone to appear on his behalf in the proceedings.

[2, 3] A motion for summary judgment presents the question whether or not defendant has stated any facts which give rise to a triable issue or defense. The trial court in considering the motion may not determine the issue itself. In passing upon the motion the facts alleged in the affidavits of the parties against whom it is made must be accepted as true and the affidavits to be sufficient need not necessarily be composed wholly of strictly evidentiary facts. Eagle Oil & Refining Co. v. Prentice, 19 Cal.2d 553, 555, 556, 122 P.2d 264; Slocum v. Nelson, 72 Cal.App.2d 33, 37, 163 P.2d 888.

If defendant is able to establish that the Illinois judgment is void upon the ground that the court rendering it did not have jurisdiction, it will constitute a good defense to plaintiff's action, and that issue having been raised, defendant should not be summarily deprived of a full hearing at a trial of the action.

Judgment reversed.

MOORE, P. J., and McCOMB, J., concur.

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90 Cal.App.2d 820

STEWARD v. PAIGE.

Civ. 3745.

District Court of Appeal, Fourth District, California.

March 26, 1949.

Hearing Denied May 23, 1949.

1. Husband and wife 🔑262(1), 263

Statutory presumption that property acquired by a married woman by an instrument in writing is her separate property is not conclusive and evidence may be admitted to show that realty is community although granted to wife as her property in fee simple. Civ.Code, § 164.

2. Appeal and error 🔑1008(1)

Ordinarily, whether statutory presumption that property acquired by a married woman by an instrument in writing is her separate property has been overcome by evidence is for trier of fact. Civ.Code, § 164.

3. Appeal and error ⚿1010(1)

Where trial court's conclusions are manifestly without sufficient support in the evidence, its judgment is not conclusive on appeal.

4. Evidence ⚿53, 597

A presumption is "evidence" and is sufficient to support a verdict of a jury or a finding of court, unless overcome by satisfactory evidence.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Evidence".

5. Husband and wife ⚿264

In quiet title action by husband against wife's trustee in bankruptcy to establish that certain property was community property rather than wife's separate property, where trustee introduced evidence indicating that property was community property, presumption that property acquired by wife in her name by an instrument in writing is her separate property was dispelled. Civ. Code, § 164.

6. Husband and wife ⚿254

Where wife acquired lot at a tax sale in her name with community funds and thereafter husband and wife erected a house thereon with community funds, both parties treated property as community, husband had a community interest therein as against claim of wife's trustee in bankruptcy.

7. Appeal and error ⚿173(9)

In husband's quiet title action against wife's trustee in bankruptcy to establish husband's community interest in certain realty in name of wife, where trustee did not plead defense of res judicata and ruling of federal District Court upon an order determining exemptions of bankrupt was never placed in evidence, trustee could not, on appeal, raise question of res judicata.

8. Husband and wife ⚿264, 270(9)

In husband's action against wife's trustee in bankruptcy to quiet title to realty to establish husband's community interest in realty and improvements thereon, trial court's finding that funds allegedly stolen by wife were commingled with community funds and applied to the purchase price of property was error as unsupported by evidence or pleadings.

◆

Appeal from Superior Court, Fresno County; Arthur C. Shepard, Judge.

Action by Irving W. Steward against James V. Paige, as trustee in bankruptcy in the matter of Malvina A. Steward, bankrupt, to quiet title to certain real property wherein defendant cross-complained. From a judgment in favor of cross-complainant, plaintiff appeals.

Reversed.

Edward L. Kellas, Richard Z. Lamberson and Lamberson & Thomas, all of Fresno, for appellant.

L. Kenneth Say, of Fresno, for respondent.

MUSSELL, Justice.

Plaintiff appeals from a judgment in favor of cross-complainant in an action to quiet title to real property in Fresno County.

It is alleged in the complaint that plaintiff and Malvina A. Steward are husband and wife; that on or about the 26th day of March, 1946, Malvina A. Steward was adjudicated a bankrupt and defendant James A. Paige was appointed, and is now trustee in bankruptcy of the estate; that the real property here involved was acquired with community funds of plaintiff and Malvina A. Steward and that at all times said property has been and now is the community property of said parties and not the separate property of Malvina A. Steward; that plaintiff is in possession of said community property and has the control and management thereof and that defendant claims an interest in said property adverse to plaintiff.

The answer and cross-complaint contain allegations that the defendant claims an interest in said real property; that defendant has succeeded to and taken over all the interest of the bankrupt therein; that plaintiff has no right in the property; that title thereto has always been and remained in the bankrupt, Malvina A. Steward, as her own separate property and that title thereto should be quieted in favor of defendant and cross-complainant.

The trial court found in accordance with the allegations of the answer and cross-complaint that the property was the separate property of the bankrupt and it is the contention of plaintiff that there was no evidence to sustain the finding of the court as to the separate nature of the property, and that it was conclusively established that it was community.

Defendant's claim to title is based on the presumption stated in section 164 of the Civil Code which provides in part as follows: "* * * but whenever any real or personal property, or any interest therein or encumbrance thereon, is acquired by a married woman by an instrument in writing, the presumption is that the same is her separate property * * * unless a different intention is expressed in the instrument". It is conceded that the property was acquired by Malvina A. Steward at a tax sale in 1940; that at the time she was the wife of plaintiff and that the title was taken in her name.

The evidence introduced by plaintiff to overcome the presumption, and in support of his claim to title, was that plaintiff and Malvina A. Steward were married in 1930 and are now husband and wife; that in 1940, Mrs. Steward, who was then an attorney at law, purchased the property involved in this action (then a vacant lot) at a tax sale for $250, using for this purpose cash supplied by plaintiff out of community funds; that the Stewards were, and for several years had been interested in building a home and decided to build on the lot in question; that they presented plans and blueprints to a builder in Fresno who informed them that he could build the house for approximately $13,000; that both parties made application to the Prudential Life Insurance Company for, and secured a construction loan in the sum of $8,500; that in connection with the application plaintiff signed a "sworn statement by owner" and a "construction loan payment sheet"; that the receipt book issued by the Insurance Company, in which payments by the parties were entered contained the following notation: "Present Owner: Irving W. and Malvina A. Steward"; that a fire insurance policy was issued to "Irving W. Steward and Malvina A. Steward, husband and wife, as joint tenants"; that plaintiff opened a special bank account in his name from which all bills pertaining to the construction of the home were paid by him; that plaintiff deposited $1,500 obtained from his employee savings fund in the special account, together with various amounts from his earnings approximating $3,100 in all, and that Mrs. Steward contributed $1,200 to the same account; that from October 1942, to January 1946, plaintiff was in the U. S. Navy and during that time the loan payments of $56 per month were made by plaintiff's wife from community funds in the amount of $2,100 left with her for that express purpose by plaintiff; that in 1945, a payment of $1,500 was made by Mrs. Steward on the loan, which payment, according to her testimony, represented a fee collected by her as administratrix of an estate; that the notice of completion, recorded at the time the house was completed, was signed and acknowledged by plaintiff and his wife as owners of the property; that plaintiff and his wife as owners signed an agreement to protect the property from a lien; that in an action to foreclose a mechanic's lien against plaintiff and his wife the complaint alleged that plaintiff and Malvina A. Steward were the owners of the property here in question; that in the answer thereto signed by Malvina A. Steward as attorney for defendants, and verified by her, the truth of the allegation was admitted and the trial court in its findings of fact found it to be true. Plaintiff testified that he did not intend at any time to make a gift of the property involved, or any interest therein, to his wife; that there was never any agreement entered into between plaintiff and his wife that the property was to be her separate property and that he never intended it to become her separate property because practically his entire savings for fifteen years went into the house and lot.

At the conclusion of plaintiff's case the defendant offered and read into evidence certain parts of the testimony of Malvina

A. Steward taken in the bankruptcy hearing. By stipulation it was agreed that the transcript of her testimony might be used as a deposition. Mrs. Steward's testimony so produced and read into the record by defendant's counsel was in part as follows:

"Q. And you kept this in your name? A. That is right. When we built the house and got a loan from the title company, they said, of course, the loan was in both our names, and we both were putting the money in. It didn't make any difference whose name it was in.

"Q. Did you have a conversation with your husband at that time? A. Yes, definitely. We didn't even think about it. We knew it was our money that was building it. We both signed for the loan and it was just community property, that is all.

"Q. Do you remember whether or not there were any statements made about your leaving it in your own name? A. I told him it was all right. I think we discussed it. I said, 'It doesn't make any difference. It is community property. For us both.' * * *

"Q. Mrs. Steward, did you ever discuss the title to this Wilson Avenue home with your husband? A. Yes, I think we did when we built.

"Q. And will you tell the Court what was said? A. I don't remember exactly, except that I told him it wasn't necessary to be in both our names. The title company had so advised. I think that came up at the time we built, that it was community property. There never would be any question about it."

[1] The presumption with which we are here concerned is not conclusive and evidence may be admitted to establish that real property is community even though it is granted to one spouse alone as his or her property in fee simple. Tomaier v. Tomaier, 23 Cal.2d 754, 757, 146 P.2d 905. The question here is whether the presumption has been overcome and dispelled as a matter of law by the testimony produced by both parties to the action.

[2-4] Ordinarily it is for the court or jury to determine whether or not the evidence against the presumption is sufficient to overthrow it. Stafford v. Martinoni, 192 Cal. 724, 738, 221 P. 919; Smellie v. Southern Pacific Co., 212 Cal. 540, 550, 299 P. 529; Duehren v. Stewart, 39 Cal.App.2d 201, 208, 102 P.2d 784; Nichols v. Mitchell, 32 Cal.2d 598, 197 P.2d 550. If the trial court's conclusions are manifestly without sufficient support in the evidence its judgment is not conclusive on appeal and the presumption may be controverted by other evidence, direct or indirect. Nichols v. Mitchell, supra, 32 Cal.2d at page 605, 197 P.2d at page 555. A presumption is evidence and is sufficient to support a verdict of a jury or a finding of the court, unless overcome by satisfactory evidence. Westberg v. Willde, 14 Cal.2d 360, 365, 94 P.2d 590. In the last mentioned case, 14 Cal.2d at page 365, 94 P.2d at page 593 it is said: "From these decisions, and others of this court which might be cited, the rule is firmly established in this state that a presumption is evidence and is sufficient to support a verdict of a jury or a finding of the court, unless overcome by satisfactory evidence. (Citing cases.)"

In Simon v. City & County of San Francisco, 79 Cal.App.2d 590, 599, 180 P.2d 393, in discussing the presumption of due care the court held that the presumption has no basis upon which to operate when the testimony described the acts and conduct of the injured party prior to and at the time of the accident.

[5] In the instant case the defendant himself introduced evidence to the effect that the property was the community property of plaintiff and Mrs. Steward, thus dispelling the effect of the presumption upon which he relies. The presumption cannot stand against the facts, and the facts having been proven contrary to the presumption, it is overcome and dispelled. Savings & Loan Soc. v. Burnett, 106 Cal. 514, 530, 39 P. 922.

[6] As is said in Levin v. Brown, 81 Cal.App.2d 913, 917, 185 P.2d 329, 331, in discussing the presumption that a person takes ordinary care of his own concerns (Code Civ.Proc., sec. 1963, Subd. 4): "It is the established rule that when satisfactory proof concerning a fact is wholly irreconcilable with that presumption 'the lat-

ter is dispelled and disappears from the case.'" In the instant case the testimony introduced by defendant himself is "wholly irreconcilable" with the presumption upon which he relies, and the uncontradicted testimony offered by plaintiff clearly establishes the community character of the property involved. Under such circumstances the presumption is overcome. Wahrenbrock v. Los Angeles Transit Lines, 84 Cal. App.2d 236, 241, 190 P.2d 272. The proof is clear that the property in question was purchased with community funds and that plaintiff did not make a gift of it to his wife. There is no suggestion in the record that the separate property of either spouse was used in the purchase or improvement of the home. Both parties treated the property as community and the documents executed by them in the construction of the house do not indicate that there was any intention to regard it as the separate property of either of them.

[7] During the course of the trial defendant sought to introduce in evidence a ruling of the United States District Court upon an order determining exemptions of the bankrupt. Defendant now maintains that this order was res adjudicata in this case, however, this defense was not pleaded, the document was never in evidence and the defendant cannot now urge the doctrine of res adjudicata. Madruga v. Borden Co., 63 Cal.App.2d 116, 123, 146 P.2d 273. Furthermore this defense is waived unless pleaded. The question is not properly before us. Reeh v. Reeh, 69 Cal.App.2d 200, 206, 158 P.2d 751.

[8] The trial court found that stolen funds were commingled with community funds and applied on the purchase price of the property here involved. In this connection it appears that shortly after plaintiff's return from the Navy in 1946, he found that his wife had been guilty of the theft of various sums of money for which she had been imprisoned and that involuntary bankruptcy proceedings had been commenced against her. Defendant at the trial asked leave to file an amendment to his answer alleging therein that a portion of the stolen funds were used by Malvina A. Steward to discharge the indebtedness due on the property to the Prudential Insurance Company. The court denied the right to file the amended answer and struck out all the testimony of the witness Mrs. Clevenger which might have been addressed to the subject matter of the amendment, including all testimony addressed to the matter of "pursuit of money into the investments in the place". The finding therefore has no support in the evidence or pleadings.

In view of our conclusion that the judgment should be reversed it is unnecessary to pass upon the question of the validity of the homestead filed by plaintiff.

Judgment reversed.

BARNARD, P.J., and GRIFFIN, J., concur.

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90 Cal.App.2d 762

PEOPLE v. CORONADO et al.

Cr. 2105.

District Court of Appeal, Third District, California.
March 22, 1949.

1. Prostitution 🔑1

Statute defining pimping contemplates a type of pimping when a man lives from the earnings of a known prostitute and a type of pimping when a man derives his support or maintenance in whole or in part from the earnings of a known prostitute. Gen.Laws, Act 1907.

2. Prostitution 🔑4

Evidence showing that defendant is a male person, that he had knowledge that woman was a prostitute, that her earnings in question were secured from prostitution, and that he derives support, in whole or in part, from such earnings knowing they were derived from her prostitution, sustains conviction of pimping. Gen.Laws, Act 1907.

3. Prostitution 🔑4

Evidence that defendant knew that girl was a prostitute, that defendant took girl and third person in his automobile to labor camps so that girl could engage in prostitution, that girl paid money received from prostitution to third person, that third person gave part of the money to defendant, who knew that money had been earned by girl in prostitution, and that defendant used the money to replenish oil and gas in automobile, was sufficient to sustain conviction of pimping. Gen.Laws, Act 1907.

4. Prostitution ⚿1

Earnings of a known prostitute need not be directly paid by her to an accused in order to make him guilty of pimping. Gen.Laws, Act 1907.

5. Prostitution ⚿1

Where a man receives knowingly the earnings of a prostitute and applies them to his support, he is guilty of pimping even though his income from other sources is sufficient for his support. Gen.Laws, Act 1907.

◆

Appeal from Superior Court, Sacramento County; Raymond T. Coughlin, Judge.

Richard Coronado and John Monteiro were convicted of pimping, and John Monteiro appeals from order denying motion for new trial.

Order affirmed.

Clifford R. Lewis and McGilvray & McGilvray, all of Sacramento, for appellant.

Fred N. Howser, Atty. Gen., and Doris H. Maier, Deputy Atty. Gen., for respondent.

THOMPSON, Justice.

The defendant John Monteiro has appealed, under Section 1237 of the Penal Code, from an order denying his motion for new trial. He was jointly charged with Richard Coronado, in the fourth count of an information, and convicted by a jury, of the crime of pimping, committed contrary to the provisions of the Statutes of 1911, page 10, as amended in 1921, at page 96. 1 Deering's Gen.Laws, p. 856, Act 1907, Appendix to Penal Code, Pt. 3, p. 750. The charge of pimping consisted of deriving support and maintenance, in part, from earnings from prostitution of a known prostitute. A portion of said receipts was expended by the appellant in purchasing oil and gas for his automobile. A motion for new trial was denied. On motion of the appellant the judgment was suspended and he was granted probation. The conviction of the co-defendant is not involved on this appeal.

The appellant contends: That the court erred in denying his motion for new trial, because there is a lack of evidence to support the verdict; that he received his pay for conveying the woman in question and her friend, Coronado, in his automobile, to and from a labor camp at Woodland and a Chinese camp south of Sacramento, without knowledge that she was a prostitute or that their missions at those camps were for the purpose of engaging in prostitution; that his income was adequate from other legitimate sources to fully pay for his support and maintenance and that there was therefore a lack of evidence to support the finding that he *derived* his support or maintenance, in part, or at all, from the earnings of prostitution.

There is a conflict of evidence regarding the essential elements of the crime of pimping. We are of the opinion the evidence is adequate to support the verdict and order denying appellant's motion for new trial. The statute, as amended in 1921, which defines and prohibits pimping, reads in part:

> "1. Any male person who, knowing a female person to be a prostitute, shall live or derive support or maintenance in whole or in part, from the earnings or proceeds of the prostitution of such prostitute, * * * shall be guilty of a felony, to wit: pimping, * * *."

The evidence shows the appellant is a discharged member of the United States Navy, and that he receives a pension from the Government of $55 per month. He lived with his mother and stepfather at Sacramento, and paid them $15 per week for board and room. When he was short of funds he paid them less. He was a friend of the co-defendant, Coronado. He owned an automobile, for the purchase price of which he borrowed $250 from a local bank, upon which indebtedness he was paying $22 per month. He had been employed by the Campbell Soup Company in Sacramento for about two months, for which services he received $1.20 per hour, or about $42 per week.

The young woman who is involved in this case was a sixteen year old school girl. She came to Sacramento and met Coronado, a barber, who seduced her and induced her to become a prostitute. He was a friend of this appellant. She subsequently regularly engaged in prostitution for pay. June 12, 1948, as the appellant, Monteiro, was driving his car in Sacramento, he was hailed by Coronado and introduced to the woman. He was told she was engaged in prostitution. The woman testified that Monteiro took them in his car to her home; that all three discussed a sort of joint enterprise, and agreed to go together, and two days later went in his car to a labor camp on King's ranch near Woodland, and later to a Chinese camp south of Sacramento, where she promiscuously engaged in prostitution with Filipinos and Chinese laborers, for which she was paid $5 for each act of intercourse; that she turned her receipts over to her friend Coronado, and that it was agreed between the three persons that Monteiro would be paid from her earnings the sum of $1 for each act performed, as his share of the proceeds for the use of his car and his services. Under that arrangement he took them to both camps where he was paid by Coronado at least the total sum of $10. He was present and knew that the prostitution was going on. The woman testified that she heard the discussion between the men regarding Monteiro's share of the proceeds and knew the money was paid to him at that time. Monteiro testified that he spent that money, or a part of it, the following day to replenish the oil and gas which was consumed in that enterprise. Clearly the appellant knew that the woman was a prostitute; that she received the money in question from said prostitution, and that the payments to him were made directly from her earnings from said prostitution. It follows that the money which he received from the prostitute's earnings were applied, in part, to his support and maintenance.

[1-3] It has been held the statute in question contemplates two types of pimping. One type is defined as, when a man *lives* from the earnings of a known prostitute. The other is, when the accused person *derives his support or maintenance*, in whole or *in part*, from the earnings of a known prostitute. 74 A.L.R. 337, note. In the present case both types of pimping were charged. The evidence supports the latter. No demurrer to the information for uncertainty, or at all, was filed. It has been held that, upon conviction for pimping, under the statute in question, for deriving "support or maintenance" in part from the earnings of a known prostitute, the judgment should be affirmed when the evidence shows that: (1) The accused person is a male person; (2) he had knowledge that the woman is a prostitute; (3) her earnings in question were secured from her prostitution; and (4) he derived support, in whole or in part, from such earnings knowing his receipts were derived from her prostitution. People v. Simpson, 79 Cal.App. 555, 559, 250 P. 403. All of the foregoing elements are supported by the evidence in this case. The woman so testified in detail, except that she did not state that appellant spent that money for his own support. Her evidence was adequately corroborated. He admitted on cross-examination that he spent a portion of that money toward his support. She testified that he knew she was a prostitute; that by agreement he participated in the joint adventure of going to the camps for prostitution purpose; that he knew she engaged in prostitution at those camps and received therefor the sum of $5 for each act of intercourse and turned the proceeds over to her associate, Coronado, who then paid appellant his agreed share of $1 for each act of intercourse. Regarding his application of a portion of said earnings toward his support, the appellant testified:

"Q. What did you do with this money which you took from Bob Coronado? A. I put some gas in my car the next day, changed the oil and stuff, that's all.

"Q. You used it as you would any other money, did you not, * * *? A. Why, it is money, that's all I know.

"Q. You just used it as you would any other money, did you not? * * * A. Yes, sir.

"Q. You mingled it and commingled it with the rest of your money, did you not? A. Yes, I had a few bucks in my pocket."

The foregoing colloquy furnishes ample evidence that appellant's support and maintenance was acquired, in part, from the earnings of a known prostitute.

[4] The statute does not require the earnings of a known prostitute to be directly paid by her to the accused person to make him guilty of pimping. All that it requires is that he "shall * * * *derive* support or maintenance * * * in part," thereby. In this case the appellant was paid from the identical earnings from said prostitution by specific agreement of all parties concerned. That transaction meets the requirements of the statute in that regard.

[5] There is no merit in the contention that the appellant may not be held to have *acquired support or maintenance, in part,* for the alleged reason that his income from other legitimate sources was adequate to support him, and that the earnings of the prostitute were not applied to his *necessary* support or maintenance. The evidence in this case does not furnish satisfactory proof that his income was adequate to defray wholly the cost of his support. But even if it did establish that fact, the statute contains no such qualification or limitation. The words "*necessary* support" are not used in the act. We assume that if such earnings are received knowingly and applied to the support of the accused person, under the circumstances mentioned in the statute, he would be guilty of pimping regardless of his wealth, possessions or legitimate income from other sources. The suggestion that "Such statutes appear to be directed against a *vagrant class* of male who, disdaining other occupation, attaches himself to some prostitute or prostitutes in order to secure means for his livelihood," 42 Am.Jur. 267, sec. 10, has no apparent application to this California statute. That quotation may apply to the statutes of some other jurisdictions, but apparently it has no application to the California statute. The California act does not mention "vagrants," or infer that its provisions are limited to vagrants. Clearly, the California statute is intended to define and prohibit the loathsome practice of pimping as distinguished from the equally obnoxious practice of pandering. We do not think the act was intended to favor opulent pimps over impecunious ones. Both are harmful to good morals and the welfare of society. Indeed, the former seem more objectionable than the latter, and certainly they are more odious. We are satisfied the statute contains no such limitation of its application.

The case of State v. Kanakaris, 54 Mont. 180, 169 P. 42, 43, upon which the appellant relies, has no application to a statute such as is involved in this case. The defendant in that case was charged under Sections 8 and 9 of the Montana statute, Laws 1911, c. 1, with two offenses. Section 8 prohibits the gratuitous receipt, "without consideration" of the earnings of a known prostitute. The question of whether such earnings contribute to the recipient's support or maintenance is not involved in that section. Section 9 prohibits pimping defined as one who "lives with a common prostitute or who depends for his living, in whole or in part, upon money supplied by a fallen woman, *whether that money be earned in legitimate business* or derived from her unlawful occupation." Under the California statute the money acquired must come from the earnings of the illicit intercourse of the prostitute, and must be used toward the recipient's support or maintenance. The Montana court did say that "By enacting section 9, the Legislature evinced a purpose to drive out of this state every vagabond." But that statement appears to be mere dictum. It is immaterial. The judgment was reversed in that case because the verdict found the defendant "guilty of the crime of living upon the earnings of a woman engaged in prostitution as charged in the information," which was not supported by the evidence. The court said in that regard: "The evidence tends to prove him guilty of one [offense] only, while the jury found him guilty of the other one." That case has no application to our statute or the facts of this case.

The other cases relied upon by the appellant are likewise distinguishable from this case. We find no justification for the contention that statutes prohibiting pimping are enacted for the sole purpose of punishing vagrants, vagabonds or impecunious persons.

Several California cases upheld convictions for pimping under this statute for receiving the earnings of known prostitutes from which the accused persons derived support or maintenance, in part. Unfortunately, most of those cases merely state that the judgments are adequately supported by the evidence without reciting the facts. In none of those cases was the point last mentioned discussed. We have found no case which supports the contention of appellant in that regard. We think that construction is unsound and not supported by the language of our statute.

For the foregoing reasons the order denying appellant's motion for new trial is affirmed.

ADAMS, P. J., and PEEK, J., concur.

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SECOND SERIES

33 Cal.2d 654

HUDSON et al. v. CRAFT et al.
S. F. 17807.

Supreme Court of California.
March 22, 1949.

1. Theaters and shows 🔑2

A principal purpose of the public policy relative to boxing matches and prize fights, as expressed by the people, legislature and state athletic commission, is to protect the combatants, primarily from the uncontrolled conduct of promoters and secondarily against their own ill advised participation in an unregulated match. Pen. Code, § 412; Business and Professions Code, §§ 18600–18782; Const. art. 4, § 25¾.

2. Theaters and shows 🔑6(5, 7)

A promoter, who conducts boxing matches or prize fights without a license and in violation of statutory provisions regulating the conduct of such contests, is liable for injuries sustained by a combatant, regardless of the rights as between the combatants, and consent of combatant does not relieve promoter from such liability nor is the doctrine of pari delicto applicable, in view of public policy to protect combatants through continuous and on the spot supervision. Pen.Code, § 412; Business and Professions Code, §§ 18600–18782; Const. art. 4, § 25¾.

3. Pleading 🔑34(7)

On appeal from judgment of dismissal for failure to amend complaint after a demurrer thereto had been sustained, complaint should be liberally construed in favor of pleader.

4. Theaters and shows 🔑6(21)

Complaint alleging that defendants conducted boxing exhibitions without a permit and in violation of statutes and rules of state athletic commission and that plaintiff as a proximate result of solicitations of defendants and for a consideration engaged in such boxing exhibition and was injured sufficiently alleged that defendant's failure to have a permit and to comply with prize fight laws was proximate cause of plaintiff's injury as against special demurrer for uncertainty, ambiguity and unintelligibility. Pen.Code, § 412; Business and Professions Code, §§ 18600–18782; Const. art. 4, § 25¾.

5. Theaters and shows 🔑6(21)

Where complaint in action against carnival proprietors for injuries sustained in boxing exhibition staged by defendants charged non-compliance with all prize fight and boxing regulations, failure to allege which rules of state athletic commission were violated by defendants did not render complaint subject to special demurrer for uncertainty.

◆

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by Guy C. Hudson, a minor, by and through his guardian ad litem, Bernice Hudson, and another against Orville Craft, John Doe and Richard Roe, individually and doing business as Craft Shows, etc., and another to recover for personal injuries sustained by the minor in a boxing match and for medical and surgical expenses incurred by minor's father. From a judgment of dismissal for failure to amend complaint after a demurrer thereto had been sustained with leave to amend, plaintiffs appeal.

Judgment reversed.

Prior opinion, 195 P.2d 857.

Young, Ryan & Whitton and Albert K. Whitton, all of Oakland, for appellants.

Appelbaum & Mitchell and John Jewett Earle, all of Oakland, for respondents.

CARTER, Justice.

Plaintiffs appeal from a judgment of dismissal, because of their failure to amend their complaint, after a demurrer thereto was sustained with leave to amend.

Plaintiff (the reference herein will be to the one plaintiff, the other one being his father who makes a claim for hospital and medical expenses) alleges that he is 18 years of age; that defendants were conducting a carnival where one of the concessions, for which a separate admission fee was charged, consisted of boxing exhibitions; that such concession was conducted in violation of section 412 of the Penal Code, and the Business & Professions Code, Chap. 2 of Div. 8, in that prizes and prize money were given to contestants and no license to conduct the same had been obtained from the State Athletic Commission, and they were not conducted in accordance with the rules of the Commission; that plaintiff, on the solicitation of defendants, and a promise of receiving $5, engaged in a boxing match and suffered personal injuries as the result of being struck by his opponent. Plaintiff's opponent in the match was also made a party defendant but was not served with process.

The basis and theory of liability, if any, in mutual combat cases has been the subject of considerable controversy. Proceeding from the premise that, as between the combatants, the tort involved is that of assault and battery, many courts have held that, inasmuch as each contestant has committed a battery on the other, each may hold the other liable for any injury inflicted although both consented to the contest. McCulloch v. Goodrich, 105 Kan. 1, 181 P. 556, 6 A.L.R. 386, 388; Grotton v. Glidden, 84 Me. 589, 24 A. 1008, 30 Am. St.Rep. 413; Stout v. Wren, 8 N.C. 420 [339], 9 Am.Dec. 653; Colby v. McClendon, 85 Okl. 293, 206 P. 207, 30 A.L.R. 196, 199; Littledike v. Wood, 69 Utah 323, 255 P. 172; Wood v. McKeever, 141 Kan. 323, 41 P.2d 989 (doubts McCulloch case); Strawn v. Ingram, 118 W.Va. 603, 191 S. E. 401; Morris v. Miller, 83 Neb. 218, 119 N.W. 458, 20 L.R.A.,N.S., 907, 131 Am. St.Rep. 636, 17 Ann.Cas. 1047; Teeters v. Frost, 145 Okl. 273, 292 P. 356, 71 A.L. R. 179; Churchill v. Baumann, 95 Cal. 541, 30 P. 770, dictum; Cooley on Torts, 4th Ed., sec. 92; 24 Col.L.Rev. 819; 22 Minn. L.Rev. 546; 79 U.Pa.L.Rev. 509; Royer v. Belcher, 100 W.Va. 694, 131 S.E. 556, 47 A.L.R. 1089, 1092. Being contrary to the maxim volente non fit injuria, Civ.Code, sec. 3515, the courts have endeavored to rationalize the rule by reasoning that the state is a party where there is a breach of the peace, such as occurs in a combat, and that no one may consent to such breach. There are cases expressing a minority view and severe criticism has been levelled at the majority rule, such as, that it ignores the principle of pari delicto and encourages rather than deters mutual combat. See Hart v. Geysel, 159 Wash. 632, 294 P. 570; 22 Minn.L.Rev. 546; Bohlen, Consent as Affecting Civil Liability for Breaches of the Peace, 24 Col.L.Rev. 819; 79 U.Pa.L.Rev. 509; 17 Va.L.Rev. 374; Prosser on Torts, p. 124; McCulloch v. Goodrich, 105 Kan. 1, 181 P. 556, 6 A.L. R. 386, 388; Colby v. McClendon, 85 Okl. 293, 206 P. 207, 30 A.L.R. 196, 199; Royer v. Belcher, 100 W.Va. 694, 131 S.E. 556, 47 A.L.R. 1089, 1092. The Restatement adopts the minority view. An assent which satisfies the rules stated "prevents an invasion from being tortious and, therefore, actionable, although the invasion assented to constitutes a crime." Rest.Torts, sec. 60. An example given thereunder is a boxing match where no license was had as required by law. The only case discovered involving the liability of a third party-promoter of the combat, such as we have in the case at bar, is Teeters v. Frost, supra, where the court, following the majority position as to the liability of the participants as between themselves, was not confronted with any difficulty in deciding that the instigator was liable as an aider and abetter.

There is an exception to the rule stated in the Restatement, reading: "Where it is a crime to inflict a particular invasion of an interest of personality upon a particular class of persons, irrespective of their assent, and the policy of the law is primarily to protect the interest of such a class of persons from their inability to appreciate the consequences of such an invasion, and it is not solely to protect the interests of the public, the assent of such a person to such an invasion is not a consent thereto." Rest.Torts, sec. 61. See also Prosser on Torts, pp. 124–5, and cases cited. It is evident, that the so-called exception and the foregoing discussion has to do only with consent as refuting liability, not with the basic tort upon which the liability is rested, assault and battery. Concerning the bearing of the factor of consent or assumption of risk on liability, the instant case, as will more fully appear from the later discussion herein, clearly falls within the exception stated in section 61 (supra) by reason of the declared public policy of the state.

If liability is predicated on the tort of battery, it might seem to follow that in order to hold the promoter liable, it would be necessary to impose responsibility upon the combatants as to each other on the theory that they are the principals while the instigator is only the aider and abetter. In view of the public policy of this state as expressed by initiative, legislation, the rules of the Athletic Commission, and the Constitution, the promoter must be held liable as a principal regardless of what the rule may be as between the combatants.

From the beginning, this state has taken an uncompromising stand against uncontrolled prize fights and boxing matches. The first session of the legislature condemned prize fighting and made it a felony. Stats.1850, p. 233, sec. 44. The same provision somewhat enlarged in scope was made a part of the original Penal Code in 1872, Pen.Code, sec. 412. A similar act was passed in 1893, Stats.1893, p. 101, which was superseded by an amendment to section 412 of the Penal Code in 1899, Stats. 1899, p. 153. That amendment contained more comprehensive language prohibiting prize fights and boxing matches, but authorized sparring exhibitions in incorporated clubs where a license was obtained, the number of rounds and weight of the gloves was limited and a physician was in attendance. The section was again amended in 1903 to require such sparring matches to be conducted in accordance with rules to be adopted by the local legislative bodies, Stats.1903, p. 409. By initiative measure in 1914, section 412 was again amended, Stats.1915, p. 1930, and has remained the same since then. It goes into detail prohibiting prize fights and boxing matches or exhibitions and reaches all persons connected therewith. It does allow "amateur boxing exhibitions" when no prize is received, but there is a maximum of four rounds of three minutes each, with a minute intermission. The weight of the gloves is fixed and they must be properly padded. Peace officers are required to stop such exhibitions if the contestants are unevenly matched or there is a danger of either of them being seriously injured.

In 1924 an initiative measure was adopted, Stats.1925, p. LXXXIX, now Business and Professions Code, secs. 18600–18782, whereby a State Athletic Commission is created with power to supervise and regulate all boxing matches and all phases of such activity are covered, as appears later herein. In 1942, a section was added to the constitution by which "The Legislature may provide for the supervision, regulation and conduct * * * of boxing and sparring matches or exhibitions; provided, that no boxing or sparring match or exhibitions shall be of more than 12 rounds in length, such rounds to be of not more than three minutes for each round, except that championship matches may, if the approval of the State Athletic Commission is first obtained, be 15 rounds in length, such rounds to be of not more than three minutes duration each. * * *

"The Legislature in the exercise of the power granted herein may amend, revise, or supplement any part of that certain initiative act approved by the electors November 4, 1924, * * *.

"The Legislature shall, however, have no power to take away the effect of the provisions of the initiative act hereinabove cited which allow wrestling and 12-round boxing contests in the State of California. The repeal either in fact or effect of the sections of the above cited act shall rest entirely in the hands of the people of the State of California as heretofore." Cal.Const. art. IV, sec. 25¾. The Business and Professions Code based on the 1924 initiative act comprehensively regulates boxing and prize fighting. It defines a professional boxer, as one who competes for a money prize, Bus. & Prof. Code, sec. 18602. An amateur boxing contest is one where there is no prize money. Id. sec. 18603. No boxing match may be held except as provided therein and the commission has the direction and control of them. Id. sec. 18670. The commission may license clubs, participants and assistants to be employed in exhibitions and a license is required. Id. sec. 18673. No person under 18 may participate in the matches. Id. sec. 18734. Participants must be examined by a physician immediately before the contest. Id. sec. 18734. A maximum number of rounds and minimum weight for gloves are fixed. Id. secs. 18736, 18737, 18739, 18741. The gloves must be properly padded. Id. sec. 18738. There must be a physician in attendance at the match and he must certify to the contestants' physical condition. Id. sec. 18742. A referee must supervise the match and stop it if there is too great a disparity between the boxers. Id. sec. 18745. Conduct of matches without a license is a misdemeanor. Id. sec. 18780. The commission may adopt rules and regulations for the conduct of contests. Pen.Code, sec. 412. Along the same lines, the regulations adopted by the commission are comprehensive and in detail. They provide for limits on the variation in weight between the contestants; for the size and padding of the ring; for what blows constitute fouls which directly pertain to the avoidance of injury; and for numerous other things such as inspection and physical examination and the like.

[1] The foregoing declarations by the people, the legislature, and the commission evince an unusually strong policy, obviously resting upon a detailed study of the problems relative to boxing matches. While there are other purposes underlying that policy, it is manifest that one of the chief goals is to provide safeguards for the protection of persons engaging in the activity. It may be that the actual participants, as well as the promoter, are liable criminally for a violation of the provisions, but insofar as the purpose is protection from physical harm, the chief offender would be the promoter—the activating force in procuring the occurrence of such exhibitions. It is from his uncontrolled conduct that the combatants are protected. Secondarily, the contestants are protected against their own ill-advised participation in an unregulated match. This is especially true in the case at bar where plaintiff is a lad of eighteen years.

[2] The foregoing policy compels the conclusion that the promoter is liable where he conducts boxing matches or prize fights without a license and in violation of the statutory provisions above discussed, regardless of the rights as between the contestants, and that the consent of the combatants does not relieve him of that liability. Manifestly the doctrine of pari delicto is not pertinent inasmuch as one of the main purposes of the statutes is to protect a class (combatants) of which plaintiff is a member. See 6 Cal.Jur. 157–159. It may be observed that the basis of such liability finds some support in principle in the doctrine of negligence per se, see Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581, 177 P.2d 279; Combs v. Los Angeles Railway Corporation, 29 Cal.2d 606, 177 P.2d 293, and strict liability arising from the nature of the conduct and its consequences, see Luthringer v. Moore, 31 Cal.2d 489, 190 P.2d 1, the seriousness of which is here established by a statute with comprehensive regulatory features aimed at the goal of especial protection for a certain class. The end result is the same and the controlling factor is whether or not the expressed public policy is sufficiently urgent, explicit and comprehensive. It has been held that a violation of an act making it a criminal offense to intercept and publish a telephone message could be the basis of a civil action. Reitmeister v. Reitmeister, 2 Cir., 162 F.2d 691; that the employment of a minor without a permit in violation of the Child Labor Laws is a basis for civil responsibility for injuries received by the minor in such employment. See Beauchamp v. Sturges & Burn Mfg. Co., 250 Ill. 303, 95 N.E. 204; Krutlies v. Bulls

Head Coal Co., 249 Pa. 162, 94 A. 459, L.R.A.1915F, 1082; Blanton v. Kellioka Coal Co., 192 Ky. 220, 232 S.W. 614; 35 Am.Jur., Master & Servant, sec. 133. Other illustrations might be given. See generally Rest.Torts, sec. 286; Prosser on Torts, pp. 271–274; 39 Yale L.J. 908; 46 Harv. L.Rev. 453, 472; 48 Col.L.Rev. 456.

It is not necessary in the instant case to state a general rule inasmuch as each situation must have individual consideration. The nature and scope of the legislation here involved and above shown requires liability, especially when we consider that it calls for continuous and "on the spot" supervision of boxing matches. That feature alone is sufficient to distinguish it from such cases as a person operating a car without an operator's license and the like. Moreover, we have more here than the mere failure to obtain a license. While it could have been more accurately pleaded, it may be inferred that the defendants did not comply with the statutes from the allegation that they failed to so comply therewith in that they did not obtain a license and did not observe the rules and regulations of the Athletic Commission.

We have no question in the instant case as to whether the failure of defendants to have a license or comply with the prize fight laws was the proximate cause of plaintiff's injury (although defendants question the pleading), for the case is here on appeal from a judgment after a demurrer was sustained and it is alleged in the complaint: "That said plaintiff did engage in said boxing exhibition as solicited by said defendants and as a proximate result of said solicitation and in the course of same was violently struck in and about the face and body by the defendant Henry Moe, and as a proximate result thereof plaintiff suffered the following personal injuries, to-wit: * * *."

[3, 4] It is a wholly reasonable construction of the complaint that the "solicitation" referred to was the solicitation to engage in a match which was conducted without a license and contrary to the regulations provided by law, and that as a proximate result thereof plaintiff was injured. Liberally construing the complaint, as we should, Speegle v. Board of Fire Underwriters, 29 Cal.2d 34, 172 P.2d 867, we do not believe that defendants' special demurrer (uncertainty, ambiguity, unintelligibility) on this point is sustainable.

[5] Further, it is urged that the special demurrer for uncertainty and ambiguity was properly sustained in that it is not alleged which rules of the athletic commission were violated by defendants. But it appears from the complaint that defendants did not comply with any of the rules. Therefore, there is no necessity that they all be named. It is plain that plaintiff is charging that defendants wholly disregarded the prize fight and boxing regulations, whether found in the statutes or the commission's rules. Both of the defendants' claims with respect to its special demurrer are unfounded when we apply the rule of liberal construction and are able to say that defendants were sufficiently apprized of the issues to be met. See Lord v. Garland, 27 Cal.2d 840, 168 P.2d 5.

For the foregoing reasons the judgment is reversed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

EDMONDS (concurring).

I place my concurrence in the judgment upon grounds different from the quite indefinite pattern of liability outlined in the majority opinion.

According to the complaint, the minor was solicited by Craft and his associates to participate in a boxing match for a consideration of $5. He accepted the offer and in the bout, sustained personal injuries as the result of blows struck by his opponent. By other allegations, the pleading asserts that the boxing match, or exhibition, was conducted in violation of applicable statutes regulating prize fighting and directing that no boxing contest shall be conducted without a license from the Athletic Commission and in accordance with specified requirements.

The demurrer admits the truth of these facts and they state a cause of action for personal injuries suffered by an employee. In determining whether an employer-employee relationship exists, the most important factor is the right to control the manner and means of accomplishing the result desired, California Employment Commission v. Los Angeles Down Town Shopping News Corporation, 24 Cal.2d 421, 150 P.2d 186; S. A. Gerrard Co. v. Industrial Accident Commission, 17 Cal.2d 411, 110 P.2d 377; Murray v. Industrial Accident Commission, 216 Cal. 340, 14 P.2d 301. One may have the status of an employee although the employment is for a single performance. Drillon v. Industrial Accident Commission, 17 Cal.2d 346, 110 P.2d 64. The fight in which Hudson participated was a part of the program offered at the circus for the entertainment of the public. It was held on the premises of the respondents and was subject to their management. The modesty of the consideration and the boy's youth are facts which may be taken into account, in connection with the use of the respondents' facilities and equipment, as indicating the degree of control exercised by them over him.

The facts stated by the complaint affirmatively show that although young Hudson was an employee, he was not subject to the workmen's compensation law and may maintain an action against his employer. Section 3351 of the Labor Code, which defines the persons entitled to compensation benefits provides: "'Employee' means every person * * * whether lawfully or unlawfully employed * * *." The purpose of the statute is to bring within its terms and make eligible for benefits persons whose employment violates laws relating to minors, work on Sunday, civil service, and the like. It does not include a person whose contract of employment is unlawful for the reason that it requires the employee to perform acts constituting a violation on his part of the express provisions of a penal statute. Massachusetts Bonding & Insurance Co. v. Industrial Accident Commission, 19 Cal.App.2d 583, 587, 65 P.2d 1349; Drakos v. Makiwett, 6 Cal. Compen.Cases 228 [1940]; see 32 Cal.Law Rev. 289, 292.

According to the facts pleaded by Hudson, his employment violated not only the requirements of the Business and Professions Code regulating boxing, but also constituted a violation of section 412 of the Penal Code, which declares that any one engaging in a prize fight is guilty of a misdemeanor and shall be fined from $100 to $1,000 and be imprisoned in the county jail for a period of thirty days to one year. The rule is well established that an employer is under a duty to furnish safe working conditions for his employees. Devens v. Goldberg, 33 Cal.2d 173, 199 P.2d 943; Cordler v. Keffel, 161 Cal. 475, 479, 119 P. 658. Section 2800 of the Labor Code provides: "An employer shall in all cases indemnify his employee for losses caused by the employer's want of ordinary care", and by the following section: "It shall be conclusively presumed that such employee was not guilty of contributory negligence in any case where the violation of any law enacted for the safety of employees contributed to such employee's injury." By section 18670 et seq. of the Business and Professions Code, which requires strict supervision of the Athletic Commission, the presence of a physician, a limited number of rounds, padding and specified weight for gloves and relative equality in contestants' ability, the Legislature has established a standard of care for those persons who participate in boxing matches. The facts pleaded in the complaint sufficiently charge an employment which required the performance of the employee's duties under unsafe working conditions. With the further allegations in regard to the injuries sustained by the minor as a result of boxing under those conditions, a cause of action for damages is stated.

33 Cal.2d 703

COLEMAN et al. v. STEWART et al.

S. F. 17319.

Supreme Court of California, in Bank.

March 31, 1949.

Constitutional law 🔑215

Privately imposed restrictions against occupancy of land by non-Caucasians were not enforceable through court action.

◆

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by E. D. Coleman and another against Thomas Stewart and another for an injunction enforcing privately imposed restrictions against occupancy of land by non-Caucasians. From a judgment granting an injunction, defendants appeal.

Judgment reversed.

Gladstein, Andersen, Resner, Sawyer & Edises, of San Francisco, and Bertram Edises and George R. Vaughns, both of Oakland, for appellants.

George F. Sharp, of Oakland, for respondents.

PER CURIAM.

This case involves the legality and enforceability of privately imposed restrictions against occupation of a lot of land by non-Caucasians. The trial court enjoined occupance of the lot by defendants, non-Caucasians. Defendants appealed.

Upon the authority of Shelley v. Kraemer, 1948, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161, (see also Hurd v. Hodge, 1948, 334 U. S. 24, 68 S.Ct. 847, 92 L.Ed. 1187), holding that such restrictions cannot be enforced through court action, the judgment of the trial court must be reversed. See Cumings v. Hokr, 1948, 31 Cal.2d 844, 193 P.2d 742; Cassell v. Hickerson, 1948, 31 Cal.2d 869, 193 P.2d 743; Davis v. Carter, 1948, 31 Cal.2d 870, 193 P.2d 744; In re Laws 1948, 31 Cal.2d 846, 193 P.2d 744; Lippold v. Johnson, 1948, 32 Cal.2d 892, 197 P.2d 161; Clayton v. Wilkins, 1948, 32 Cal.2d 895, 197 P.2d 162; Morin v. Crane, 1948, 32 Cal.2d 896, 197 P.2d 162.

For the reason above stated the order appealed from is reversed.

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33 Cal.2d 635

NATIONAL CITY et al. v. FRITZ et al.

L. A. 20857.

Supreme Court of California, in Bank.

March 22, 1949.

1. Statutes 🔑228

Exceptions in a statute are to be strictly construed.

2. Municipal corporations 🔑887

"Utilities", as used in that portion of statute authorizing municipalities to establish a capital outlay fund which provides that capital outlays shall not be construed to include the construction, acquisition, extension of, or addition to, utilities, other than utilities for the furnishing of water supply, is used in its restrictive sense of "public utility". General Laws, Act 8496a.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Utility".

3. Municipal corporations 🔑887

The construction and maintenance of a sewer system is not a "public utility", within meaning of statute prohibiting municipalities from using capital outlay fund in the construction, acquisition, extensions of, or addition to, utilities; hence the fund may be used for construction of sewers. General Laws, Act 8496a.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Public Utility".

4. Statutes 🔑225

Generally, statutes should be construed in light of other statutes dealing with the same subject matter.

5. Municipal corporations 🔑271, 272

The term "public utilities", with reference to power of a municipal corporation to acquire and operate them, customarily embraces an enterprise which was usually engaged in by private corporations or individuals, such as supplying water and electricity to the inhabitants.

6. Municipal corporations 🔑270

The power of municipalities to construct and maintain sewers is broad and unquestioned.

EDMONDS, J., dissenting.

Original proceeding on the petition of the City of National City, Richard E. Adams and others, as members of the City Council, and Charles J. Dorfman and others, against Gilbert E. Fritz, as a member of the City Council and Mayor, and Frank W. Rogers, as City Clerk, for a writ of mandate to compel respondent Mayor to sign contracts awarded by the council for construction of sewers and to compel respondent clerk to transfer a specified sum from the capital outlay fund for the general fund to meet payments under such contracts.

Writ granted.

Burke, Marshall & Burke and Daniel G. Marshall, all of Los Angeles, for petitioners.

Merideth L. Campbell, City Atty., of National City, for respondents.

CARTER, Justice.

The controversy in this proceeding involves the interpretation of a statute authorizing the establishment by municipal corporations of capital outlay funds. Stats. 1937, p. 1995, as amended last in 1945, Stats.1945, p. 1867, Gen.Laws Act 8496a.

That act provides that the governing body of any city "empowered to levy and collect assessments or taxes may by ordinance provide for the levy and collection fo assessments or taxes for the creation and accumulation of a fund for capital outlays." The general limitation on the right to impose taxes applies. "At any time after the creation of such a fund such governing body may transfer to such fund any unincumbered surplus funds remaining on hand in such city, * * * at the end of any fiscal year.

"Whenever such fund is created in the manner aforesaid it shall remain inviolate for the making of any capital outlays and no moneys shall be disbursed therefrom excepting for such a purpose; * * *.

"The term 'capital outlays' shall not be construed to include the construction, acquisition, extensions of, or addiitons to, utilities, other than utilities for the furnishing of water supply." (Emphasis added.)

In the instant case the city council passed an ordinance purporting to create a capital outlay fund pursuant to the act. There is a dispute in regard to whether the ordinance in fact achieved that end inasmuch as it did not provide for the levy of taxes or assessments for the creation of the fund. It merely created the fund. But in view of the result reached herein, it is not necessary to resolve that question. From the receipts from sale of real property of the city to the United States, $983,800.29 was ordered deposited in the fund by the city council and it is now there and unencumbered. The council has awarded contracts for the construction of sewers in the city in the sum of $675,287.77 but respondent mayor of the city refuses to sign the contracts, and respondent clerk refuses to transfer said sum to the general fund to meet the payments under those contracts, claiming that moneys in the capital outlay fund cannot be used for sewer purposes under the above quoted act for the reason that a sewer is a utility as used in the last sentence dealing with things for which the fund cannot be used. Petitioners, on the other hand, take the position (among others) that a sewer is not a utility as that term is used in the act. With the latter contention we agree for the following reasons.

[1, 2] The unqualified word "utility" has a broad meaning. It is defined as "quality or state of being useful; usefulness; profitableness to some desired end." Webster's New International Dictionary [2nd Ed.] p. 2808. See also Interstate Natural Gas Co. v. Gully, D.C., 4 F.Supp. 697, 699. If that definition were applied

to the statute in question, there would be practically no activity in which the city could use the money from the capital outlay fund because practically all of its property and public services are presumably for useful purposes. Thus the exception in the act (the italicized part thereof) for which funds may not be used would be broader than the main purpose of the act to authorize the creation of, and levy of taxes for, a capital outlay fund. Practically the only use that could be made of the fund would be for a water supply which is an exception carved out of an exception. These factors, coupled with the rule that exceptions in a statute are to be strictly construed, Hurst v. City and County of San Francisco, 33 Cal.2d 298, 201 P.2d 805; McAlpine v. Baumgartner, 10 Cal.2d 409, 74 P.2d 753; Dufton v. Daniels, 190 Cal. 577, 213 P. 949; Forbes v. City of Los Angeles, 101 Cal.App. 781, 282 P. 528; Crawford, Statutory Construction, sec. 299, require that the word "utility" be interpreted to mean a "public utility", for as will be seen, that term as used here has a more narrow meaning than "utility".

[3-6] We are convinced that the construction and maintenance of a sewer system is not a "public utility" within the meaning of the act. Generally speaking, statutes should be construed in the light of other statutes dealing with the same subject matter. In re Phyle, 30 Cal.2d 838, 186 P.2d 134; Stillwell v. State Bar, 29 Cal.2d 119, 173 P.2d 313. The term "public utilities," with reference to the power of a municipal corporation to acquire and operate them, customarily embraces an enterprise which was usually engaged in by private corporations or individuals such as supplying water and electricity to the inhabitants. In this state it never has been the custom to have sewers operated privately. There was some doubt whether municipal corporations could acquire and operate such enterprises (public utilities) until the amendment to the Constitution (Cal.Const. Art. XI, sec. 19) in 1911 authorizing such corporations to supply their inhabitants with light, water, power, heat, transportation and means of communication (18 Cal.Jur. 1076), but the power of municipal corporations to construct and maintain sewers has always been broad and unquestioned; the power may be derived from the authority to construct and maintain streets. See Harter v. Barkley, 158 Cal. 742, 112 P. 556; Kramer v. Los Angeles, 147 Cal. 668, 82 P. 334; McBean v. City of Fresno, 112 Cal. 159, 163, 44 P. 358, 31 L.R.A. 794, 53 Am.St.Rep. 191; City of Madera v. Black, 181 Cal. 306, 313, 184 P. 397. The Public Utilities Act of this state lists many activities as "public utilities" but no mention is made of sewers. Stats.1915, p. 115, as amended, Gen.Laws, Act 6386.

For the foregoing reasons it is clear that the term "utilities" as used in the exception in the statute in question does not include sewers. The fund here involved may, therefore, be used for construction of sewers.

Let a peremptory writ of mandate issue as prayed for.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

EDMONDS, Justice (dissenting).

Again the court has rendered what I consider to be an advisory opinion in a collusive proceeding brought by a city against two of its officers. The result is a decision which places the stamp of the highest judicial approval upon financial transactions which affect every taxpayer of the city without any truly adversary presentation of the merits of the controversy. Moreover, the construction of the statute authorizing the establishment of a capital outlay fund may now be the unquestioned basis for action by the governing body of other cities. For the reasons I have stated in City of Whittier v. Dixon, 24 Cal.2d 664, 668, 151 P.2d 5, 153 A.L.R. 956; City and County of San Francisco v. Boyd, 22 Cal.2d 685, 707, 140 P.2d 666; City and County of San Francisco v. Linares, 16 Cal.2d 441, 448, 106 P.2d 369, I believe that this procedure is contrary to fundamental principles of the administration of justice.

33 Cal.2d 664

OLSON et al. v. BIOLA CO-OP. RAISIN GROWERS ASS'N et al.

S. F. 17401.

Supreme Court of California, in Bank.
March 23, 1949.

Rehearing Denied April 21, 1949.

1. Damages ⚿79(1), 157(3)

A contract which undertakes to fix amount of damages in anticipation of a breach of obligation is void to that extent except where it would be impracticable or extremely difficult to fix the actual damage, and hence party relying on a liquidated damage clause in contract must plead and prove facts validating his right to recover thereon. Civ.Code, §§ 1670, 1671.

2. Agriculture ⚿6

Under Agricultural Code, a nonprofit co-operative marketing association is permitted to fix by contract or by-laws liquidated damages to be paid on a breach of contract with respect only to sale, delivery, or withholding of products that may be subject matter of contract, and any attempt by association to go beyond such express statutory power must fall within statutory provisions which permit recovery of liquidated damages by contract only where it is impracticable or extremely difficult to fix the actual damages. Agricultural Code, § 1209; Civ.Code, §§ 1670, 1671.

3. Agriculture ⚿6

Marketing agreement, providing that co-operative raisin growers association "buys and the grower sells" to association annually his crop of raisins, contemplated a sale with future delivery and under Agricultural Code sale was completed and title passed to association upon delivery to and acceptance by association and its packer. Agricultural Code, § 1208.

4. Agriculture ⚿6

Delivery of wet raisins by member growers to co-operative raisin growers association was not a breach of marketing agreement for which liquidated damages could be recovered under provision of Agricultural Code permitting a nonprofit co-operative marketing association to fix by contract or by-laws the liquidated damages to be paid for breach of contract with regard to sale, delivery, or withholding of products. Agricultural Code § 1209.

5. Agriculture ⚿6

The right of nonprofit co-operative marketing association under Agricultural Code to provide by contract or by-laws for liquidated damages to be paid for a breach of contract with respect to sale, delivery, or withholding of products extends only to breaches of contract with respect to the quantity of product to be delivered and not with respect to quality thereof. Agricultural Code, §§ 1209–1211.

6. Agriculture ⚿6

Section of Agricultural Code providing that any provisions of law in conflict with Agricultural Code shall not be construed as applying to nonprofit co-operative marketing associations did not render inapplicable, with respect to raisins of inferior quality sold by members to association, statutory provisions that a contract may not fix amount of damages to be paid for future breach except where it is impracticable or extremely difficult to determine the actual damages sustained, since such statutory provisions are not in conflict with Agricultural Code in such case. Agricultural Code, §§ 1208, 1209, 1213; Civ.Code, §§ 1670, 1671.

7. Agriculture ⚿6

Marketing agreement between co-operative raisin growers association and members, construed as a whole, manifested intent to provide for recovery of liquidated damages only where a grower failed or refused to deliver all raisins grown to association.

8. Contracts ⚿147(3)

The determination of meaning of a contract depends upon the intent of the parties as evidenced by entire agreement construed in the light of circumstances under which it was made. Civ.Code, §§ 1636, 1641.

CARTER, TRAYNOR, and SCHAUER, JJ., dissenting.

* * *

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Representative suit by A. J. Olson and others against Biola Cooperative Raisin Growers Association, a corporation, and others, to recover liquidated damages for delivery of substandard raisins to the association in violation of a marketing agreement between association and its members. From adverse judgment, defendants appeal.

Judgment reversed.

Prior opinion 193 P.2d 929.

Chester R. Andrews, William C. Crossland, Lawrence W. Young, and Milo Popovich, all of Fresno, for appellants.

Irvine P. Aten, Aynesworth & Hayhurst, G. L. Aynesworth, and L. Nelson Hayhurst, all of Fresno, for respondents.

SPENCE, Justice.

Following the granting of a rehearing, further consideration of the issues presented on this appeal leads to the conclusion that our former opinion correctly disposed of such issues, and said opinion is therefore adopted as follows:

Biola Cooperative Raisin Growers Association was organized as a nonprofit cooperative marketing association under the laws of the state of California. Plaintiffs—four members of the Association—brought this action, a representative suit, against the Association and the other sixteen members thereof, including the five directors, to recover liquidated damages alleged to be due by virtue of the delivery of raisins deemed to be substandard under the provisions of the marketing agreement between the Association and its various members. Eight of the individually named defendants were found to be so liable in conformity with the theory of plaintiffs' complaint, and judgment accordingly was entered against them in varying amounts computed upon the basis of their substandard tonnage delivery to the Association, the total sum being $19,856.79, plus interest, and costs. These defendants have appealed from such judgment, urging, as a principal ground for reversal, that liquidated damages were not properly assessable against them under the record in this case. Consideration of the language of the marketing agreement and the statutory regulations governing the disposition of such damage claim as is here made demonstrates the merit of defendants' argument distinguishing their default as one in quality rather than in quantity of crop delivery.

The record reveals that on October 20, 1944, plaintiff Chris H. Scheidt, "a grower member of the * * * Association," entered into an agreement with the Association whereby he undertook to process and pack the "raisin crop" of the Association "for the year 1944" for a specified sum per ton. He rented the Association's packing-house for the season, and the Association's members were obligated to deliver their raisins there "properly cured and in good condition" under the terms of their marketing agreement with the Association. Delivery of the raisins to Scheidt at the packing-house commenced soon after the date of the packing agreement and was concluded early in 1945. Although the Association was empowered under the marketing agreement to set up quality standards regarding "sugar and moisture content" to "be met by all raisins delivered by the Grower[s]," it had not done so. However, it appears that fifty-five per cent of the raisin crop in question was under contract for sale to the United States Government, and the federal regulations, introduced in evidence, permitted a moisture content of "not more than 18 per cent." Gauged by this standard, there was substantial evidence that some of the raisins delivered by the eight grower members of the Association against whom judgment was rendered had a higher moisture content so that they could not be run through the stemmer and processed without further drying. Finding that such raisins "were not properly dried and cured but were too wet and contained too much moisture and were too heavy for processing and marketing," the trial court determined the exact weight of the defective delivery made by each of the eight defaulting growers and accordingly proportioned against them plaintiffs' recovery of liquidated damages.

All of the members' raisins, both wet and dry, were delivered at the packing-house, which was under the control of plaintiff Chris H. Scheidt. He received them, knowing at the time of delivery or shortly thereafter that some of them were wet. He did report that fact to the officers of the Association but the wet raisins were neither rejected nor returned, and both he and the Association continued to permit the delivery and acceptance of wet raisins, all of which were ultimately sold. Some of the growers who had delivered wet raisins offered to remove them from the packinghouse and properly cure them at their own expense, but they were not permitted to do so. However, it appears that under the Government regulations, all of the raisins—both wet and dry—were sold for $180 per ton and each grower received an additional $10 per ton as an "incentive payment" or reward for drying his grapes instead of selling them fresh, so that no one suffered any loss by reason of the delivery of wet raisins.

With these basic factual considerations at hand, the determinative issue is whether plaintiffs, as representative members of the Association, may enforce the collection of liquidated damages for the default in question, premised solely upon the allegation that after demand, the directors failed to act because three of them, a majority of the board, were interested parties, having themselves delivered wet raisins to the packinghouse. The answer to this problem lies in an analysis of certain provisions of the Association's marketing agreement with its members, in the light of applicable language in the Agricultural Code bearing upon the exception of cooperative marketing associations from the rules governing the enforcement of liquidated damage claims under the general law of this state as expressed in sections 1670 and 1671 of the Civil Code.

Section 1 of the marketing agreement reads: "The Association buys and the Grower sells to the Association annually from the date of the signing of the By-Laws of the Association and this agreement *all* of the raisins owned and grown by the Grower, and agrees to deliver the same and all thereof *properly cured and in good condition* to the plant of the Association." (Emphasis added.)

Section 7 of the agreement contains the following stipulation: "In the event that Grower should *fail to deliver raisins* hereby sold *in accordance with terms of this agreement* and these By-Laws, such act will injure the Association to an amount that is, and will be impracticable and extremely difficult to determine and fix, and that is, therefore, *fixed at the amount of Twenty-five (25%) per cent of the average current seasonal price for each and every ton of raisins that the Grower fails to deliver in accordance with the terms hereof* and these By-Laws, and which amount the Grower agrees to pay, and shall pay, to the Association upon demand * * *." (Emphasis added.)

And section 13 of the agreement states in part: "It is expressly understood and agreed that Grower has by this agreement agreed to and *will deliver the raisins herein contracted to be delivered to the Association,* or in lieu thereof to pay *liquidated damages* therefor as by this agreement provided for his *failure so to do* * * *." (Emphasis added.)

Section 1209 of the Agricultural Code provides: "The by-laws or the marketing contract may fix, as *liquidated damages,* specific sums to be paid by the member or stockholder to the association upon the breach by him of any provision of the marketing contract regarding the *sale* or *delivery* or *withholding of products;* * * * and such clauses providing for liquidated damages shall be enforceable as such and shall not be regarded as penalties." (Emphasis added.) And the first paragraph of section 1213 of said code states: "Any provisions of law which are in conflict with this chapter shall not be construed as applying to the associations herein provided for."

[1] The general rule in this state is that a contract which undertakes to fix the amount of damages in anticipation of a breach of an obligation is void to that extent, Civil Code, sec. 1670, except "when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage." Civil Code, sec. 1671. Accordingly, it is held that a party relying on a liquidated damage clause in a contract must plead and prove the facts validating his right to recover such predetermined amount. Dyer Bros. Golden West Iron Works v. Central Iron Works, 182 Cal. 588, 593, 189 P. 445; Robert Marsh & Co., Inc.,

v. Tremper, 210 Cal. 572, 576, 292 P. 950; Rice v. Schmid, 18 Cal.2d 382, 385, 115 P.2d 498, 138 A.L.R. 589; Kekich v. Blum, 43 Cal.App.2d 525, 527–528, 111 P.2d 411.

[2] However, an important exception to the general rule on the remedy of liquidated damages prevails in the case of a nonprofit cooperative marketing association, as declared by section 1209 of the Agricultural Code above quoted. This exception permits such an association and its members to stipulate in advance the amount of damages to be paid upon the breach of an obligation in the particulars of "the sale or delivery or withholding of products" forming the object of their agreement. While such statutory language constitutes a grant of power, that power is confined to the three subjects specifically mentioned so that any undertaking on the part of the association to go beyond those stated limits must fall within the provisions of sections 1670 and 1671 of the Civil Code, which, as heretofore noted, permit the recovery of liquidated damages only where it would be impracticable or extremely difficult to estimate actual damages—a matter of pleading and proof resting on the party seeking such redress.

Even in the absence of statute it was well established in this state that a nonprofit cooperative marketing association might contract for the payment by a member of a stipulated sum for the violation of his agreement to deliver *all* of his product to the association for processing and marketing. Anaheim Citrus Fruit Association v. Yeoman, 51 Cal.App. 759, 764, 197 P. 959; Poultry Producers of Central California, Inc. v. Murphy, 64 Cal.App. 450, 455, 221 P. 962; California Canning Peach Growers v. Downey, 76 Cal.App. 1, 11–12, 243 P. 679; California Canning Peach Growers v. Harris, 91 Cal.App. 654, 655, 267 P. 572; see, also, Poultry Producers of Southern California, Inc., v. Barlow, 189 Cal. 278, 280–281, 208 P. 93; California Bean Growers' Association v. Rindge Land & Navigation Co., 199 Cal. 168, 183, 248 P. 658, 47 A.L.R. 904. The validity of such a liquidated damage provision stemmed from the principle that the whole business scheme of the marketing association necessarily depended upon its ability to hold and control the subject matter of its operations, a consideration demonstrating the disrupting effect which a member's failure to deliver all of his product to the association would have on its successful functioning and the consequent elements of damage which would not be capable of any exact estimation. As was so aptly stated with regard to such breach in delivery to the citrus fruit cooperative involved in the Anaheim case, supra, 51 Cal.App. at pages 763–764, 197 P. at page 961: "The existence and life of the association itself depended upon its being furnished fruit to dispose of in the public market. A reduction in the amount of fruit so handled would not only tend to increase the overhead cost to the nontransgressing members, but, we may assume, to some extent affect the prestige and standing of the association as a marketing concern. The argument would be the same, regardless of the quantity of fruit which might have been delivered by the defendant, whether it composed but a small fractional part or one-half or more of the entire product designed to be marketed by the plaintiff agency [the association]. Enough has been said, we think, to show that the case falls within the class as to which the law permits damages to be liquidated by contract in advance of their occurrence [Civ.Code, sec. 1671]. It follows as a necessary conclusion that plaintiff was entitled to recover the exact amount fixed in its contract as the sum per box which defendant should pay by reason of his failure to market [his] fruit in the manner agreed." The same line of reasoning was followed in Irwindale Citrus Association v. Semler, 60 Cal.App.2d 318, 323, 140 P.2d 716.

But all of these cases involved the *quantity* of the product contracted for delivery to the marketing association and the significance of a member's breach in that respect, so that a part of his product was released for distribution through other channels in competition with the cooperative enterprise and to the detriment of all the members thereof. The *quality* of the fruit delivered was not an issue and was not considered. The same distinguishing observations apply with respect to delivery

breaches discussed in similar cases from other jurisdictions. See Phez Co. v. Salem Fruit Union, 103 Or. 514, 201 P. 222, 205 P. 970, 25 A.L.R. 1113; supplemented in Tobacco Growers' Co-op. Ass'n v. Jones, 185 N.C. 265, 117 S.E. 174, 33 A.L.R. 247; 47 A.L.R. 936; Watertown Milk Producers Co-operative Ass'n v. Van Camp Packing Co., 199 Wis. 379, 225 N.W. 209, 226 N.W. 378, 77 A.L.R. 405; Neith Co-operative Dairy Products Ass'n v. National Cheese Producer's Federation, 217 Wis. 202, 257 N.W. 624, 98 A.L.R. 1406. In the instant case the *quantity* of the raisins delivered is not a point of dispute, as it is admitted that the members delivered *all* of their raisins to the Association for marketing. Rather here it is the *quality* of the raisins that is at issue, so that the present problem transcends the scope of the decided cases. However, they are significant because of their discussion of the economic considerations which tend to indicate the design of the statutory law expressive of the legislative policy with regard to the availability of liquidated damages in protecting the integrity of a cooperative marketing association.

[3, 4] Pursuant to these preliminary remarks, there is to be considered at the outset whether or not the grower members of the Association who delivered wet raisins to the packing-house violated their marketing agreement in any of the particulars specified in section 1209 of the Agricultural Code—that is, in regard to "the sale or delivery or withholding of products," as those terms are used in said section. Section 1 of the marketing agreement contemplates a sale of the raisins by the grower to the Association when it provides that "the Association buys and the Grower sells to the Association * * *." his crop of raisins—a sale with future delivery. This brings into operation the provision of section 1208 of the Agricultural Code that if a contract of sale is made, "it shall be conclusively held that title to the products passes absolutely and unreservedly, except for recorded liens, to the association upon delivery." So here a sale of the raisins occurred and was completed upon delivery to, and acceptance by, the Association and the packer Scheidt. In contrast to such "sale" arrangement as here prevails, cooperative marketing agreements frequently provide for an agency relationship, under which the grower agrees to deliver his crop to the association and appoints the association his agent to handle and market the crop for him and to return the net proceeds to him—a mere "delivery" arrangement whereby title to the crop does not pass to the association. But the equal importance of faithful performance of either type of obligation is expressly recognized in section 1209 in the specific mention of "sale or delivery * * * of products." The third reference in section 1209, the "withholding of products," would appear to apply to any act of the grower in holding back from the association any part of the crop which he has either sold or is otherwise bound to deliver to the association for marketing. As each grower member admittedly turned over *all* his raisins to the Association, and therefore made no default in performance with respect to quantity, we are of the opinion, for the reasons hereinafter stated, that a proper construction of the provisions of said section 1209 leads to the conclusion that plaintiffs failed to show a breach of any of the three conditions enumerated as the premise for the recovery of liquidated damages.

[5] The above view of the qualifying language of section 1209 of the Agricultural Code follows the theory that the right to delivery of its members' products is the most important right of a cooperative marketing association, a matter that was forcefully adjudicated in this state in the Anaheim and succeeding cases above cited, and which principle of judicial decision presumably governed the legislature's correlative statutory action on the subject. 23 Cal.Jur. 783, sec. 159. It was the *quantity*, not the *quality*, feature of the members' delivery that was considered the lifeblood of the cooperative and essential to the maintenance of its place in the competitive market. That such was the legislature's concept of the need for liquidated damages as a protective measure for cooperatives appears from other related sections of the Agricultural Code. Thus section 1210 pro-

vides that "in the event of any *such* breach or threatened breach of such marketing contract by a member, the association shall be entitled to an injunction to prevent the further breach of the contract and to a decree of specific performance thereof." (Emphasis added.) In so making the remedies of injunction and specific performance available to a cooperative marketing association on the same basis as the remedy of liquidated damages—that is, for the type of breach mentioned in section 1209, one "regarding the sale or delivery or withholding of products"—the legislature must have intended such judicial enforcement with relation to the members' promised delivery in *quantity* rather than to have the court undertake detailed supervisory measures to insure delivery not merely as to amount but likewise as to the *quality* of the product, depending on the performance of various farming operations which would yield the desired standard. Likewise section 1211 provides that "in any action upon such marketing agreements, it shall be conclusively presumed that a landowner or landlord or lessor is *able to control the delivery of products produced on his land* by tenants or others, * * *; and in such actions, the foregoing remedies for nondelivery or breach shall lie and be enforceable against such landowner, landlord or lessor." (Emphasis added.) In so recognizing that a grower might attempt to evade his obligation as to delivery under the marketing agreement by leasing his land to another, thus supposedly divesting himself of control over the crop, and in rendering such device ineffectual, the legislature again evinced its intent that the matter of delivery within the landowner's control would be the *quantity,* not the *quality* dependent on various practices of husbandry that might prevail on the farm. In other words, these provisions all point to the fundamental tenet of exclusive dealing between such association and its members, in the sense of full delivery of the promised product, as the limit of legislative concern, and not the added consideration of variance in the condition of the product delivered with the involvement of multiple details as to farming operations.

[6] While plaintiffs do not cite any section of the Agricultural Code that specifically permits contracting for the recovery of liquidated damages for breach of an agreement as to the *quality* of the product to be delivered, they claim that such would be within the scope of the reference in section 1209 to "*any* provision of the marketing contract regarding the sale or delivery or withholding of products." In pursuance of this position, plaintiffs argue that in section 1 of the marketing agreement each grower contracted to deliver his raisins "properly cured and in good condition," and that this covenant was breached by the delivery of wet raisins; that in section 7 each grower agreed to pay the liquidated damages if he failed to deliver his raisins "in accordance with the terms of this agreement"; that this covenant was broken by the delivery of wet raisins which were neither "properly cured" nor "in good condition"; that thereupon the agreement to pay liquidated damages came into effect and could be enforced within the intent of the "omnibus provisions" of section 1209. They also argue that under the quoted language of section 1213 of the Agricultural Code, the provisions of section 1670 and 1671 of the Civil Code have no application in this case. But to construe section 1209 as an "omnibus" provision would in effect eliminate any premise of limitation consistent with the three particulars mentioned as the basis for the contracting for liquidated damages and would allow such remedy for the breach of "any provision of the marketing contract," without qualification. However, the statute does qualify the availability of the remedy and, as above construed, it refers to "delivery" as embracing an agency relationship in contrast to a "sale," as here prevails. Accordingly, the word "delivery" cannot be said to connote there, as plaintiffs contend, "time, place, manner, object, quantity and quality"—an "omnibus" concept which would far exceed the idea of the fact of delivery of the promised amount as a measure of assurance to the cooperative marketing association that its whole scheme of organization would not be nullified by some of the product of its members reaching the public

market through outside competitive channels, to its disadvantage and, perhaps, to its ultimate break-up. Since upon the record plaintiffs' claim involves the *quality*, not the *quantity*, of raisins delivered, the provisions of sections 1670 and 1671 are not in conflict with the provisions of the Agricultural Code insofar as the facts of this case are concerned, and section 1213 of the latter code does not aid their position.

[7, 8] Moreover, a study of the entire marketing agreement leads to the conclusion that it was the intention of the contracting parties to provide for the recovery of liquidated damages only when a grower member failed or refused to deliver *all* his raisins to the Association. Such overall examination accords with the fundamental rule that the determination of the meaning of a contract depends, in each case, upon the intent of the parties as evidenced by the entire agreement construed in the light of the circumstances under which it was made. Civ.Code, secs. 1636, 1641; Ogburn v. Travelers Insurance Co., 207 Cal. 50, 52, 276 P. 1004. In other words, the "sense and meaning of the parties to any particular instrument should be collected ex antecedentibus et consequentibus; that is to say, every part of it should be brought into action, in order to collect from the whole one uniform and consistent sense, if that may be done." Balfour v. Fresno Canal and Irrigation Co., 109 Cal. 221, 227, 41 P. 876, 878.

So pertinent are these considerations of language in the parties' marketing agreement. Section 13 appears to be a summary of the prior provision on the subject of liquidated damages. It conditions the agreement to pay such sum upon the fact of failure to deliver. Likewise section 7, containing the agreed terms for the liquidated damages, suggests that it was intended to apply upon failure to deliver the full amount of the product, and not upon failure in the quality of the product. In addition to other provisions, the section expressly states that it would be "impracticable and extremely difficult to determine and fix" the damages "in the event that Grower should fail to deliver raisins hereby sold in accordance with the terms of this agreement," and accordingly, the damage liability is related directly to the circumstance of default in the promised tonnage of raisins. It has been held that such declaration is a true statement of a fact in the case of the failure to deliver to a cooperative marketing association, as the subject has been exhaustively discussed in the above-noted decisions in this and other jurisdictions. But the same result does not prevail in the case of the delivery of substandard raisins for the reason that raisins are graded, and each grade has an ascertainable market value which may vary from season to season and from time to time. Raisins not properly cured, of course, have a less market value than those properly cured. The loss from a violation of the contract specification as to *quality* may be ascertained and determined under the ordinary rules of the law of damages. Rice v. Schmid, supra, 18 Cal.2d 382, 385–386, 115 P.2d 498, 138 A.L.R. 589. That the parties had such principle in mind for the assessment of damages in the event of delivery of a substandard lot of raisins appears from their failure to provide in their agreement a variable pecuniary standard, according to the degree of default, for the computation of liquidated damages rather than a flat rate which might be far in excess of the actual damages sustained where the default in quality was slight, and the resultant damage obligation would partake of the nature of a penalty, contrary to "the effort of the law" to "work [an] equitable result" in casting "upon the delinquent party a liability to respond to" a reasonable assessment of damages. Anaheim Citrus Fruit Association v. Yeoman, supra, 51 Cal. App. 759, 761, 197 P. 959, 960; Mente & Co., Inc., v. Fresno Compress & Warehouse Co., 113 Cal.App. 325, 330–331, 298 P. 126. Likewise the flat rate of liquidated damages provided in the marketing agreement might be wholly inadequate if the fruit delivered was greatly below the promised standard or the nature of the defect was such that the substandard lot might contaminate the other lots of raisins of the Association with which it was mixed, and so cause a very substantial loss, which the parties could not have reasonably anticipated in predetermining the damage liability as a "fair compensation for the loss sustained." Rice v. Schmid, supra, 18 Cal. 2d 382, 386, 115 P.2d 498, 500, 138 A.L.R. 589.

In the light of the foregoing discussion, plaintiffs' position on this appeal cannot be sustained. The provisions of the Agricultural Code do not authorize a contract for the recovery of liquidated damages because of the inferior quality of the product delivered to and accepted by a nonprofit cooperative marketing association; and an analysis of the particular marketing agreement here in question does not show such damage liability to have been within the contemplation of the parties.

The judgment is reversed.

GIBSON, C.J., and SHENK and EDMONDS, JJ., concur.

CARTER, Justice (dissenting).

I dissent.

I disagree with the position taken by the majority in this case. That position is not only not in accord with the various statutory provisions involved, but in effect holds that this Court will not enforce the terms of a contract, which is not illegal or in contravention of public policy, and which was made by parties capable of contracting. It seems quite apparent to me that the result reached in the majority opinion is achieved by ignoring the facts involved and concentrating on the unexpressed thought that to do otherwise would be to come to a harsh result. It also seems quite apparent to me that if I contract to buy a horse with four sound legs and I am sold one with only three legs that I should be able to enforce my contract. However, I may be assuming too much—as the three-legged horse might be able to walk, and the majority of this court would therefore hold that I got all that I bargained for.

Biola Cooperative Raisin Growers Association was organized as a nonprofit cooperative marketing association under the laws of the State of California. Plaintiffs, four members of the Association, brought this action, a representative suit, against the Association and the other sixteen members thereof, including the five directors, to recover liquidated damages alleged to be due by virtue of the delivery of raisins of substandard quality under the provisions of the marketing agreement between the Association and its various members. Eight of the individually named defendants were found to be so liable in conformity with the theory of plaintiffs' complaint, and judgment was accordingly entered against them in varying amounts computed on the basis of their tonnage delivery of raisins of defective quality. The total sum amounted to $19,856.79 plus interest and costs. These defendants have appealed, contending that liquidated damages were not properly assessed against them for several reasons hereinafter stated.

On October 20, 1944, plaintiff Chris H. Scheidt, a grower member of the Association, entered into an agreement with the Association whereby he undertook to process and pack the raisin crop of the Association for the year 1944 for a specified sum per ton. He rented the Association's packing house for the season, and the Association's members agreed, in writing, to deliver their raisins there "properly cured and in good condition." The contract provided further that he would "perform said packing operations according to the instructions of the Association and the specifications provided by the government in packing same." The pertinent provisions of the marketing agreement entered into by all grower members in 1941 with the Association are as follows:

"Section 1: The Association buys and the Grower sells to the Association annually from the date of the signing of the By-Laws of the Association and this agreement all of the raisins owned and grown by the Grower, *and agrees to deliver the same and all thereof properly cured and in good condition to the plant of the Association.* * * *

"Section 5: The Association reserves the power to set standards of maturity, quality, sugar, and moisture content, which must be met by all raisins delivered by the Grower. * * *

"Section 7: In the event that Grower should fail to deliver raisins hereby sold in accordance with the terms of this agreement and these By-Laws, such act will injure the Association to an amount that is, and will be impracticable and extremely difficult to determine and fix, and that is, therefore, fixed at the amount of Twenty-Five (25%) percent of the average current seasonal price for each and every ton of raisins that the Grower *fails to deliver in accordance with the terms hereof and these By-Laws,* and which amount the Grower agrees to pay, and shall pay, to the Association upon demand, * * *

"Section 13: It is expressly understood and agreed that Grower has by this agreement agreed to and will deliver the raisins herein contracted to be delivered to the Association, or in lieu thereof to pay liquidated damages therefor as by this agreement provided for his failure so to do, * * *

"Section 14: It is further understood and agreed that should any controversy arise between the Association and the Grower pertaining to the *quality or quantity* of any raisins delivered, or to be delivered hereunder, and an agreement cannot be reached between the parties, that the same shall be referred to a board of arbitration consisting of three parties, one designated by the Board of Directors of the Association, one by the Grower, and one by the two so designated, and their decision in regard thereto shall be final and binding upon both parties hereto." (Emphasis added.)

Shortly after the packing agreement with Chris H. Scheidt had been entered into, the growers began delivery to him under the terms of their agreements with the Association. The deliveries were concluded early in 1945. Although the Association had reserved the power to set standards of maturity, quality, sugar, and moisture content it had not done so. However, it appears that fifty-five per cent of the raisin crop in question was under contract for sale to the United States Government, and the federal regulations, introduced in evidence, permitted a moisture content of "not more than 18 per cent."

In accordance with the marketing agreement, and upon the basis of the standard set by the Government, arbitration proceedings were had on November 26, 1945, between the members of the Association, with the exception of defendant J. H. Scheidt. The court ordered J. H. Scheidt to appoint an arbitrator within thirty days so that the arbitration with respect to the quality of his raisins could be disposed of, but Scheidt declined to do so, and consented to the court passing upon and determining the quality of raisins delivered by him to the Association, and at the trial introduced evidence upon that issue. The court confirmed the report of the arbitrators and found that, in accordance therewith, certain of the individual defendants, including J. H. Scheidt, had delivered raisins with excessive moisture content and the amount thereof.

There is substantial evidence, as will be shown in some detail later in this opinion, that some portions of the raisins delivered by the eight grower members of the Association against whom judgment was rendered were so high in moisture content that they could not be run through the stemmer and processed without further drying. Finding that such raisins "were not properly dried and cured but were too wet and contained too much moisture and were too heavy for processing and marketing" the trial court determined the exact weight of the defective delivery made by each of the defaulting growers and accordingly proportioned against them plaintiffs' recovery of liquidated damages.

Defendants contend that plaintiffs could not recover liquidated damages without alleging and proving that actual damages would be "impracticable or extremely difficult to fix * * *." in accordance with the provisions of section 1671 of the Civil Code. That this is the general rule in this state where there is a contract which undertakes to fix the amount of damages in anticipation of an obligation has been so held in the following cases: Rice v. Schmid, 18 Cal.2d 382, 385, 115 P.2d 498, 138 A.L.R. 589; Robert Marsh & Co., Inc., v. Tremper, 210 Cal. 572, 576, 292 P. 950; Dyer Bros. Golden West Iron Works v. Central Iron Works, 182 Cal. 588, 189 P. 445; Kekich v. Blum, 43 Cal.App.2d 525, 111 P.2d 411. But the Legislature has provided for an exception to this rule with respect to liquidated damages where a nonprofit cooperative marketing association is concerned. This exception, which is a grant of power to such cooperatives, is set forth in section 1209 of the Agricultural Code: "The by-laws or the marketing contract may fix, as liquidated damages, specific sums to be paid by the member or stockholder to the association upon the breach by him of any provision of the marketing contract regarding the sale or delivery or withholding of products; * * * and any such provisions shall be valid and enforceable in the courts of this State; and such clauses providing for liquidated damages shall be enforceable as such and shall not be regarded as penalties."

The majority say that the alleged breach by defendants does not fall within the above section of the Agricultural Code in that the intention of the Legislature was to provide for deliveries deficient in quantity, rather than deliveries of produce of defective quality.

In order to conclude that this contention has merit it is necessary to ignore certain terms of the marketing agreement entered into by each defendant with the Association. It was there agreed that each grower should sell "all of the raisins owned and grown" by him, *and* that the grower "agrees to deliver the same and *all thereof properly cured and in good condition.*" [Emphasis added.]

Section 1208 of the Agricultural Code provides in part that "If they contract a sale to the association, it shall be conclusively held that title to the products passes absolutely and unreservedly, except for reported liens, *to the association upon delivery;* or at any other specified time if expressly and definitely agreed in the said contract." [Emphasis added.]

Section 1725(3) of the Civil Code provides that: "Where the parties purport to effect a present sale of future goods, the agreement operates as a contract to sell the goods and as soon as the seller acquires the goods the property therein shall pass to the buyer without further act if the parties so intend unless the agreement otherwise provides."

Section 1213 of the Agricultural Code provides that: "Any provisions of law which are in conflict with this chapter shall not be construed as applying to the associations herein provided for."

Construing these statutory provisions together with the marketing agreement, which made no provision for the time title was to pass, *it would appear that the sale of the raisins was to take place upon delivery of the raisins to the Association in accordance with the terms of the contract,* thus bringing the present case within the provisions of section 1209 of the Agricultural Code. That section provides that liquidated damages may be provided for upon the breach by a member "of any provision of the marketing contract regarding the sale * * * of products * * *."

Why the majority feel it necessary to discuss the practice of delivery of produce by the grower to a cooperative association as agent for the sale of that produce is not clear. That practice is not involved here. It is also not clear just why the facts of this case do not bring it within the provisions of the Agricultural Code (1209). The parties contracted for the sale of fruit in a certain condition. Further, all applicable laws in existence at the time the contract is made become a part thereof as fully as if incorporated by reference. Civ. Code, sec. 1656; 6 Cal.Jur. 311, sec. 186; Calpetro Producers Syndicate v. Chas. M. Woods Co., 206 Cal. 246, 274 P. 65. The parties then intended, because it is so provided in the Agricultural Code, that title should pass when the fruit was delivered. This is the time the sale took place, *not* when the contract to sell was entered into. The contract was breached with respect to the quality of the fruit which was to be delivered. As I have previously pointed out, the Legislature has specifically provided that the parties may contract for liquidated damages to be paid to the association upon *any* breach by a member regarding the sale of products. The parties did so contract and the breach occurred, but the majority of this court refuse to allow that contract to be enforced. I cannot agree with a result which ignores not only the intent of the parties as expressed in their contract, but which also ignores the clear provisions of the Agricultural Code.

In the absence of statute in this state it was well established that a nonprofit cooperative marketing association might contract for the payment by a member of liquidated damages for the violation of his agreement to deliver his product to the association for processing and marketing. California Bean Growers' Ass'n v. Rindge Land & Navigation Co., 199 Cal. 168, 248 P. 658, 47 A.L.R. 904; Poultry Producers of Southern California v. Barlow, 189 Cal. 278, 208 P. 93; Anaheim Citrus Fruit Ass'n v. Yeoman, 51 Cal.App. 759, 197 P. 959. The validity of liquidated damage provisions in situations involving cooperatives was established because of the need on the part of these associations to control the quantity of the particular commodity involved. As was said in the Anaheim case, decided before the enactment of the present code sections: "The existence and life of the association itself depended upon its being furnished fruit to dispose of in the public market. A reduction in the amount of fruit so handled would not only tend to increase the overhead cost to the nontransgressing members, but, we may assume, to some extent affect the prestige and standing of the association as a marketing concern." 51 Cal.App. 759, 763, 197 P. 961. These words are equally applicable to a situation such as the one here under consideration. The quality of the produce to be marketed may be of vital importance to the prestige of the association, and one does not need a vivid imagination to anticipate such situations. In the present case, the Association and its members had agreed between themselves that fruit of a certain quality should be delivered. The Association had contracted with the Government of the United States that fruit of a certain moisture content should be packed and delivered. As a result of the derelictions of certain members, the Association was unable to meet its government contracts and the raisins in question were sold, unprocessed, to others. That the Association and the members considered the quality of the raisins important is evident from the terms of the marketing agreement. It is equally evident that the prestige and standing of a marketing association may suffer as well from not being able to meet its contracts because of the poor quality of the produce as from a deficiency in quantity. *It is to be noted here that the poor quality of the raisins prevented them from being packed and thus the result was precisely the same as if the defaulting growers had not delivered all the raisins produced by them.* That the unprocessed raisins were subsequently sold to others is immaterial with respect to the standing and prestige of the Association. The fact remains that it, admittedly, could not meet its contracts with the Government for processed raisins. It is thus apparent that the Association was injured by the breach of the marketing contract.

The defendants next contend that the words "properly cured and in good condition" were ambiguous; and that although the raisins in question were delivered during the latter months of the year 1944, the chemical tests, showing the excessive water content of the raisins, were not made until January, 1945. Oral evidence is admissible to show the meaning of a term in a particular trade or business in order to enable the court to interpret the writing. This oral evidence is not received to vary or contradict the writing, but to explain it. Ermolieff v. R. K. O. Radio Pictures, 19 Cal.2d 543, 122 P.2d 3; California Canning Peach Growers v. Williams, 11 Cal.2d 221, 78 P.2d 1154; Body-Steffner Co. v. Flotill Products, 63 Cal.App.2d 555, 147 P.2d 84. In the Ermolieff case this Court said, 19 Cal.2d page 550, 122 P.2d page 6: "The basis of this rule is that to accomplish a purpose of paramount importance in interpretation of documents, namely, to ascertain the true intent of the parties, it may well be said that the usage evidence does not alter the contract of the parties, but on the contrary gives the effect to the words there used as intended by the parties. The usage becomes a part of the contract in aid of its correct interpretation." It is apparent from the record that all the growers had been in the business for many years, and were well aware of the fact that raisins properly cured and in good condition were raisins that would go through the "stemmer," a machine used preparatory to packing the fruit. That these raisins would not go through the "stemmer" and were necessarily stacked inside and out of the packing house is, in itself, evidence that the raisins were not delivered in accordance with the agreement. With respect to the raisins delivered by defendant J. H. Scheidt, there was testimony to the effect that he had admitted that his raisins were too "wet" and that he had got "more [money] than was coming to me" for them. Section 1870(2) of the Code of Civil Procedure provides that: "[An] act, declaration, or omission of a party" is evidence against such party. "The rule is settled beyond all controversy that the admissions or declarations of a party to a suit are admissible as evidence against the party making them. When given in evidence, they tend, as does other competent evidence, to prove the fact in issue to which they relate." Hall v. The Emily Banning, 33 Cal. 522, 524. Gates v. Pendleton, 71 Cal.App. 752, 236 P. 365; Langensand v. Obert, 129 Cal.App. 214, 18 P.2d 725.

The contention is made that the trial court restricted the defendants' right of cross-examination of one of plaintiffs' witnesses, and refused the admission of other evidence. The evidence sought to be introduced in the cross-examination was with respect to the custom of other packing houses, other than the one here under consideration, of stacking the boxes of raisins until they were sufficiently dried out to run through the "stemmer." The objection was made and sustained that this custom was immaterial to the issue involved—whether these particular raisins were delivered in conformity with the provisions of the marketing agreement. The excluded evidence consisted of a reiteration of testimony given before the arbitrators as to the condition of the raisins of one of the other growers. The trial court ruled that this had been concluded by the report of the arbitrators. But conceding, without deciding that this was not a proper ground for such ruling, it seems clear that the custom of other packing houses could not have been material to the present case since the issue at hand was whether or not the defendants had breached their agreement with the Association. While facts concerning conditions at places other than those concerned in the case on trial may be admissible in evidence as bearing upon the issues of a case, in order to render such evidence admissible it must be shown that such conditions are substantially the same as that concerned in the instant case. There was no showing here nor offer to show that the other packing houses were similar with respect to lack of drying facilities, or that the marketing agreements were the same.

The defendants maintain that even if the raisins were not delivered in conformity with the contract that they were accepted by the Association, and that as a result the provision with respect to the quality of the raisins was waived. The record shows that as the defective raisins were brought in by the growers, Chris H. Scheidt complained that they were too wet to pack, and reported their condition to the secretary-manager, and the president of the Association who, in turn, reported to the Board of Directors. Chris H. Scheidt had no authority to do more than report the derelictions to the directors. He was under no obligation to reject the raisins delivered by the members. Under his contract with the Association he was bound only to pack the raisins as they were delivered to him by the growers. His acceptance of the defective raisins could not have bound the Association, and cannot be considered a waiver on its part to the terms of the marketing agreement.

Three of the five directors of the Association were among those members who delivered the defective raisins to the Association. When notice was given of the defective quality of the raisins and of the resultant breach of the marketing agreement, it became their duty to enforce the terms of the contract. By not doing so, they obtained an advantage for themselves and the other defaulting members of the Association. Directors of a cooperative hold the property and property rights of the members thereof as trustees. Bogardus v. Santa Ana Walnut Growers Ass'n, 41 Cal.App.2d 939, 108 P.2d 52; San Joaquin Valley Poultry Producers' Ass'n v. Com'r of Int. Rev., 9 Cir., 136 F.2d 382, 385; Texas Certified Cottonseed Breeders' Ass'n v. Aldridge, 122 Tex. 464, 61 S.W. 2d 79; Bowles v. Inland Empire Dairy

Ass'n, D.C., 53 F.Supp. 210, 214, 215. The directors, knowing of their own defective deliveries, and the deliveries of the other defaulting members were bound to compel compliance with the marketing agreements and to pay damages themselves and to enforce the liquidated damage provisions of the agreement. Further, by the terms of the by-laws they were required to withhold payments to any member indebted to the Association, so that the lien of the Association on monies due it by a member would be safeguarded. In not so doing, they were guilty of a breach of trust with respect to the association and the other members. As such trustees, they were bound to act with the utmost good faith. Churchill v. Peters, 57 Cal.App.2d 521, 134 P.2d 841; In re Estate of Brown, 22 Cal. App.2d 480, 71 P.2d 345; Overell v. Overell, 78 Cal.App. 251, 248 P. 310.

The trial court correctly found that it was not necessary that plaintiffs make a demand on the directors that the terms of the marketing agreement be enforced because such demand would have been futile as three of the five directors were among the defaulting members. The law does not require the doing of a futile act. Smith v. Dorn, 96 Cal. 73, 30 P. 1024; Koshaba v. Koshaba, 56 Cal.App.2d 302, 132 P.2d 854; 6a Cal.Jur. 810-812, and cases there cited. In Smith v. Dorn, supra, 96 Cal. page 79, 30 P. page 1025, the Court said: "Besides, the answer of the corporation shows that any demand upon it, or upon its controlling directors, for the remedy sought by this action, or any remedy for the wrongs alleged, would have been useless. Therefore no such demand was necessary." Ashton v. Dashaway Association, 84 Cal. 61, 22 P. 660, 23 P. 1091, 7 L.R.A. 809; Moyle v. Landers' Adm'rs, 83 Cal. 579, 23 P. 798; Parrott v. Byers, 40 Cal. 614.

The point is made by the defendants that one of the plaintiffs, Chris H. Scheidt, does not come into equity with "clean hands" in that he refused to let the defaulting growers retake their raisins for further drying, and that it was his duty to do so in order to mitigate damages. An examination of the record shows that the evidence was conflicting as to whether the growers tried to retake the raisins for further drying, and with respect to whether they intended to return them to Chris H. Scheidt for packing thereafter. It was the province of the trial court to resolve this conflict, and it is to be presumed that the trial judge reconciled and accounted for, to his own satisfaction, any and all inconsistencies which might be made to appear in the testimony.

There is no merit in defendants' contention that the judgment for attorneys' fees and the appointment of a receiver was erroneous. "It is a well-established doctrine of equity jurisprudence that where a common fund exists to which a number of persons are entitled and in their interest successful litigation is maintained for its preservation and protection, an allowance of counsel fees may properly be made from such fund. By this means *all* of the beneficiaries of the fund pay their share of the expense necessary to make it available to them." [Emphasis added.] Winslow v. Harold G. Ferguson Corporation, 25 Cal. 2d 274, 277, 153 P.2d 714. And a court of equity has inherent power to appoint a receiver at the request of stockholders on grounds of fraud or mismanagement. Koshaba v. Koshaba, supra.

For the foregoing reasons, I would affirm the judgment.

TRAYNOR and SCHAUER, Justices (dissenting).

We concur in the conclusion reached by Justice CARTER and generally in the grounds stated therefor.

Rehearing denied; CARTER, TRAYNOR, and SCHAUER, JJ., dissenting.

33 Cal.2d 603

LOVING & EVANS v. BLICK.

L. A. 19884.

Supreme Court of California, in Bank.
March 18, 1949.

Arbitration and award ⚷77

Where motion to vacate arbitration award was supported by uncontradicted affidavits showing that building contract executed by contractors in partnership and on which award was based was void because only one member of partnership held a contractor's license when contract was entered into and performed, trial court erred in affirming award in favor of contractors. Code Civ. Proc. §§ 1280–1293; Business and Professions Code, § 7025 et seq., 7026, 7028, 7029, 7031.

CARTER, SHENK and SCHAUER, JJ., dissenting.

EDMONDS, J., dissenting in part.

◆

Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Proceeding in the matter of the arbitration between Loving & Evans, a copartnership, contractors, and Frank R. Blick, owner, concerning work performed and services rendered under a building contract. From an order granting motion for order confirming arbitrator's award, from order denying motion to set aside award, and from judgment for $5,739.87 on award in favor of the contractors, the owner appeals.

Judgment and orders reversed, and cause remanded for further proceedings.

Prior opinions, 177 P.2d 981, 191 P.2d 445.

Siemon, Maas & Siemon, Alfred Siemon, Walter L. Maas, Bennett Siemon and Walter L. Maas, Jr., all of Bakersfield, for appellant.

Burum, Woodruff & Young and Roland S. Woodruff, all of Bakersfield, for respondents.

Loeb & Loeb and Herman F. Selvin, all of Los Angeles, as amici curiæ on behalf of respondents.

SPENCE, Justice.

This case presents for consideration the propriety of a judgment entered upon an arbitration award in compensation of certain contractors for work performed and services rendered under a building contract. The legality of the award is challenged upon the ground that the contractors at all times in question had failed to comply with the state licensing requirements and were therefore not entitled to enforce their claim. An examination of the record shows this point to be well taken, for the award cannot be reconciled with the settled public policy of this state as expressed in our statutory law.

On February 8, 1945, Loving and Evans, a copartnership, respondents herein, entered into a written contract with Frank R. Blick, appellant herein, for the repair and remodeling of the latter's premises. The contract was on "a cost plus ten per cent (10%) basis," and it provided that any controversy arising between the parties should be submitted to arbitration. After the work was completed, appellant paid to respondents the sum of $13,555, but respondents claimed that a further amount was still due. To settle this point of dispute and in line with their previous understanding, the parties on August 24, 1945, entered into a separate "Agreement of Submission to Arbitration" of all their rights and obligations, under the provisions of sections 1280 to 1293, inclusive, of the Code of Civil Procedure. The agreement empowered the chosen arbitrator to hear the evidence, judge and determine the controversy, and "according to the legal right of the parties" render a "final award," which should "constitute a complete and final adjudication of all matters * * * submitted to arbitration" and "be in the same form" as a judgment in any civil action.

In accordance with the agreement, the following pleadings were submitted to the arbitrator: (1) respondents' petition setting forth their claim; and (2) appellant's answer wherein he denied the correctness of respondents' various charges and demands, and urged as a "separate and special defense" that respondents as contractors could not recover on the building contract in the absence of proof that they were duly licensed as required by article 2, chapter 9, division 3 of the Business and Professions Code.

On March 22, 1946, the arbitrator made his award declaring that "a dispute had arisen * * * in regard to the amount due" under the parties' building contract, and that they thereupon signed an agreement which "provided that the issues of said controversy should be joined by the submission of a petition * * * and an answer thereto" and that the arbitrator should determine "the matters submitted to arbitration" and that the "award should constitute a complete and final adjudication" of all matters submitted; that a hearing was had on "all of the issues involved"; and that "after consideration of the evidence introduced" he found in favor of the contractors in the sum of $5,739.87.

Thereafter, respondents served upon appellant and filed in the superior court an application for an order confirming the award of the arbitrator. Appellant appeared and objected to the award upon the ground that the arbitrator failed to "make a full and final determination of the matters submitted" in that he gave no consideration to the special defense presented by appellant in his pleading of respondents' noncompliance with the state licensing provisions as a bar to their recovery on the contract. Accordingly, appellant served and filed his notice of motion to set aside the award, stating that it would be based upon the award, the agreement of submission, the petition for the award, and the answer to the petition—copies of all of which were attached thereto—and upon the objections to the award, the affidavit of the arbitrator, and the affidavit of appellant's counsel—copy of each of which was served therewith. The affidavit of the arbitrator recited the filing of the petition and answer, setting out the special affirmative defense; that in the course of the hearing of the matters before him, "it was stipulated by the parties * * * that it was true that at all times from the initial negotiations for the work to be performed by the Contractors for the Owner, one of the partners of the firm of Loving and Evans, to wit: J. P. Loving, held a contractor's license and held such license throughout the progress of the work and until the completion thereof," and that during all of said time "the other partner, H. D. Evans, did not have such a contractor's license" nor did "the firm of Loving and Evans, a partnership, hold or have issued to [it] a contractor's license under the provisions of the Business and Professions Code of the State of California"; that "the initial negotiations for the work eventually performed were conducted between J. P. Loving and Frank R. Blick, the Owner"; that "prior to February 9, 1945, H. D. Evans became a partner with J. P. Loving in the contracting business and thereafter the work * * * was carried on by * * * [the] partnership." The affidavit of appellant's counsel corroborated the affidavit of the arbitrator with reference to the stipulation therein mentioned.

On May 13, 1946, the matter came on for hearing and was submitted for decision. In addition to the above documents and papers stating the positions of the parties, there was also before the court the affidavit of respondents' counsel. That affidavit admitted the making of the stipulation before the arbitrator with respect to the licensing status of respondents—that "at all times * * * J. P. Loving held a general contractor's license * * *; that the firm of Loving and Evans did not hold such a license until after the termination of [the] job; that H. D. Evans, individually, did not hold such license"—but declared that "the admission of such facts did not admit that said Contractors had not complied with the provisions of the Business and Professions Code * * *, nor admit that said provisions were applicable under the circumstances * * *"

On May 17, 1946, it was ordered that respondents' motion for an order confirming the award be granted and that appellant's motion to set aside the award be denied; and accordingly judgment for $5,739.87 was thereupon entered on the award. This appeal is taken from the two orders and the judgment. The county clerk certified the documents and papers aforementioned in accordance with Rule 5 of the Rules on Appeal. 22 Cal.2d 1, 4-6. Attached thereto is the certificate of the trial judge certifying that the three affidavits above reviewed were "used and considered" by him at the hearing, and that they constituted "all of the evidentiary matter so used or considered."

There are two legal issues involved: (1) whether respondents, under the undisputed evidence, operated in violation of the law; and (2) if so, whether the award of the arbitrator and its approval by court order can be sustained.

The following provisions of the Business and Professions Code must be considered in determining the first question. Section 7028 states that "It is unlawful for any person to engage in the business or act in the capacity of a contractor within this State without having a license therefor, * * *." Section 7025 declares "person" to include "an individual, a firm, copartnership, * * *." Section 7026 defines "a contractor" as "any person * * * who in any capacity other than as the employee of another with wages as the sole compensation, undertakes to or offers to undertake to or purports to have the capacity to undertake to or submits a bid to, or does himself or by or through others, construct, alter, repair * * * or demolish any building * * * or other structure, project, development or improvement, or to do any part thereof, * * *." Section 7029 specifies that "it is unlawful for any two or more licensees, each of whom has been issued a license to engage separately in the business or to act separately in the capacity of a contractor within this State, to jointly submit a bid or otherwise act in the capacity of a contractor within this State without first having secured an additional license for acting in the capacity of such a joint venture or combination in accordance with the provisions of this chapter as provided for an individual, copartnership or corporation." And section 7031 provides that "No person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action in any court of this State for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that he was a duly licensed contractor at all times during the performance of such act or contract."

There can be no question but that this case presents a clear violation of the statutes regulating the contracting business. Thus, while respondent Loving at all times possessed an individual contractor's license, his respondent partner Evans did not, and the partnership, as such, failed to procure such a license. As appellant maintains, it has been repeatedly declared in this state that "a contract made contrary to the terms of a law designed for the protection of the public and prescribing a penalty for the violation thereof is illegal and void, and no action may be brought to enforce such contract", Gatti v. Highland Park Builders, Inc., 27 Cal.2d 687, 689, 166 P.2d 265, 266; see, also, Haas v. Greenwald, 196 Cal. 236, 247, 237 P. 38, 59 A.L.R. 1493; Wise v. Radis, 74 Cal.App. 765, 774-776, 242 P. 90; Holm v. Bramwell, 20 Cal.App.2d 332, 335-337, 67 P.2d 114; Phillips v. McIntosh, 51 Cal.App.2d 340, 343, 124 P.2d 835; and that "whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case." Firpo v. Murphy, 72 Cal.App. 249, 253, 236 P. 968, 969; see, also, Chateau v. Singla, 114 Cal. 91, 94, 45 P. 1015, 33 L.R.A. 750, 55 Am.St.Rep. 63; Moore v. Moore, 130 Cal. 110, 113, 62 P. 294, 80 Am.St.Rep. 78; Levinson v. Boas, 150 Cal. 185, 193, 88 P. 825, 12 L.R.A.,N.S., 575, 11 Ann.Cas. 661.

To overcome the force of these settled principles, respondents unavailingly seek to align their status under the licensing regulations with that prevailing as a disinguishable consideration in Gatti v. Highland Park Builders, Inc., supra, 27 Cal.2d 687, 166 P.2d 265. There a judgment in favor of plaintiff contractors was affirmed although no license in the name of the partnership under which they had been operating had been issued to the two plaintiff contractors as such. But in the Gatti case these factors were material to its disposition: (1) At the time the contract was performed, both plaintiffs possessed contractor's licenses in their own names as individuals; and (2) during the performance of the contract, a joint contractor's license was issued to plaintiffs and a third party not concerned in the action so that "thereby any matters which might form the basis of legitimate inquiry by the licensing board as a condition precedent to the issuance of an additional partnership or joint venture license to plaintiffs, though involving a third party, were necessarily considered, and favorable action was taken thereon." 27 Cal.2d page 698, 166 P.2d page 266. Accordingly, it was concluded, 27 Cal.2d at page 690, 166 P.2d at page 266, that plaintiff contractors had "substantially complied with the statutory requirements," for otherwise their legitimate claim would be defeated on a "technical ground, resting on an unnecessarily strict construction of the statutory provision for the additional joint contractor's license and denying any effect to the combination license in fact issued to plaintiffs and a third person as above recited, [and] the legislative scheme in relation to the licensing of contractors, intended 'for the safety and protection of the public,' would become an unwarranted shield for the avoidance of a just obligation." As was further said in the Gatti case, 27 Cal.2d at page 690, 166 P.2d at page 267, "similar considerations" with respect to a contractor's claim prevailed in Citizens State Bank of Long Beach v. Gentry, 20 Cal.App.2d 415, 67 P.2d 364, and "justified the denial of [a] motion for a nonsuit, predicated on a rigid application of the licensing requirement," where the "contractor's license expired while the work was in progress but was renewed in the name of a corporation, organized by and bearing the contractor's name, and in which he was the dominant and controlling factor; and where the work was completed under the auspices of the corporation." But no comparable situation is presented here, for under the undisputed facts the contracting partnership of Loving and Evans did not hold a license "until after the termination of [the] job" in question and though from "all times from the initial negotiations * * * throughout the progress of the work and until the completion thereof," respondent Loving "held a contractor's license," his partner, respondent Evans, during all of said times "did not have such a contractor's license." Thus, it is apparent that the licensing regulations enacted "for the safety and protection of the public," by prohibiting inexperienced persons from engaging in contracting work, were at no time here material permitted to function in determining the qualifications of respondent Evans therefor. Such disregard of the public policy underlying the state's licensing requirements cannot be correlated with the rationale governing the Gatti and Gentry cases, and it renders the entire transaction between respondents and appellant "illegal and void," for completion of the contract "necessarily would involve the performance of illegal acts." Wise v. Radis, supra, 74 Cal.App. 765, 776, 242 P. 90, 94.

There now remains the question of the premise of appellant's objection to the enforcement of the award in favor of respondents. It must be conceded at the outset that ordinarily with respect to arbitration proceedings "the merits of the controversy between the parties are not subject to judicial review," Pacific Vegetable Oil Corporation v. C. S. T., Ltd., 29 Cal.2d 228, 233, 174 P.2d 441, 445, and that "arbitrators are not bound by strict adherence to legal procedure and to the rules on the admission of evidence expected in judicial trials." Id., 29 Cal.2d page 241, 174 P.2d page 449. But, as will hereinafter appear, the rules which give finality to the arbitrator's determination of ordinary questions of fact or of law are inapplicable where the issue of illegality of the entire transaction is raised in a proceeding for the enforcement of the arbitrator's award. When so raised, the issue is one for judicial determination upon the evidence presented to the trial court, and any preliminary determination of legality by the arbitrator, whether in the nature of a determination of a pure question of law or a mixed question of fact and law, should not be held to be binding upon the trial court.

The foregoing conclusion is entirely in harmony with the provisions of section 1288 of the Code of Civil Procedure, which recites the grounds upon which the trial court "must make an order vacating the award." Section (d) thereof specifies that the award must be vacated "where the arbitrators exceeded their powers, * * *." It seems clear that the power of the arbitrator to determine the rights of the parties is dependent upon the existence of a valid contract under which such rights might arise. Hanes v. Coffee, 212 Cal. 777, 779, 780, 300 P. 963; Friedlander v. Stanley Productions, Inc., 24 Cal.App.2d 677, 680, 76 P.2d 145; Stetson v. Orland Oil Syndicate, Ltd., 42 Cal.App.2d 139, 143, 108 P.2d 463; Johnson v. Atkins, 53 Cal. App.2d 430, 434-435, 127 P.2d 1027; Abraham Lehr, Inc., v. Cortez, 57 Cal.App.2d 973, 976-977, 135 P.2d 684. In the absence of a valid contract no such rights can arise and no power can be conferred upon the arbitrator to determine such nonexistent rights. The question of the validity of the basic contract being essentially a judicial question, it remains such whether it is presented in a proceeding "for an order directing * * * arbitration" under section 1282 of the Code of Civil Procedure or in a proceeding "for an order confirming" or "vacating [an] award" under sections 1287 and 1288 of said code. If it is presented in a proceeding under said section 1282 and it appears to the court from the uncontradicted evidence that the contract is illegal, the court should deny the petition for "an order directing the parties to proceed to arbitration." If it is presented in a proceeding under said section 1287 or 1288 and similar uncontradicted evidence is offered, the court should deny confirmation and should vacate any award granting relief under the illegal contract upon the ground that the arbitrator exceeded his powers in making such award.

Section 1281 of the Code of Civil Procedure, providing for submission to arbitration of "any controversy * * * which arises out of a contract," does not contemplate that the parties may provide for the arbitration of controversies arising out of contracts which are expressly declared by law to be illegal and against the public policy of the state. So it is generally held that "a claim arising out of an illegal transaction is not a proper subject matter for submission to arbitration, and that an award springing out of an illegal contract, which no court can enforce, cannot stand on any higher ground than the contract itself." 6 C.J.S., Arbitration and Award, § 12, page 160. Aptly illustrative of this well-settled principle is the fairly recent case of Smith v. Gladney, 128 Tex. 354, 98 S.W.2d 351, where a dispute arose between the parties as a result of trading in "futures" upon the Chicago Board of Trade. The matter was submitted to arbitration. When suit was brought upon the award and it was affirmed "on the theory that [it] was final," the appellate court, in reversing the judgment, said, 98 S.W.2d at pages 351, 352: "It appears to be almost universally recognized that a claim arising out of an illegal transaction, such as a speculation in futures, is not a legitimate subject of arbitration, and an award based thereon is void and unenforceable in courts of the country. Tandy v. Elmore-Cooper Live Stock Commission Company, 113 Mo.App. 409, 87 S.W. 614, 618; Benton v. Singleton, 114 Ga. 548, 40 S.E. 811, [58 L.R.A. 181]; Lum v. Fauntleroy, 80 Miss. 757, 32 So. 290, 92 Am.St. Rep. 620; Hall v. Kimmer, 61 Mich. 269, 28 N.W. 96, 1 Am.St.Rep. 575; Polk v. Cleveland Railway Company, 20 Ohio App. 317, 151 N.E. 808. * * * A claim that cannot be made the basis of a suit cannot be made the basis of an arbitration. The mere submission of an illegal matter to arbitrators and reducing it to an award does not purge it of its illegality." See, also, In re Gale, 176 Misc. 277, 27 N.Y.S. 2d 18, 21–23.

In ruling here upon the propriety of the arbitrator's decision, the trial court had before it and considered the affidavits of the arbitrator, of counsel for appellant, and of counsel for respondents showing the invalidity of the contract stemming from respondent partners' failure to comply with the state licensing requirements and the partnership's consequent lack of authority to bring or maintain an action or proceeding for the enforcement of the award. Pleaters & Stitchers Ass'n v. Davis, 140 Cal.App. 403, 406, 35 P.2d 401. Such affidavits were neither denied nor controverted; they were admitted without objection; no question is raised concerning their competency to show the illegality of the transaction; and being entirely in accord on the facts establishing the invalidity of the contract, the court was required to accept as true the facts therein stated. Giannopulos v. Pappas, 80 Utah 442, 15 P.2d 353, 355.

Since an unlawful transaction cannot be given legal vitality by the arbitration process, there is obviously no force to respondents' argument that they are in a distinguishable position because they allegedly are not bringing an "action in any court" on their claim, within the meaning of section 7031 of the Business and Professions Code, but are only seeking judicial confirmation of an arbitration award, and therefore their noncompliance with the statutory licensing regulations would not preclude their right to enforce a recovery. But as was said in Tandy v. Elmore-Cooper Live Stock Commission Co., 113 Mo.App. 409, 87 S.W. 614, at page 618: "The laws in support of a general public policy and in enforcement of public morality cannot be set aside by arbitration, and neither will persons with a claim forbidden by the laws be permitted to enforce it through the transforming process of arbitration." See, also, Smith v. Gladney, supra, 128 Tex. 354, 98 S.W.2d 351, 352. To hold otherwise would be tantamount to giving judicial approval to acts which are declared unlawful by statute. Wise v. Radis, supra, 74 Cal. App. 765, 775, 776, 242 P. 90; Massie v. Dudley, 173 Va. 42, 3 S.E.2d 176, 180, 181; In re Gale, supra, 176 Misc. 277, 27 N.Y.S. 2d 18, 21–23.

Similar considerations were involved in the case of Holm v. Bramwell, supra, 20 Cal.App.2d 332, 67 P.2d 114, relative to the enforcement of a mechanic's lien, which, like the arbitration process, is listed in our code as a "special proceeding", Code Civ. Proc., sec. 23, as distinguished from an "action", Code Civ.Proc., sec. 22, in the division of judicial remedies, Code Civ.Proc., Part III, secs. 1180–1208; 1280–1293. In the cited case plaintiff, a licensed building contractor, undertook certain construction work on defendant's lots. In so doing, plaintiff contracted with an unlicensed subcontractor for the furnishing of certain materials and the performance of certain labor, for which plaintiff paid an agreed sum. Upon the completion of plaintiff's undertaking, defendant paid him in part but "refused to pay * * * the balance on the theory that he had awarded certain contracts for materials and labor to an unlicensed subcontractor, which was contrary to law and invalid. * * * plaintiff then brought * * * suit to establish a mechanic's lien on the property and to sell it to satisfy the unpaid balance." 20 Cal.App.2d page 333, 67 P.2d page 115. The court found in favor of plaintiff in every respect except as to the amount that he paid the unlicensed subcontractor, which item was disallowed because "founded on an illegal contract which [plaintiff] had made * * * contrary to law" and so "void." 20 Cal.App.2d page 334, 67 P.2d page 115. Holding that the trial court had "properly disallowed" the mentioned item and had "properly refused to vest a lien upon the [defendant's] property for the payment of that sum," the appellate court continued, 20 Cal.App.2d at page 334, 67 P.2d at page 115, as follows: "Mechanics' liens are creatures of statute and therefore dependent upon at least substantial compliance with the law. * * * This is * * * a suit to recover money paid pursuant to an illegal contract with a subcontractor which is void. A mechanic's lien may not be founded on an illegal contract procured contrary to law." Thereupon, after quoting the various sections of the Contractors' License Law relative to the licensing requirements and compliance therewith as a condition prerequisite to the maintenance of an "action * * * for the collection of compensation," the appellate court stated 20 Cal.App.2d at page 336, 67 P.2d at page 116: "It has been repeatedly held that a party to an illegal contract may not rest his cause or recover judgment based upon such void agreement." Accordingly, the moneys advanced to the unlicensed subcontractor were "not recoverable" by plaintiff in his suit against defendant.

So here an analogous situation is presented where respondents are seeking to invoke the jurisdiction of the court to establish their award as a "judgment" having "the same force and effect, in all respects, as * * * a judgment in an action". Code Civ.Proc., sec. 1292. No more than a mechanic's lien should an arbitration award "founded on an illegal contract procured contrary to law" be enforced through a court proceeding. Whether applying to the court for recovery on his compensation claim either at the outset through the institution of a suit or later in fulfillment of the arbitration process, the contractor seeking judicial aid in the enforcement of his alleged rights should be required to comply with the specifications of the law "designed for the protection of the public." Firpo v. Murphy, supra, 72 Cal.App. 249, 253, 236 P. 968, 969. In this general sense, respondents' application for judicial confirmation of the arbitrator's award is an "action * * * for the collection of compensation" within the purport of section 7031 of the Business and Professions Code, as that section expresses the public policy of this state. Franklin and Roberts v. Goldstone Agency, Cal.Sup., 204 P.2d 37, see, also, In re Vanguard Films, Inc., 188 Misc. 796, 67 N.Y.S.2d 893, 896; Application of Levys, Sup., 73 N.Y.S.2d 801, 802; Tugee Laces, Inc., v. Mary Muffet, Inc., Sup., 73 N.Y.S.2d 803; also Waterbury Blank-Book Mfg. Co. v. Hurlburt, 73 Conn. 715, 49 A. 198, 199.

In conclusion, it appears appropriate to make reference to certain claims made by respondents, and also to make further comment upon the state of the record on this appeal. Respondents set forth in their briefs and petition for hearing certain alleged facts as the basis for the claim that they had substantially complied with the licensing requirements. Their statement of these matters is prefaced by the remark "Although the record does not reflect the following facts and they are recited here merely for example, the facts concerning the license of respondents are as follows: * * *" Appellant not only disputes the correctness of the facts stated by respondents but likewise contends that it is improper for respondents to attempt to bring before this court alleged facts which do not appear in the record on appeal. We are of the opinion that this contention of appellant must be sustained. Under the authorities above cited it seems clear that when a party seeks to use the processes of the courts to obtain confirmation of an arbitrator's award, and an issue is raised concerning the alleged illegality of the contract upon which the award is based, the trial court is the tribunal which must determine such issue of illegality upon the evidence presented to it. If this were not the rule, courts would be compelled to stultify themselves by lending their aid to the enforcement of contracts which have been declared by statute to be illegal and void. A party seeking confirmation cannot be permitted to rely upon the arbitrator's conclusion of legality for the reason that paramount considerations of public policy require that this vital issue be committed to the court's determination whenever judicial aid is sought.

Turning to the record, it appears that the only evidence before the trial court showed without contradiction that the contract upon which the award was based was illegal and void because of respondents' failure to comply with the licensing requirements. According to the application for confirmation and according to the award, which was attached as an exhibit, the contract upon which the award was based was a contract made on February 8, 1945, between "Loving and Evans, a copartnership, Contractors," and "Frank R. Blick, Owner." All the evidence before the trial court, including the affidavit of counsel for respondents, showed that "the firm of Loving and Evans did not hold such a [contractor's] license" and that "H. D. Evans, individually, did not hold such [contractor's] license" either at the time of the making of the contract or at any time while the work was in progress. No evidence purporting to show any attempted compliance with the licensing requirements at any time was offered to the trial court. This appeal is not in the nature of a so-called judgment roll appeal, and the rules governing the latter can have no application here. The transcript contains the several affidavits submitted to the trial court, and the certificate of the trial judge certifies that said affidavits were "used and considered by me" and that "said affidavits constitute all of the evidentiary matter so used or considered by me in the hearings of said motions [motion for order confirming award of the arbitrator and motion to set aside award of arbitrator]." Under these circumstances, this appeal must be determined upon the facts appearing in the record on appeal, and it follows from what has been said that the trial court erred in confirming the award. It is unnecessary here to enter into the realm of conjecture by discussing the effect, if any, of the disputed facts which are set forth in the briefs but which do not appear in the record. Upon reversal, respondents may present to the trial court any matters which they may claim will show a substantial compliance with the licensing requirements so as to avoid the charge of illegality with respect to the contract in question.

The judgment and orders subject of this appeal are, and each of them is, reversed, and the cause is remanded for further proceedings not inconsistent with the views herein expressed.

GIBSON, C. J., and TRAYNOR, J., concur.

EDMONDS, Justice.

I concur in the judgment but do not join in that portion of the majority opinion which approves and reaffirms the decision in Gatti v. Highland Park Builders, Inc., 27 Cal.2d 687, 166 P.2d 265.

SHENK, Justice.

I dissent. The parties executed a building construction contract providing for arbitration in the event of disagreement. A controversy ensued. The owner and the contractor entered into a separate agreement submitting the entire controversy to settlement by arbitration. By that agreement and the submission to arbitration the owner became bound by the award subject to the power of the Superior Court to vacate it for causes stated in section 1288 of the Code of Civil Procedure. Pursuant to section 1281 of that Code all of the factual and legal issues were properly submitted to the arbitrator. Evidence on all of the issues was introduced and considered by the arbitrator and the award was based thereon. Therefore when no fraud, misconduct or corruption is involved and the arbitrator has proceeded in accordance with his authority no excess of his powers has been shown and the merits of the controversy are not reviewable. Pacific Vegetable Oil Corporation v. C.S.T., Ltd., 29 Cal. 2d 228, 174 P.2d 441. Such an award is "according to the legal right of the parties." That qualification in the contract of arbitration should not be deemed to create an exception to the general rule so as to empower the court to review the issues before the arbitrator as on an appeal from a judgment rendered in the superior court. The parties may not by agreement bestow such additional power upon the court. Arbitration is a substitute for an action and trial in court, and the power of the court to set aside the award is very properly limited by the provisions of Title X Part 3 of the Code of Civil Procedure. Any implication from language in Utah Construction Co. v. Western Pac. Ry. Co., 174 Cal. 156, 162 P. 631, to the effect that the parties may extend the judicial power is dictum and should not be deemed persuasive in view of the determination in Pacific Vegetable Oil Corporation v. C. S. T., Ltd., supra.

The majority opinion has attempted to resolve the problem as though it might involve an unlawful contract or a contract contrary to public morals and therefore void. It may be assumed that a law declaring such contracts illegal may not be circumvented by submitting controversies thereunder to arbitration and obtaining court confirmation. But the contract here is not of that nature. There is nothing basically unlawful or contrary to public morals in a contract to construct or repair a building. Evidence dehors the contract is necessary to determine whether the activity which it evidences was or was not permissible under the law. The statute does not declare such a contract to be unlawful. The declaration of unlawfulness is confined to engaging in the business or acting in the capacity of a building contractor without having secured a license. Secs. 7028 et seq., Bus. & Prof. Code. A person pursuing the activities of a building contractor without the required license is guilty of a misdemeanor. Id. sec. 7030. And such person may not maintain an action in any court of the state for the collection of compensation for building contractor services. Id. sec. 7031. These are the consequences attached to violation.

The statutory restrictions applicable to the contractor are for the protection of the owner. Considering the limited consequences of a violation the owner may properly be deemed to have waived the right to make the objection when he submitted the controversy to arbitration. The time when he had a right to urge in court the claimed unlawfulness was before, not after, he went into arbitration. The procedure for submitting that question to the court is provided for in section 1282 of the Code of Civil Procedure whereby a "party aggrieved by the failure * * * of another to perform under an agreement in writing providing for arbitration may petition" the court "for an order directing that such arbitration proceed." After notice the court "shall hear the parties, and upon being satisfied that the making of the agreement or such failure to comply therewith is not in issue, shall make an order directing the parties to proceed to arbitration. * * * If the making of the agreement" be in issue a trial is then had. On such trial the contractor must necessarily show that he was duly licensed. The outcome is either a dismissal or an order summarily directing that the parties proceed to arbitration. Under the facts in this case the owner passed the proceeding in which he could question the contract or the propriety of arbitration and voluntarily submitted the controversy on all issues to the arbitrator. In the absence of a showing sufficient to set aside the award under section 1288 he must be deemed to be bound by the award. To allow him to continue to rely on his objection after submitting the controversy to arbitration, introducing evidence, and proceeding to an award would permit him to speculate on the outcome and accept it if it is favorable and reject it if it is adverse. When, as here, all of the factual and legal issues have been considered on evidence brought into the arbitration proceeding and there is no reason to vacate the award for any of the causes enumerated in section 1288 of the Code of Civil Procedure it should be confirmed pursuant to the mandate of section 1287 of the same code. Furthermore in accordance with the policy favoring arbitration the proceeding to confirm an award is not an action in court as specified in the licensing statute. Certainly it is not an action as defined in section 22 of the Code of Civil Procedure. This seems to be conceded by the majority. As stated, arbitration is a substitute for such an action. It is an alternative remedy authorized by law and the motion to confirm the award is at most a special proceeding as defined in section 23 of the same code and is not an action. I would affirm the judgment.

SCHAUER, J., concurs.

CARTER, Justice.

I dissent.

The problem here presented for consideration is whether a recovery should be allowed when a contract was entered into by a duly licensed contractor who subsequently found it necessary to enter into a partnership for financial reasons, the partnership, through no fault of its own, being unable to procure a partnership contractor's license until the completion of the work.

This case presents extenuating circumstances similar to those which prevailed in the cases of Gatti v. Highland Park Builders, Inc., 27 Cal.2d 687, 166 P.2d 265 and Citizens State Bank of Long Beach v. Gentry, 20 Cal.App.2d 415, 67 P.2d 364, and a similar result should be reached. In both cases it was held that where there was substantial compliance with the licensing statutes, recovery should be allowed to prevent a manifestly unjust and inequitable result.

The only record before us is a so-called judgment roll consisting of an application by Loving and Evans for Order Confirming Award of Arbitrator, Notice of Motion by Blick to set Aside Award of Arbitrator, Affidavit of Arbitrator, Affidavit of Walter L. Maas, Jr., one of the attorneys for Blick, Affidavit of Roland S. Woodruff, one of the attorneys for Loving and Evans, Order Confirming Award of Arbitrator, and judgment on award of arbitrator. With the exception of the above affidavits, no evidence was offered in the trial court, and the evidence taken before the arbitrator was not introduced at the trial and is not a part of the record in this case.

In the affidavit of Roland S. Woodruff which was before the trial court at the time it made its order confirming the award of the arbitrator, he states with reference to the proceeding before the arbitrator:

"That at said hearing evidence was introduced that the original contract for the performance of the alteration, remodeling and repair work was executed by J. P. Loving and Frank R. Blick; that at said time J. P. Loving was doing business as an individual and was properly licensed as a general contractor under the laws of the State of California.

"Evidence was further introduced showing the relationship between J. P. Loving and H. D. Evans, when that relationship was commenced, and other facts relating thereto which were relevant to the question of whether or not said persons had complied with, or were required to comply with, the provisions of the Business and Professions Code of the State of California relating to Contractors' licenses."

In this state of the record it must be presumed that all evidence necessary to support the judgment was received. We may, therefore, assume any state of fact necessary to support the judgment which is not contrary to the admissions and stipulations of the parties appearing in the record. This is the rule announced by this court in the recent case of Transportation Guarantee Company v. Jellins, 29 Cal.2d 242, 174 P.2d 625. At pages 245 and 246 of 29 Cal. 2d at page 627 of 174 P.2d the court said: "Contrary to the rule contended for by defendant we must, on this appeal, in determining whether the judgment shall be reversed or affirmed, construe all ambiguities in the contracts against defendant and in favor of plaintiff. *This is true, if for no other reason, than that on a judgment roll appeal it will be presumed that all evidence necessary to support the findings was received.* Freeman v. Gray-Cowan, Inc., 1933, 219 Cal. 85, 88, 25 P.2d 415. In accordance with such rule it is to be presumed that evidence was received establishing that the contracts in question, at least insofar as any ambiguous language is concerned, were prepared and formulated by defendant and hence are to be construed against him. Civ. Code, § 1654; Payne v. Neuval, 1908, 155 Cal. 46, 50, 99 P. 476. This rule would prevail as to the ambiguous language, under the circumstances shown here, even though it is asserted in plaintiff's brief that 'it is plain from the face of each contract in suit that a stock form of contract was used.' The admission that a 'stock form of contract' prepared by plaintiff was used, does not, on a judgment roll appeal by defendant, require us to assume in favor of reversing the judgment, that any particular clause was formulated by the plaintiff. Obviously, the contract forms were specially filled in to cover the details of the agreement in each case. Such forms, it is entirely possible, and hence, it must be presumed, if necessary, to support the judgment, were furnished in blank by plaintiff to defendant and filled in by the latter in respect to the disputed language. *In any event, the construction most favorable to sustaining the judgment must be indulged.* 2 Cal.Jur. § 511, pp. 871-3; id., § 515, pp. 879-81. It is also a rule of construction that a contract 'must receive such an interpretation as will make it lawful * * * if it can be done without violating the intention of the parties' (Civ.Code, § 1643), and 'may be explained by reference to the circumstances under which it was made, and the matter to which it relates' (Civ.Code, § 1647)." (Emphasis added.)

The majority quote from the affidavit of respondent's counsel that a stipulation was made before the arbitrator to the effect that "at all times * * * J. P. Loving held a general contractor's license * * *; that the firm of Loving and Evans did not hold such a license *until after the termination* of [the] job; that H. D. Evans, individually, did not hold such license". There was added the further statement that this did not constitute an admission that the provisions of the Business and Professions Code had not been complied with. This stipulation subtracts nothing from the rule just set forth. As a matter of fact, the italicized portion informs us that the partnership did hold a license at the completion of the work, that evidence as to why they did not hold the license before must have been before the arbitrator when he gave his award. It also puts the case directly within the statement made in the Gatti case, supra, and set forth in the majority opinion [27 Cal.2d 687, 166 P.2d 266]: "thereby any matters which might form the basis of legitimate inquiry by the licensing board as a condition precedent to the issuance of an additional partnership or joint venture license to plaintiffs * * * were *necessarily considered,* and favorable action was taken thereon."

This case presents a stronger argument for allowing recovery on the contract than does the Gentry case, supra. In the Gentry case, the license of the contractor who entered into the contract and who did the actual work was allowed to expire during the performance of the contract. Although a license was taken out in the name of the corporation which was organized by the contractor and which bore his name, the one who did the actual work was not licensed at all times during the performance of the contract as is required by law. In this case, Loving, the one who was actively engaged in the actual construction work, was licensed at all times during the performance of the contract.

The conclusion is therefore inescapable, that the licensing requirements of the statute have been substantially complied with by the respondents and to deny them a recovery would bring about a manifestly unjust, inequitable and unreasonable result. Speaking frankly, I do not appreciate the morality which denies in such cases any rights to the individual whose money or other property has been thus appropriated. The law countenances no such wretched ethics. Its command always is to do justice. To those who dislike injustice and harsh results, the principle enunciated by the majority of this court will cause a justified indignation—that work honestly and faithfully done shall not be compensated because of an overly strict and technical construction of a statute.

It was provided in the contract that any controversy arising between the parties should be submitted to arbitration. After the completion of the work, appellant paid to the respondents the sum of $13,555 but respondents claimed that an additional amount was due. To settle this dispute, the parties entered into a separate "Agreement of Submission to Arbitration" of all their rights and obligations pursuant to sections 1280 and 1293, inclusive, of the Code of Civil Procedure. Under this agreement the arbitrator was empowered to hear the evidence, judge and determine the controversy, and "according to the legal right of the parties" render for them a "*final* award".

The policy of the law in recognizing arbitration agreements and in providing by statute for their enforcement is to encourage persons who wish to avoid delays incident to a civil action to obtain an adjustment of their differences by a tribunal of their own choosing. The statutory provisions are designed to avoid useless proceedings and to make the practice simple and as speedy as would be consistent with justice. Since it is the policy of the law to favor arbitration, every reasonable intendment will be indulged to give effect to such proceedings. 3 Cal.Jur. 36, sec. 6; Utah Const. Co. v. Western Pac. Ry. Co., 174 Cal. 156, 162 P. 631.

The Code of Civil Procedure, section 1281, provides that two or more persons may submit in writing to arbitration any controversy existing between them at the time of the agreement to submit, which arises out of a contract or the refusal to perform the whole or any part thereof or the violation of any other obligation.

Section 1288 of the Code of Civil Procedure sets forth the exclusive situations in which an award may be set aside upon the application of any party to the arbitration: (a) Where the award was procured by corruption, fraud, or undue means. (c) Where the arbitrators were guilty of misconduct, in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence, pertinent and material to the controversy, or of any other misbehaviors, by which the rights of any party may have been prejudiced. (d) Where the arbitrators have exceeded their powers, or so imperfectly executed them, that a mutual, final and definite award, upon the subject matter submitted, was not made.

The majority, unable to find a provision applicable to the present situation, place the case within subdivision (d) set forth above, which, it is my understanding, refers to the powers granted them in the agreement to arbitrate. It is further said that the contract was "illegal" and that no arbitration proceeding can give it validity. Whether or not the contract was valid was a mixed question of law and fact. There is ample authority to the effect that in the absence of a provision to the contrary in the arbitration agreement an arbitrator has power to determine questions of law as well as questions of fact. See 6 C.J.S., Arbitration and Award, §§ 48, 95, and cases there cited. In New York, the arbitration award has the same status as the verdict of a jury. See Arbitration Law and Decisions, Herman Tocker, page 171 of the Arbitration Journal, Vol. 6, 1941-1942.

In Dugan v. Phillips, 77 Cal.App. 268, 246 P. 566, it was held that a party is not permitted to speculate upon the action of the arbitrators and then refuse to be bound by an adverse award. To permit a man, capable of contracting, to refuse to be bound by the award of the arbitrator, would be to permit him, with the sanction of the Court, to breach his own contract, into which he entered voluntarily.

In Nelson v. Bestform Knitwear Corporation, Sup.Ct. Spec. Term, Part I, — Misc. —, 87 N.Y.S.2d 353, it was held that the issue of the validity of the contract may not be raised by a party thereto after participation in the arbitration proceeding and that no one may participate in an arbitration proceeding and then attempt to escape the consequences of a voluntary submission to its jurisdiction. "Generally, unless there is a contrary provision in the submission, a valid award operates as a merger and bar of all claims and defenses embraced in the submission and award." 6 C.J.S., Arbitration and Award, § 96; Stockwell v. Equitable Fire and Marine Ins. Co., 134 Cal.App. 534, 25 P.2d 873.

The majority opinion states that, "the rules which give finality to the arbitrator's determination of ordinary questions of fact or of law are inapplicable where the issue of illegality of the entire transaction is raised in a proceeding for the enforcement of the arbitrator's award. When so raised, the issue is one for judicial determination upon the evidence presented to the trial court, and any preliminary determination of legality by the arbitrator, whether in the nature of a determination of a pure question of law or a mixed question of fact and law, should not be held to be binding upon the trial court." This argument finds no support whatever in the decisions on the subject of arbitration and award. 3 Cal.Jur., sec. 27, p. 67; 6 C.J.S., Arbitration and Award, § 94; 6 C.J.S., Arbitration and Award, § 103; 3 Am.Jur., sec. 130, page 951. The latter text states the rule as follows:

"The award of arbitrators acting within the scope of their authority determines the rights of the parties as effectually as a judgment secured by regular legal procedure, and is as binding as a judgment until it is regularly set aside or its validity questioned in a proper manner. *Their decision on matters of fact and law is conclusive, and all matters in the award are thenceforth res judicata,* on the theory that the matter has been adjudged by a tribunal which the parties have agreed to make final —a tribunal of last resort for that controversy. This rule is universally applied with respect to matters actually presented by the parties for the decision of the arbitrators, and it has been held true even in case one of the parties neglects to present portions of his claim, for the reason that the arbitrators proceed pursuant to the contract of the parties and one so contracting who fails to take advantage of his opportunity to present his full case to the arbitrators should be concluded by the award and denied further relief. *To hold otherwise, it is said, would defeat the object of arbitration, which is to avoid litigation, and would, instead, encourage resort to the courts.* In other jurisdictions, however, the courts refuse to regard an award as conclusive upon matters embraced in the submission but not actually laid before the arbitrators. Nevertheless, an award which professes to cover everything in the submission is conclusive unless it clearly appears or is proven that such matters were not considered in reaching the decision.

"An award, if otherwise sufficient, is conclusive and binding irrespective of the question of whether or not the party in whose favor it is made originally had a

legal cause of action with respect to the matters submitted." (Emphasis added).

The only reason given in the majority opinion for its statement that the usual rules applying to arbitration proceedings do not apply in a situation such as this, is that the arbitrators "exceeded their powers." Subd. (d), Code of Civil Procedure, section 1288. And the case of Hanes v. Coffee, 212 Cal. 777, 300 P. 963 is cited. In this case, there was no arbitration and no award, and the lease, in which there was a clause providing for arbitration, was invalid. It is not, therefore, in point. In Friedlander v. Stanley Productions, 24 Cal. App.2d 677, also cited, at page 680, 76 P. 2d 145, at page 146 there is found the following statement: "The instant action was brought upon the contention that the contract of employment had been canceled and terminated. If the contract had been terminated, then the *arbitration provision was inoperative.*" Again, no arbitration was had, and no award made. In Johnson v. Atkins, 53 Cal.App.2d 431, 127 P.2d 1028, we find this statement: "If, through frustration, the contract was at an end arbitration was not proper under any interpretation of the rules, and it would then become immaterial whether the award was in proper form.

" 'We may assume without deciding that the contract was one that called for arbitration under the rules of the association, because we prefer to rest the judgment upon the firmer foundation that the trial court should have tried the issue whether the contract was terminated by frustration of the commercial venture contemplated by the parties in the execution of the contract, and hence the arbitrators had no jurisdiction to make the award.' " And, 53 Cal.App. 2d at page 434, 127 P.2d at page 1030: "Following the same rule (continued existence of the person or thing), but addressed particularly to appellants' contention that the frustration of the purpose of the contract left nothing to arbitrate under it, are Hanes v. Coffee, 212 Cal. 777, 300 P. 963, * * *." The case of Abraham Lehr, Inc., v. Cortez, 57 Cal.App.2d 973, 135 P.2d 684, 686 holds as follows: "We conclude * * * that our first cause of action, identical with that found in the Collier & Wallis, Ltd., case [Collier & Wallis v. Astor, 9 Cal.2d 202, 70 P.2d 171] presented a controversy 'arising under this chapter' (Labor Code, section 1647), and that an action upon it may not be maintained because the matters in dispute have not been referred to the Labor Commissioner. Were the necessity for the reference contractual, a termination of the contract might be said to end the necessity, but as it arises from statute, even the termination of the contract does not put an end to the requirement that matters in controversy be first referred to the Labor Commissioner.

"Secondly, we conclude that an action for damages, based on the theory that the contract is no longer operative, does not present a controversy arising under sections 1550-1649 of the Labor Code. If the contention were that by a term of plaintiff's contract the questions involved had first to be arbitrated, the cases already referred to justify the conclusion that under the facts of the second cause of action, the contract is at an end, as an operative contract, and the arbitration provision would also be ended."

In Stetson v. Orland Oil Syndicate, Ltd., 42 Cal.App.2d 139, 108 P.2d 463, an oil lease had terminated by its own terms before the action was brought to quiet title. It is said 42 Cal.App.2d at page 143, 108 P.2d at page 465: "Appellants next claim that, under the provisions of the lease, any question of disputed fact shall be first referred to arbitration and that respondents are therefore without remedy, other than through such procedure, inasmuch as the lease provides that the decision of the arbitrators shall be a condition precedent to any right of action, *and that there was no submission to arbitration* in the instant case." (Emphasis added.) The court held that the case of Hanes v. Coffee, supra, was controlling.

In only one of the cited cases was arbitration actually had, and prior to that time, the contract had been terminated because of commercial frustration. Hence, the facts are not similar to those under consideration here. The contract here had been fully executed by the respondents and all that remained to do was to compensate them for their work and labor.

The general rule with respect to the finality of the award of an arbitrator is stated in 6 Corpus Juris Secundum, Arbitration and Award, § 95 as follows: *"As an adjudication or judgment, an award, which is regular on its face and has not been impeached finally concludes and binds the parties on the merits of all matters properly within the scope of the award, both as to the law and the facts, and the courts will make no inquiry as to whether the determination thereon was right or wrong, for the purpose of interfering with the award,* unless there is a statute providing for a court review of an award on the merits, or preventing the award from becoming conclusive before the entry of judgment thereon. The general rule is particularly applicable where the parties have expressly agreed that the award shall be final and conclusive, or that there shall be no appeal therefrom." This rule finds support in all of the decisions of this court and the District Courts of Appeal in this state which have given consideration to the problem here involved. Utah Construction Co. v. Western Pac. Ry. Co., 174 Cal. 156, 162 P. 631; Carsley v. Lindsay, 14 Cal. 390; Peachy v. Ritchie, 4 Cal. 205; In re Frick, 130 Cal.App. 290, 19 P.2d 836.

In legal effect, the holding of the majority can result in but one conclusion, and that is, whenever the question of illegality is raised, or can be raised, in any case where the parties desire to submit a controversy to arbitration, and where such question of illegality is a question of fact, or a mixed question of law and fact, the determination of this issue by the arbitrator is a nullity as it must be redetermined by the trial court in the event the losing party desires to have the matter relitigated, and must again, be redetermined by this court in the event that the losing party again loses. This is indeed a backward step in the science of jurisprudence and in the administration of justice, as the law favors the submission of matters to arbitration since it affords an expeditious and inexpensive method for determining disputes and relieves the courts of some of their burdens and consequent congestion arising from the necessity of hearing and determining controversies.

Finally, there is no legal basis for the introduction in evidence in the trial court of the affidavits of counsel for the respective parties and the affidavit of the arbitrator which were filed in this case. This conclusion must follow from the settled rule that the award of an arbitrator is conclusive evidence of all matters contained therein and that such an award cannot be impeached or attacked except for fraud or misconduct or unless the error appears on the face of the award. 3 Am.Jur., sec. 166, p. 980; 6 C.J.S., Arbitration and Award, § 131; Utah Construction Co. v. Western Pac. Ry. Co., supra; Carsley v. Lindsay, supra; Peachy v. Ritchie, supra. In American Jurisprudence, supra, the rule is stated thus:

"In general, the award is the best evidence of the matters determined by the arbitrators; and in proceedings to enforce it, the award itself is conclusive evidence of all matters therein contained, *provided the arbitrators have not exceeded the powers delegated to them by the agreement of submission.* The courts regard matters submitted as concluded by the award, and in an action thereon they will not review the merits of the arbitrators' findings. However, the mere fact that certain persons signed the award is not, in itself, sufficient evidence that they were the persons selected by the parties to decide the controversy.

"Parol evidence, of course, is admissible to establish an oral award or an oral submission; *but extrinsic evidence cannot be admitted to alter an award. The award generally speaks for itself, and cannot be altered any more than the verdict of a jury.* It is not open to proof of any understanding or meaning of the arbitrators different from that which it carries with it and is warranted by its terms." (Emphasis added).

In 6 Corpus Juris Secundum, Arbitration and Award, § 131, the rule is thus stated: "Impeachment of award. It is often declared broadly that an arbitrator is not a competent witness to impeach his own award, and that his admissions or declarations are not admissible for that purpose. Hence, an arbitrator is not a competent witness to prove his own fraud or misconduct, or the misconduct of a party involving also misconduct of the arbitrator; and admissions made by an arbitrator, after the filing of an award, are not competent evidence for that purpose. However, an arbitrator who has refused to join in the award may testify to acts of partiality or misconduct on the part of other arbitrators; and he may testify as to conduct of a party tending to influence his decision."

It follows from the foregoing authorities that the affidavits presented to the trial court in the case at bar, and on which the majority relies for a reversal of the judgment, were not competent evidence and should not have been considered by the trial court or by this court in determining the finality of the award made by the arbitrator.

While the proposition is not discussed in the majority opinion, it is obvious that under the rule therein announced, appellant will not only defeat recovery by respondents of the sum of $5,739.87 awarded to them by the arbitrator, but may also recover from respondents the sum of $13,555 voluntarily paid by appellant to respondents before the award was made. Miller v. McKinnon, 20 Cal.2d 83, 124 P.2d 34; 140 A.L.R. 570; Salada Beach Public Utility Dist. v. Anderson, 50 Cal.App.2d 306, 123 P.2d 86; Miller v. City of Martinez, 28 Cal.App.2d 364, 82 P.2d 519; County of Shasta v. Moody, 90 Cal.App. 519, 265 P. 1032.

I cannot believe it was the intention of the framers of this statute or of the members of the Legislature who adopted it that it could ever be invoked to perpetrate such an outrageous injustice. Certainly no injury can result to the public from a holding that the provisions of the statute were substantially complied with in this case. It is the public interest and not private gain which should be given paramount consideration in the interpretation and application of statutes of this character.

For the foregoing reasons I would affirm the judgment of the trial court.

SCHAUER, J., concurs.

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33 Cal.2d 628

FRANKLIN et al. v. NAT C. GOLDSTONE AGENCY et al.

L. A. 20524.

Supreme Court of California, in Bank.
March 18, 1949.
Hearing Denied April 14, 1949.

1. Licenses 🔑11(5)

Interior decorators who furnished and decorated office by painting and carpeting, were "contractors" within purview of the Business and Professions Code, and required to comply with state licensing requirements of such code. Business and Professions Code, §§ 7000, 7008, 7026, 7028, 7031, 7055, 7058, 7059.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Contractor".

2. Arbitration and award 🔑66

Once an award of an arbitrator, regular on its face, is established by satisfactory proof, a prima facie case is made, and every presumption is in favor of its validity, and burden of introducing evidence to overthrow the award rests on party attacking award. Code Civ.Proc. §§ 1280–1293.

3. Arbitration and award 🔑66

The law favors arbitration, and every reasonable intendment will be indulged to give effect to such proceeding. Code Civ. Proc. §§ 1280–1293.

4. Affidavits 🔑18

Affidavit made on information and belief, was only hearsay and no proof of facts stated therein.

5. Licenses 🔑39.44

Proceeding by contractors for confirmation of award of arbitrators, was an "action" within meaning of provision of Business and Professions Code that no contractor may bring or maintain any "action" for collection of compensation for performance of contract for which a license is required without alleging and proving that he was a duly licensed contractor, and therefore contractors were required to prove that they were duly licensed. Business and Professions Code, § 7031; Code Civ.Proc. §§ 1280–1293.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Action".

6. Action ⚷4
Contracts ⚷138(1)

A party to an illegal contract or transaction cannot come into a court of law and ask the court to carry out the illegal contract or to enforce rights arising out of the illegal transaction.

7. Licenses ⚷11(5)

The licensing requirements of the Business and Professions Code in regulation of the contracting business were enacted for safety and protection of the public against imposition, and such public policy may not be circumvented. Business and Professions Code, §§ 7000, 7008, 7026, 7028, 7031, 7055, 7058, 7059.

8. Licenses ⚷39.44

Interior decorators who failed to prove that they were licensed contractors under the Business and Professions Code at time they painted office, were not entitled to have court confirm award of arbitrators for the painting. Business and Professions Code, §§ 7000, 7008, 7026, 7028, 7031, 7055, 7058, 7059; Code Civ.Proc. §§ 1280–1293.

CARTER, SHENK and SCHAUER, JJ., dissenting.

◆

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Proceeding by Helen W. Franklin and Malcolm M. Roberts, petitioners, against the Nat C. Goldstone Agency, a copartnership consisting of Nat C. Goldstone and Charles Goldstone, for confirmation of an award of arbitrators. From an order confiming arbitrators' award, and from judgment thereon, the copartnership appeals.

Reversed and cause remanded for further proceedings.

Prior opinion, 188 P.2d 60.

Kaplan, Livingston & Lewis, of Los Angeles, and Eugene S. Goodwin, of Hollywood, for appellant.

A. L. Weil, of Los Angeles, for respondents.

SPENCE, Justice.

This case involves the enforcement of an arbitration award in payment for certain painting work performed by interior decorators as part of their agreed services. The propriety of such recovery is challenged upon the ground that the decorators were not shown to be licensed contractors at the time of performance of the work in question. Such point of objection, tendering the issue of illegality in derogation of the right to judicial relief, is well taken, and the court's order confirming the award cannot be sustained upon the record as it now stands.

Respondents, as interior decorators, undertook by oral agreement "to furnish and decorate" appellant's office. The work included painting and carpeting. A dispute arose with respect to the charges for these services, and the parties submitted the matter to arbitration. The arbitrator made an award in favor of respondents. Within three months thereafter respondents applied to the superior court for an order confirming the award. The application for confirmation did not allege that respondents, either as a firm or individually, were licensed by the state to act as contractors at the time the work was performed. On the day of the court hearing, appellant filed an affidavit of one of its attorneys in opposition to confirmation of the award. The affidavit stated, upon information and belief, that neither of respondents "is or was a licensed contractor"; and that "no allegation or proof of contractor's license was made by [respondents] or either of them during the said arbitration." Respondents filed no counter-affidavit. The court made its order confirming the award and ordered that judgment be entered accordingly in favor of respondents. From such order and judgment appellant has appealed.

Appellant contends that respondents have no legal standing in court as the basis for the enforcement of their claim for compensation because it does not appear from the petition to confirm the arbitrator's award, or from any of the documents attached thereto, that respondents were duly licensed contractors at all times during performance of the agreement. Appellant makes no objection to the award to respondents for the carpeting work, but limits the application of its contention solely to the propriety of the court's order insofar as it allows compensation to respondents for the painting of appellant's office—$1,648.59.

[1] "It is unlawful for any person to engage in the business or act in the capacity of a contractor within this State without having a license therefor * * *." Bus. & Prof.Code, sec. 7028. As defined by statute, a "contractor" is "any person * * * who * * * undertakes to * * * himself or *by or through others*, construct, *alter, repair, add to*, subtract from, *improve* * * * any building * * *." Bus. & Prof.Code, sec. 7026; emphasis added. Classified as a separate branch of "the contracting business" is the comprehensive field of "specialty contracting" (Bus. & Prof.Code, sec. 7055), which includes "a contractor whose operations as such are the performance of construction work requiring special skill and whose principal contracting business involves the use of specialized building trades or crafts". Bus & Prof.Code, sec. 7058. The Contractors' State License Board (Bus. & Prof.Code, sec. 7000), in recognition of the fact that the construction industry embraces numerous specialized crafts requiring certain arts and skills, has expressly listed among the "classified specialists" coming within the scope of the licensing statutes "painting and decorating contractors." Calif.Admin.Code, Title 16, sec. 735. In line with these observations, the conclusion is inescapable that respondents should be regarded as "contractors" within the purview of the statute and the rules and regulations adopted in pursuance thereof (Bus. & Prof.Code, secs. 7008, 7059), and that compliance with the state licensing requirements was necessary to validate their undertaking to do and doing the work of painting appellant's office. Howard v. State of California, 85 Cal.App.2d 361, 363–365, 193 P.2d 11.

[2, 3] Respondents argue, however, that the award of the arbitrators may not be attacked upon this ground of illegality in challenge of their right to recover for the painting work in question, as determined by the arbitrator. Accordingly, they cite the well-settled principles that "once an award [of an arbitrator] regular on its face is established by satisfactory proof, a prima facie case is made, and every presumption is in favor of its validity, the burden of introducing evidence is to overthrow the award resting on the party who attacks the award", 3 Am.Jur. sec. 165, p. 980; see, also, 6 C.J.S., Arbitration and Award, § 130, page 281; that the arbitration process provides "a summary and expeditious means of attempting to determine controversies out of court pursuant to a stipulation of the parties in a written contract", Snyder v. Superior Court, 24 Cal.App.2d 263, 267, 74 P.2d 782, 784; see, also, Pacific Vegetable Oil Corporation v. C.S.T., Ltd., 29 Cal.2d 228, 240, 174 P.2d 441; Glesby v. Balfour, Guthrie & Co., Ltd., 63 Cal.App.2d 414, 417, 147 P.2d 60; and that pursuant to the proposition that the law favors arbitration, "every reasonable intendment will be indulged to give effect to such proceedings". Utah Construction Company v. Western Pacific Railway Company, 174 Cal. 156, 159, 162 P. 631, 633.

[4] The arbitration process in this state is governed by sections 1280–1293 of the Code of Civil Procedure and the parties have proceeded in accordance therewith. No error appeared on the face of the award, and at the judicial hearing appellant's entire attack thereon rested on the charge, by affidavit of its counsel, that respondents' compensation claim grew out of an illegal transaction by reason of respondents' failure to comply with the state licensing requirements for contractors. However, since such affidavit as to respondents' alleged unlawful conduct in the mentioned particular was made on information and belief, it was only "hearsay and no proof of the facts stated therein." Kellett v. Kellett, 2 Cal.2d 45, 48, 39 P.2d 203, 205; see, also, Pratt v. Robert S. Odell & Co., 63 Cal.App.2d 78, 82, 146 P.2d 504.

[5, 6] But the failure on the part of appellant to offer competent evidence on the disputed point of respondents' status as duly licensed contractors does not aid respondents, for whether or not they had complied with the state licensing requirements was a matter essential to their right of recovery on their contract. Section 7031

of the Business and Professions Code provides: "No person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action in any court of this State for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that he was a duly licensed contractor at all times during the performance of such act or contract." Respondents argue that they were not required to comply with this statutory requirement of pleading and proof as a condition precedent to recovery of judgment because they were not bringing "any action" to enforce their compensation claim, Phillips v. McIntosh, 51 Cal.App.2d 340, 341, 124 P.2d 835; Kirman v. Borzage, 65 Cal.App.2d 156, 158, 150 P.2d 3, but rather were seeking only judicial confirmation of an award already made in pursuit of the arbitration process. 6 C.J.S., Arbitration and Award, § 129, page 277. However, in the latter case as in the former, the aid of the court is sought through judicial proceedings in affirmance of alleged rights arising from a contract which violates the public policy of this state. As stated in Wise v. Radis, 74 Cal. App. 765, at page 775, 242 P. 90, at page 94: "No principle of law is better settled than that a party to an illegal contract or an illegal transaction cannot come into a court of law and ask it to carry out the illegal contract or to enforce rights arising out of the illegal transaction." See, also, Holm v. Bramwell, 20 Cal.App.2d 332, 336, 67 P.2d 114. Such "rule is not generally applied to secure justice between parties who have made an illegal contract, but from regard for a higher interest—that of the public, whose welfare demands that certain transactions be discouraged." Haruko Takeuchi v. Schmuck, 206 Cal. 782, 786, 787, 276 P. 345, 346; see, also, Butler v. Agnew, 9 Cal.App. 327, 331, 332, 99 P. 395.

[7, 8] The licensing requirements in regulation of the contracting business were enacted "for the safety and protection of the public" against imposition, Gatti v. Highland Park Builders, Inc., 27 Cal.2d 687, 690, 166 P.2d 265, 266, and such public policy may not be circumvented according to the manner in which application is first made to the court for relief. Otherwise, a person with a claim forbidden by law would be permitted to enforce it through the transforming process of arbitration—a procedure "tantamount to giving judicial approval to acts which are declared unlawful by statute." Loving & Evans v. Blick, Cal.Sup., 204 P.2d 23. A "judgment * * * entered in conformity" with "an order confirming, modifying, or correcting an award" (Code Civ.Proc., sec. 1291) has "the same force and effect, in all respects, as * * * a judgment in an action; and it may be [so] enforced * * *." (Code Civ.Proc., sec. 1292). Since the "judgment" in either event has the "same force and effect," it would likewise appear proper to hold that the legislature in neither situation intended that such recovery, through judicial proceedings, should run counter to public policy—that the mere submission of the illegal matter to arbitration and reducing it to an award would purge it of its illegality. Loving & Evans v. Blick, supra, Cal.Sup., 204 P.2d 23, and cases there cited. Accordingly, respondents' application for confirmation of the arbitrator's award and entry of a "judgment" in conformity therewith was an "action * * * for the collection of compensation" within the purport of section 7031 of the Business and Professions Code, and their proof of at least substantial compliance with the state licensing requirements as contractors in the performance of their painting services was essential to their recovery in this proceeding. Cf. Siemens v. Meconi, 44 Cal.App.2d 641, 642, 112 P.2d 904.

The judgment and order are reversed, and the cause is remanded for further proceedings not inconsistent with the views herein expressed.

GIBSON, C. J., and EDMONDS and TRAYNOR, JJ., concur.

SHENK, Justice.

I dissent for the reasons stated in my dissenting opinion in Loving & Evans v. Blick, Cal.Sup., 204 P.2d 23. In addition I am in accord with the opinion of the District Court of Appeal in affirming the judgment in this case, Second Appellate District, Division 3; 188 P.2d 60.

SCHAUER, J., concurs.

CARTER, Justice.

I dissent in this case upon the same grounds, and for the same reasons set forth in my dissent in Loving & Evans v. Blick, Cal.Sup., 204 P.2d 23.

The position taken by the majority in each case has the effect of declaring null and void the express provisions for arbitration, confirmation of the award of the arbitrators and the grounds upon which such awards may be set aside as set forth in the Code of Civil Procedure, sec. 1280 et seq.

Section 1288 of the Code of Civil Procedure specifically sets forth the grounds upon which the award of an arbitrator may be set aside. It is to be noted that such alleged "illegality" as appears in these two cases is not among them. To hold that the facts of these two cases bring them within the subdivision providing that an award may be set aside when the arbitrators have exceeded their powers appears to me to be a tortured way of adding a new provision to those expressly provided for by the Legislature.

The majority opinion is clearly inconsistent in holding that the portion of the award relating to the carpeting work may be confirmed because appellant makes no objection thereto, but the portion relating to the painting must be vacated and set aside because of appellant's objection to the confirmation of the award. So far as appears, there was one contract for both the carpeting and painting and the controversy over both items was submitted to arbitration. The award made by the arbitrator covered both items. Obviously, if the contract was illegal because of respondents' failure to obtain a contractor's license, this illegality affected the carpeting work as well as the painting and no recovery should be permitted under the theory on which the majority opinion is based.

The majority opinion in the case at bar demonstrates the soundness of the argument advanced in my dissenting opinion in the Loving & Evans case, supra, to the effect that in any case where it is possible to raise a question of illegality, it is idle to submit such a controversy to arbitration for the reason that the entire matter must be heard and determined by the Superior Court upon the application of either party to the proceeding; that is, as I understand the majority opinion, it holds that whenever the question of illegality is raised, it is a matter for the court to determine regardless of whether the question was raised before the arbitrator. This holding, in effect, will remove from the field of arbitration many controversies which have been the subject of arbitration in the past, for if a court is not bound by the award of an arbitrator, where the latter determines upon conflicting evidence that a contract is legal and binding, it would be idle to submit such matters to arbitration and then have to re-try the entire issue before a court. This will be the situation if the majority opinion becomes the law of this state.

The appeal in this case was first heard by the District Court of Appeal, Second Appellate District, Division 3, and an opinion was rendered by said court affirming the judgment 188 P.2d 60. This opinion, prepared by Mr. Justice Vallee and concurred in by Presiding Justice Shinn and Associate Justice Wood, contains a clear and correct statement of the law and I adopt it as a part of this dissent.

SCHAUER, J., concurs.

Hearing denied; SHENK, CARTER, and SCHAUER, JJ., dissenting.

90 Cal.App.2d 835

THOMAS et al. v. PACIFIC GREYHOUND LINES et al.

Civ. 7619.

District Court of Appeal, Third District, California.

March 28, 1949.

Appeal and error ⚷371

Where there was no compliance by appellants with court rule requiring that notice of appeal shall be ineffective unless appellant shall make arrangements with clerk for payment of costs of preparing transcript within ten days after notification from clerk of his estimate thereof, and, when respondents moved to dismiss the appeal, appellants neither requested to be relieved of their default nor filed any matter in opposition to motion to dismiss, appeal was dismissed. Rules of Appeal, rules 5(c), 10(a), 42.

◆

Appeal from Superior Court, Tehama County; H. S. Gans, Judge.

Action by J. P. Thomas and Rodie Thomas, husband and wife, and Jessey Keathley, a minor, by and through J. P. Thomas, his guardian ad litem, against Pacific Greyhound Lines, a corporation, and another, to recover for injuries sustained in collision between an automobile in which plaintiffs were riding and a bus. From an adverse judgment, the plaintiffs appeal, and the defendants move to dismiss the appeal.

Motion granted and appeal dismissed.

Alfred E. Frazier, of Red Bluff, for appellants.

Goldstein, Barceloux & Goldstein, of Chico, for respondents.

PEEK, Justice.

This is a motion by respondents to dismiss the appeal taken by plaintiffs from a judgment entered in an action brought by them to recover damages for personal injuries arising out of a collision between an automobile in which they were riding and a bus owned and operated by respondents. The motion, which has not been opposed by plaintiffs, is predicated on Rules 5(c) and 10(a) of Rules on Appeal and is supported by the certificate of the clerk of the superior court as required by Rule 42, Rules on Appeal.

The pertinent facts disclosed by the clerk's certificate are that judgment in favor of respondents was entered upon the verdict of the jury on May 22, 1948; that appellants' motion for a new trial was denied on July 12, 1948; that notice of appeal from the judgment of May 22, 1948, was filed on August 10, 1948; that notice to prepare the record on appeal was filed on August 10, 1948, and that the clerk served notice of estimated cost of preparing the record on August 21, 1948, but that neither the cost thereof was paid nor were arrangements made therefor as of the date of the clerk's certificate which is dated November 1, 1948.

Rule 5(c) of Rules on Appeal provides that the notice of appeal shall be ineffective unless the appellant shall make arrangements with the clerk for the payment of the cost of preparing the transcript within 10 days after notification from the clerk of his estimate thereof. Rule 10(a) of Rules on Appeal in effect provides in part that if an appellant fails to perform any act necessary to procure the filing of the record as provided in said rules, and such failure is the fault of appellant and no other person, the appeal may be dismissed on motion of respondent or by the reviewing court.

Viewing the facts set forth in the clerk's certificate in light of the foregoing rules it is quite obvious that appellants are in default.

It necessarily must follow that where, as in the instant case, an appellant has neither requested to be relieved of his default nor filed any matter in opposition to respondent's motion to dismiss, entitling him to relief, there remains no alternative but to dismiss the appeal.

The respondents' motion is granted, and the appeal is dismissed.

ADAMS, P. J., and THOMPSON, J., concur.

90 Cal.App.2d 803

In re BEST'S ESTATE.

EGGE v. ROYER.

Civ. 16473.

District Court of Appeal, Second District,
Division 3, California.
March 24, 1949.

Hearing Denied May 19, 1949.

1. Courts ⚷202(5)

On appeal from an order of the probate court in favor of respondent, appellate court views the evidence in the light most favorable to the respondent drawing all inferences in her favor and disregarding all conflicting and contradictory evidence.

2. Deeds ⚷206, 208(1)

Evidence sustained finding that deed to property which deceased had previously conveyed to grantor was delivered with intent that it should become operative as such, that in parting with possession thereof, grantor intended to divest herself of title, and that deed had never been redelivered by the deceased to the grantor with the intention of vesting title in the grantor.

3. Appeal and error ⚷882(8)

Admission of declarations of deceased made out of presence of appellant respecting conveyance of property by deceased to appellant, reason therefor and reconveyance by appellant was not prejudicial as resulting in a miscarriage of justice in view of similar testimony by appellant.

4. Appeal and error ⚷1058(1)

Alleged error in excluding declarations of appellant in presence of deceased respecting appellant's intent in executing a deed to deceased was cured in view of court's further ruling and fact that in later stages of the trial all material matters previously excluded were received in evidence.

◆

Appeal from Superior Court, Los Angeles County; Wm. S. Baird, Judge.

Proceeding in the matter of the estate of Betty Mae Best, also known as Betty M. Miller, Betty M. Royer, and as Betty M. Wright, deceased. From an order of the probate court decreeing that certain realty and income and increment therefrom claimed by Lorena G. Egge, as part of the assets of the estate, and ordering Avis F. Royer coexecutrix, to file an account and removing her from office, Avis F. Royer appeals.

Affirmed.

Reynolds, Painter & Cherniss, of Los Angeles, for appellant.

Roland G. Swaffield, of Long Beach, for respondent.

VALLÉE, Justice.

Appeal from an order of the probate court decreeing that certain real property and the income and increment therefrom claimed by a co-executrix is a part of the assets of the estate, ordering the co-executrix to file an account and removing her from office. Appellant and respondent are co-executrices of the estate of Betty Mae Best, whose true name was Betty M. Miller. The controversy centers around a deed executed by appellant in December, 1941, or early January, 1942, conveying to the deceased the north half of a 20-acre orange grove situate in the County of Orange. In April, 1939, the deceased had conveyed the entire 20 acres to appellant.

Appellant's assignments of error are: 1. The evidence is insufficient to support the findings. 2. Declarations of the grantor made out of presence of the grantee in disparagement of the grantor's deed were erroneously admitted in evidence. 3. Declarations of the grantor made in the presence of the grantee at the time of the transaction and bearing on the grantor's intent to deliver the deed when such intent was in issue were erroneously excluded from the evidence. Appellant claims that there is no substantial evidence to support the court's finding that the deed of December, 1941, or January, 1942, was delivered unconditionally. She claims that it was her intent and that of the deceased that the deceased should hold it only temporarily and should later return it.

[1] Viewing the evidence in the light most favorable to respondent, drawing all inferences in her favor and disregarding all

conflicting and contradictory evidence, Khoury v. Barham, 85 Cal.App.2d 202, 210, 192 P.2d 823, the facts are these:

Appellant and respondent are half sisters. On January 23, 1936, the deceased, mother of the parties, acquired a parcel of real property in the County of Orange, consisting of about 20 acres of citrus fruit. On May 4, 1936, the deceased conveyed to appellant the south half of the property. On April 1, 1938, appellant reconveyed the south half to the deceased. On April 22, 1938, the deceased and appellant joined in executing a deed of trust of the 20 acres to secure an indebtedness. Prior to March, 1939, the deceased married a Mr. Miller. In March or April, 1939, she was having trouble with him. He was continually wanting an interest in the ranch. The deceased wanted to take the property out of her name and asked respondent if she would be willing to take title and sign an agreement that she was holding it in trust for the deceased. Respondent declined. In March or April, 1939, the deceased asked a son if he would take title. He declined. Later in April, 1939, the deceased conveyed the entire 20 acres to appellant. In May or June, 1939, the deceased told respondent that she had placed the title to the ranch in the name of appellant and that appellant had given her an agreement back.

At the time of the execution of the deed of April 1939, two installments upon a first trust deed were due and there was a balance owing to a bank on a crop mortgage of about $5000.00. Appellant testified that the reason her mother deeded the 20 acres to her in April, 1939, was that a foreclosure was being threatened; that she had other property and was afraid a deficiency might be taken against her. Appellant gave no consideration for the deed of April, 1939. After the execution of this deed, about June, 1939, a loan of $200.00 was obtained from a bank on the crop evidenced by a note signed by appellant and the deceased. In 1939 and after the execution of the deed of April, appellant and her mother negotiated for the sale of the crops and went to different buyers for the purpose of arranging a sale. On one occasion the deceased did such negotiating alone. Some time after April, 1939, the deceased and appellant executed an application for reamortization of the first trust deed on the property. The name of the deceased was never taken off the notes secured by the crop mortgage. On one occasion after 1939 the deceased listed the ranch for sale with a man in San Diego. In 1940 additional moneys were borrowed on a crop mortgage evidenced by notes signed by appellant and the deceased.

E. R. Lewis, a fruit buyer, testified that he knew the 20-acre property, that he first met the deceased in 1940, the appellant in 1941, and the petitioner (respondent) in 1942. He saw the deceased at the ranch many times. During the picking of fruit, she was there every day as long as the picking lasted. She worked on the ranch in 1940 and 1941, irrigating and distributing snail bait. He purchased the crop in 1940 and did the negotiating with the deceased. He made her an offer, which she declined. She made a counter-offer, which he accepted. She told him they would have to go to the bank and draw some papers, which they did. In 1941 the deceased asked Mr. Lewis to look over the crop. He did. They agreed upon a satisfactory price and signed a contract.

Frank Belmont, a fruit shipper, testified that he first met the deceased in 1940 or 1941. She asked him for a loan to care for the crop. The loan was not made. At a later time he met the deceased with appellant. The deceased again asked for a loan. Mr. Belmont told her that he would have to have an agreement and that both would have to sign the papers. The deceased told him that the property stood in appellant's name and asked, "Why should the daughter sign the papers since it wasn't her property?" Mr. Belmont told her that if the daughter held the property in her name but the deceased owned the property it would be necessary to have both of their names on the paper. The loan was not made.

In late December, 1941, or early January, 1942, appellant signed, acknowledged and delivered to the deceased a grant deed conveying to her the north half of the property. This deed was prepared by a notary public at the direction of the deceased. After it was signed and acknowledged the notary handed it to appellant who handed it to the deceased. It was never recorded. Appellant's testimony was to the effect that she gave her mother this deed to enable her mother to obtain an agreement from her husband Miller, by which Miller would agree to do the labor on the ranch or have it done and take care of the expenses and by which he would agree to pay whatever expenses could not be obtained out of the ranch. She testified that her mother told her that Miller would not do these things unless he saw a deed to the property so he knew he was going to get something out of it and that her mother said that when the agreement was obtained from Miller the deed would be returned to her. She testified that later when it became evident that Miller was not going to do the work or sign an agreement the deceased told her that she could do as she pleased with the deed.

Appellant also testified that about three weeks before her mother's death and at her request, a box containing her papers, including the unrecorded deed, was taken from the back of her car and placed in the back of appellant's car; that deceased had put the deed in the box with her other papers shortly after it had been delivered to her, and that on the day she died, February 12, 1942, at the request of her mother, appellant moved the box back into her mother's car because she was going to have her car repaired. She also testified that at that time she had a box of her own papers in her car which she did not transfer to her mother's car.

On the day the deceased died the deed with other papers belonging to her was in a satchel in her car. She drove from her home to a "beauty parlor" with the papers in her car. She died at the beauty parlor. A friend drove the car back to her home. That evening the satchel containing the deed and papers of the deceased was taken out of her car and to the office of respondent's husband. Respondent took the deed out of the satchel in appellant's presence. Appellant testified that she said, "That is mine," and that respondent said, "If this is yours, you take it," and that she took it. She testified that several weeks later she destroyed it by tearing it into small bits which were thrown into the fireplace in the home of a Mr. and Mrs. Woodward. At a prior hearing in the probate court she testified that she was on the highway near the ranch when she destroyed the deed. Neither Mr. nor Mrs. Woodward was called as a witness.

During the morning of the day she died the deceased told respondent that appellant had made a deed to her of the north half of the property; that it would be in her papers; that she was carrying her papers with her at all times wherever she went and if anything happened to her respondent should get the papers. During that morning up to the time she went to the beauty parlor the deceased kept the satchel with her. When the satchel was opened after her death appellant stated to those present that in case anything happened she had promised her mother she would turn the ranch over to the rest of the children and she intended to do so. She stated that the deed which she had given her mother was not really good as it could not be recorded after death. She stated to them that her mother did not want Miller to get the ranch, or any part of it. The night her mother died appellant asked that she be permitted to take her mother's papers with her that night. She said she would bring them back in the morning and that they would all go over them at that time. She took the papers in the satchel. About two weeks later appellant handed the satchel to respondent, who opened it. There were only a few papers in it. Respondent asked what had happened to the papers. Appellant stated that she had taken out all of the papers that pertained to the ranch and a lot of inconsequential papers. Respondent asked where the unrecorded deed to the ranch was. Appellant stated that it was not in the papers and she did not know where it was; that she thought perhaps Miller might have found it. Appellant said, "It don't make any difference anyway about that because I intend to turn the ranch over to the rest of you, and this lawyer told mother that it was of no value anyhow." In June, 1942, appellant told respondent that she had destroyed the deed.

[2] The evidence fully supports the finding of the court that the deed to the

north half of the property executed in December, 1941, or January, 1942, was delivered with the intent that it should become operative as such; that in parting with the possession of the deed appellant intended to divest herself of title, and that the deed had never been redelivered by the deceased to appellant with the purpose and intention of vesting the title in appellant.

[3] The court over the objection of appellant admitted in evidence declarations of the deceased made to respondent and to a brother of the parties before the execution of the deed of April, 1939. These declarations were those in which deceased told respondent and the brother separately that she was having trouble with her husband; that he was continually wanting an interest in the ranch and that she wanted the property out of her name, asking each of them to take title and sign an agreement to the effect that the property was held in trust and that each had declined. Other declarations admitted over objection were that after the deed of April, 1939, the deceased told respondent that she had put the ranch in appellant's name and that appellant had given an agreement back. Others were that about a week before her death when the brother and the deceased were going over some papers, he saw the deed of December, 1941, or January, 1942, which she handed to him. He asked her, "Why don't you get the deed arranged so you can sell your half of it to Avis, you still have her half if you don't get together, and she said that she—no, that is not correct, she said, 'I have it fixed that way now.'" Appellant claims that the admission of these declarations was erroneous and prejudicial. None of them was made in the presence of appellant.

We deem it unnecessary to pass upon the admissibility of these declarations. Their admission was not prejudicial. Appellant testified that the April, 1939, deed to her was without consideration and that it was made because the deceased wished to place the property out of her name because of fear of a deficiency in the event of a threatened foreclosure. After this deed was executed the deceased exercised numerous acts of dominion over the property compatible with continued actual ownership. The evidence, other than the declarations the admission of which is complained of, establishes that the deed of April, 1939, vested title to the north half of the property in appellant merely as a convenience to the deceased. Further, the court found that no agreement back as mentioned in the declarations had been executed by appellant. We do not perceive any prejudicial error in the admission of the conversation had by the brother with the deceased a week before her death. It is an admitted fact that appellant executed the deed of December, 1941, or January, 1942, and that the deceased had it in her possession at the time of the conversation. The conversation was merely to the same effect.

[4] Appellant claims that the court committed prejudicial error in excluding declarations of the appellant made in the presence of the deceased bearing upon appellant's intent in executing the deed of December, 1941, or January, 1942. In the early part of a rather protracted trial, appellant testified that she had conversations with the deceased prior to and at the time of the execution of the deed. In ruling on objections to the conversations, the court restricted the witness to what the deceased had said and did not permit appellant to testify to what she had said. The error, if any, was cured. In later stages of the trial all material matters previously excluded were received in evidence.

After a review of the entire cause, including the evidence, we cannot say that any error complained of has resulted in a miscarriage of justice.

Judgment affirmed.

SHINN, P. J., and WOOD, J., concur.

90 Cal.App.2d 608

PEOPLE v. KLINKENBERG et al.

Cr. 4259.

District Court of Appeal, Second District,
Division 2, California.

March 15, 1949.

Hearing Denied April 14, 1949.

See 204 P.2d 613.

1. Assault and battery 🔑92
Conspiracy 🔑47
Kidnapping 🔑5
Weapons 🔑17(4)

Evidence sustained conviction of kidnapping while armed with deadly weapon, of assaults with deadly weapon, of violation of Deadly Weapons Act, and of conspiracy to commit such offenses. Gen. Laws, Act 1970; Pen.Code, §§ 207, 245.

2. Criminal law 🔑1159(3)

It is not within the province of the District Court of Appeal to determine conflicts of evidence or inferences to be reasonably drawn from the evidence, but the court is solely concerned with whether there is substantial evidence to support conviction.

3. Criminal law 🔑1159(2)

Before an appellate court may set aside a judgment of conviction it must appear that upon no hypothesis is there sufficient substantial evidence to support it.

4. Criminal law 🔑562

The determination of a criminal case involves proof that the offense was committed by the person or persons accused thereof.

5. Criminal law 🔑1144(13)

On appeal from conviction every fact which the jury could have reasonably deduced from the evidence will be assumed in favor of the verdict, and the appellate court will then determine whether such facts are sufficient to support it.

6. Criminal law 🔑1159(1)

On appeal from conviction if the verdict is justified by the circumstances a reviewing court will not interfere with the jury's determination even though the court might be of the opinion that such circumstances might also be reasonably reconciled with the innocence of the defendant.

7. Criminal law 🔑554, 558

The jury may disregard the testimony of a defendant even though uncontradicted and need not accept it as proof of facts leading to the commission of a crime when other circumstances warrant the disbelief of such testimony.

8. Criminal law 🔑1159(4)

A reviewing court may not reject statements of a witness that have been believed by the trier of facts unless it is a physical impossibility that they be true or their falsity is apparent without resort to inferences or deductions.

9. Criminal law 🔑553

Evidence which discloses circumstances that are unusual cannot be said to be inherently improbable.

10. Criminal law 🔑553

In order to say that a statement is inherently improbable it must appear that what has been related or described could not have occurred.

11. Criminal law 🔑1037(1, 2), 1044, 1129(1)

Where defendants fail to object to alleged misconduct of deputy district attorney or to move to strike out allegedly improper statements or to assign error respecting such matters, or to request the court to instruct the jury to disregard such statements, the general rule is that no objection may be raised for the first time on appeal.

12. Criminal law 🔑720(1)

Deputy district attorney's references in argument to defendants' conduct and relations to each other and to others and characterizations of such conduct was warranted by the evidence.

13. Criminal law 🔑720(1)

The fact that defendant denied that he had had any immoral relations with codefendant did not preclude the prosecutor from commenting on the uncontradicted evidence concerning their association.

14. Criminal law 🔑713

Where transcript of testimony had been corrected through the cooperation of counsel and the court, reference to such matter in prosecutor's argument to jury was not improper.

15. Criminal law 🔑706, 1171(1)

Cross-examination of defendant as to whether she would waive privilege of attorney and client in order that her former attorney might be asked to disclose certain information was unfair but not prejudicial.

16. Criminal law 🔑814(17)

Where circumstantial evidence is relied on only as incidental to and corroborative of direct evidence, and not as the sole proof of defendants' guilt, requested instructions based on contrary theory and containing erroneous statements were properly refused.

17. Criminal law 🔑814(17)

Where there is direct evidence connecting the defendants with the commission of the crimes charged and the circumstantial evidence is only incidental or corroborative, the court is not required to instruct the jury on the rules applicable to circumstantial evidence.

18. Criminal law 🔑552(3)

Each fact in a chain of circumstances that will establish a defendant's guilt need not be proved beyond a reasonable doubt.

19. Criminal law 🔑561(1)

The doctrine of reasonable doubt applies to proof of guilt and not to the establishment of each incident or event inculpating the defendant.

20. Criminal law 🔑561(1)

A reasonable doubt that warrants acquittal is one that results or arises from a consideration of all the evidence in the case. Pen.Code, §§ 1096, 1096a.

21. Assault and battery 🔑96(2)
Conspiracy 🔑48
Criminal law 🔑762(5)
Kidnapping 🔑6
Robbery 🔑27(1)
Weapons 🔑17(6)

Instruction that prosecuting witness' claim to interest in house to which he was not entitled would not justify kidnapping or assaulting or robbing him, or violation of Deadly Weapons Act, or a conspriacy to do so, was based on the evidence and was correct and did not indicate court's opinion that defendants had committed any of such acts. Gen.Laws, Act 1970; Pen.Code, §§ 207, 245.

22. Criminal law 🔑770(1)

It is the court's duty to instruct the jury not as to theories of either prosecution or defense but as to all matters of law necessary for their deliberations.

23. Criminal law 🔑770(1)

It was the court's duty to inform the jury as to all matters which had been developed by the evidence.

24. Criminal law 🔑829(18)

Refusal to give an additional instruction on the doctrine of reasonable doubt as applied especially to the possession of a blackjack, was not error where the court had stated to jury what constituted possession of a blackjack and had given jury the statutory instruction on the doctrine of reasonable doubt, since only one instruction as to reasonable doubt is required although the defendant is charged with having committed several different offenses. Pen. Code, § 1096a.

25. Criminal law 🔑829(1)

Refusal to give a requested instruction which was fully covered by another instruction given at defendants' request was not error.

26. Criminal law 🔑829(20)

Where all defendants were present at the time of the commission of the offenses charged and were active participants in the antecedent preparations therefor, and the court had instructed the jury in almost the same language as that requested by the defendant, refusal of requested instruction that evidence that a defendant was in the company of one or more persons who were members of a criminal conspiracy was not of itself sufficient to prove that such defendant was a member of the conspiracy, was not error.

27. Criminal law 🔑878(4)

Where defendants were charged with robbery and with conspiracy to commit several other crimes including robbery, and jury acquitted defendants of robbery but convicted them of the other offenses, the verdict was not inconsistent.

28. Conspiracy ⟹28

Conspiracy is a distinct offense from the crime which is planned to be committed.

29. Conspiracy ⟹47

Proof that two or more persons conspired to commit a crime and engaged in overt acts leading to its commission will sustain a conviction of conspiracy even though they failed to accomplish the object of such conspiracy.

30. Conspiracy ⟹27

Even though some of the overt acts were not in themselves criminal, yet if they were performed in preparation for the commission of the criminal act they are sufficient overt acts to sustain the charge of conspiracy.

31. Conspiracy ⟹48

Verdict finding the defendants guilty of conspiracy to rob was not deficient because it failed to specify the degree of robbery. Pen.Code, § 211a.

32. Conspiracy ⟹23, 48

The crime of conspiracy is not divided into degrees and the jury is not required to find the degree of such crime. Pen.Code, § 211a.

33. Conspiracy ⟹43(12), 48

In a trial for conspiracy the fact that robbery may be of the first or second degree, does not require either allegation, proof or verdict as to the degree of robbery which the defendants are alleged to have conspired to commit. Pen.Code, § 211a.

34. Conspiracy ⟹28

The penal code does not limit the charge of conspiracy to an agreement to commit only one crime. Pen.Code, §§ 183, 184.

35. Conspiracy ⟹23, 28

The crime of conspiracy consists in an unlawful agreement or combination to commit a crime and is separate and distinct from the substantive crime which constituted the object of such conspiracy. Pen. Code, §§ 183, 184.

36. Criminal law ⟹1186(4)

Where record of approximately 2,100 pages revealed that trial was remarkably free of error, and such errors as occurred were inconsequential and there was no miscarriage of justice, conviction would be affirmed. Const. art. 6, § 4½.

37. Criminal law ⟹1023(10)

Attempted appeal from verdicts would be dismissed.

◆

Appeals from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Marjorie May Massow and Albert William Tucker were convicted of kidnapping while armed with a deadly weapon, of assaults with a deadly weapon, of violation of the Deadly Weapons Act, and of conspiracy to commit such offenses, and from the judgment and from order denying motion for new trial and from verdicts, they appeal.

Judgments and orders denying motions for new trial affirmed, and appeal from verdicts dismissed.

Fink, Rolston, Levinthal & Kent, of Los Angeles, for appellant Massow.

Albert William Tucker, in pro. per.

Fred N. Howser, Atty. Gen., Henry A. Dietz, Deputy Atty. Gen., William E. Simpson, Dist. Atty., and Robert Wheeler and J. Miller Leavy, Deputy Dist. Attys., all of Los Angeles, for respondent.

WILSON, Justice.

The record in this case narrates a series of events as bizarre and fantastic as could be invented by a fictionist but actually a most carefully planned and brutally executed assault. While the evidence is conflicting as to some of the occurrences it is undisputed that the complaining witnesses were viciously assaulted, beaten and thereafter kidnaped by being forcibly conveyed from one place to another in the Hollywood hills. The paramount question in dispute is whether, as asserted by the prosecution, defendants conspired to kidnap the complaining witnesses for the purpose of assaulting them and did kidnap and assault them, or, as maintained by defendants, the complaining witness Gianaclis arranged to "frame" defendant Massow by having himself kidnaped by defendant Tucker while she was present, thereby implicating her in the crime. By their verdict of guilty the jury adopted the former theory.

Defendants Massow, Tucker, Klinkenberg and Hatfield were charged in seven counts with felonies alleged to have been committed on June 30, 1947: (1) Kidnaping Nicholas Dan Gianaclis while they were armed with a deadly weapon; (2) robbery of Gianaclis; (3) assault with a deadly weapon upon Gianaclis; (4) assault with a deadly weapon upon Verne Davis; (5) kidnaping of Gianaclis for the purpose of extortion and robbery; (6) violation of the Deadly Weapons Act, Stats.1923, ch. 339, p. 695, as amended, 1 Deering's General Laws, 1944 Ed., p. 864, Act 1970; (7) conspiracy to commit the several crimes of murder, kidnaping, Penal Code, sec. 207, robbery, assault with a deadly weapon, Penal Code, sec. 245, and violation of the Deadly Weapons Act.

The overt acts alleged to have been committed in furtherance of the conspiracy charged in count 7 are as follows: (a) Tucker and Miss Massow instructed one Barbara Whitworth to rent an automobile; (b) Miss Massow obtained an automobile from one Barclay Thomas; (c) she drove an automobile into Laurel Canyon; (d) Klinkenberg, Tucker and Hatfield drove and rode in an automobile into Laurel Canyon; (e) Tucker and Hatfield obtained a blackjack.

The jury found defendants Massow and Tucker guilty as charged in counts 1, 3, 4, 6 and 7 and that they were armed while committing the crime of kidnaping as alleged in count 1. Klinkenberg was found guilty under counts 3, 4 and 6, and Hatfield under count 6. The latter two were sentenced to the county jail and have not appealed. All defendants were found not guilty under count 2, and count 5 was dismissed by the district attorney. Defendants Massow and Tucker presented motions for new trials which were denied. Miss Massow was sentenced to the California Institution for Women and Tucker to the State prison at San Quentin. Miss Massow has appealed from the judgment and from the order denying her motion for a new trial and has purportedly appealed from the verdicts. Tucker has appealed from the judgment and from the order denying a new trial.

Defendants assign as grounds for reversal the insufficiency of the evidence to sustain the verdicts and the judgments and prejudicial errors occurring at the trial. Their briefs are devoted primarily to a discussion of the evidence, their version of which, insofar as it relates to events in dispute, is based chiefly on their own testimony. But there are volumes of evidence given by other witnesses which point unerringly to their guilt.

Sufficiency of the Evidence.

In 1943 or 1944 Miss Massow met Gianaclis and thereafter often visited his store to obtain articles needed by her employer. She invited him to her home where he became acquainted with her father and mother. She indicated her interest in obtaining employment as an actress in motion pictures and told Gianaclis she had attended a dramatic school where one Kachel had been her coach. Gianaclis told her he could not aid her in gaining employment as an actress. Later he was instrumental in obtaining a position for her as cashier in a restaurant in one of the large studios. As a result of acquaintances thus made she was hired to act in one or two pictures. Thereafter through his influence she was employed in another studio and through arrangements made by him she adopted as her professional name Madge Meredith. They had slight though not serious disagreements whenever she talked of having an agent.

In the fall of 1943 Miss Massow called on Kachel several times. Gianaclis accompanied her on one of her visits and sought to induce Kachel to coach her in connection with her studio work. Kachel consented and during the remainder of 1943 and a part of 1944 instructed her, refusing to accept any compensation. About the beginning of 1946 Miss Massow, Gianaclis and Kachel agreed to live under the same roof to serve the latter's convenience in his coaching. They purchased a house which will be referred to as the Magnolia house or property. While Gianaclis was to advance the funds for the purchase each party was eventually to pay one third of the cost and each was to have a one-third interest. They regarded the property as a profitable investment and estimated it could be sold for a large profit.

Kachel was a "dummy" in the purchase, the deed having been made in his name. It was agreed that thereafter Kachel was to convey title to Miss Massow and himself. Because of domestic difficulties it was inadvisable to have Gianaclis appear as a part owner and Miss Massow said she could not have it in her name because of trouble at home. Although she had always declared it was a "three way deal," a grant deed to her alone was subsequently executed by Kachel. Gianaclis, Miss Massow and her family resided in the house for several weeks. Eventually Kachel was "frozen out" of the transaction and Gianaclis and Miss Massow entered into an agreement whereby each should own a one-half interest. She said she had sufficient money to pay her share. Gianaclis deposited his half of the purchase money. He and Miss Massow went to a notary public whom she instructed to prepare a deed conveying a one-half interest to Gianaclis. Both were specific in their statements to the notary that they were making an investment from which each was to benefit when the property should be sold.

In the fall of 1946, because of a disagreement between Miss Massow and Gianaclis, she and her family moved out of the house. Gianaclis suggested that inasmuch as they were drifting apart the property should be sold and the proceeds divided. For the first time she asserted sole ownership and said the house was not for sale. When Gianaclis interviewed a real estate agent concerning the price that could be obtained for the property she repeated that he had nothing more in the property than a trust deed. He never claimed more than a half interest.

In January, 1947, Miss Massow sued Gianaclis claiming to be the sole owner of the Magnolia property. The case came to trial on June 9, 1947, and after some testimony had been given the case was put off calendar.

Prior to the hearing in court she called on Gianaclis at the Magnolia house and threatened that if he did not convey the property to her she would make complaint to the Revenue Department, the State Board of Equalization, the Narcotic Squad and the Immigration Officers. She told him she had reported him to each of those offices and unless he deeded the property to her she was going to "use the prosecution" against him. She advised him during their conversation, which extended from 11:00 o'clock in the evening until 5:00 o'clock the following morning, what would happen to him if he did not comply with her demands for a deed to the property. A revenue officer informed Gianaclis that she had reported him to that office. A few days prior to the trial Kachel advised Miss Massow that Gianaclis had said he and Miss Massow jointly owned the Magnolia property. Her reply was that the place was her own and Gianaclis had merely loaned her the purchase price. She later suggested to Kachel that he might inform Gianaclis that she had reported him to the law enforcement officers.

About November, 1946, Miss Massow met defendant Tucker, a nurseryman and landscape gardner, when he was employed to plant a lawn on the Magnolia property. After her appearance in court in the civil action against Gianaclis on June 9, 1947, she and Tucker became friendly and he took her out socially. He had never done so before. At the time of the hearing in the civil action Tucker knew Gianaclis was claiming a half interest in the property and Miss Massow was trying to obtain the entire title. He encouraged her in her claim of sole ownership. After the hearing Tucker told her Gianaclis had attempted to bribe him, Tucker, as a witness.

Defendant Klinkenberg was a cook in a cafe on Laurel Canyon Road in the neighborhood of the Magnolia house. Tucker had given Klinkenberg some needed assistance in a fight in April, 1947, and in return Klinkenberg promised to do a favor for Tucker whenever the latter needed it. During May and June Klinkenberg and Tucker met frequently. In the latter part of June Tucker asked Klinkenberg to assist in a farce "frame-up" and Klinkenberg agreed to do so.

On June 25, 1947, Tucker purchased a Colt automatic pistol for $85 and some shells, the gun being the one used in the crime charged against defendants. On the following day Tucker applied for a permit to carry a gun, stating to police officers as some of his reasons that his wife had been threatened by Gianaclis because of his testimony in the superior court and that he was involved in civil litigation with Gianaclis. This statement was false, for Tucker had never had any trouble with Gianaclis and his wife had not been threatened. They had been divorced in April previously. The officers told him if he believed the threats were serious they would procure a prosecution, to which he replied it was a minor matter and he was not interested in prosecuting.

On the afternoon of Friday, June 27, at the suggestion of Miss Massow, Tucker registered her and himself at a motel as "Mr. and Mrs. A. W. Tucker." Thereafter they saw each other frequently at the motel and at Tucker's nursery. On the day following the registration at the motel Miss Massow complained to the officers at the Hollywood Police Station that Gianaclis had followed her, "had thrown her clothes around" and had slandered her, but she did not indicate he had made any threat to commit a felony.

Barclay Thomas, who was Gianaclis' former son-in-law, was the registered owner of a Chevrolet automobile. Shortly after purchasing it he had brought Miss Massow in it from Texas to Los Angeles. For a long time she had owned and driven a Ford roadster. On June 29, about 7:00 o'clock in the evening, she met Thomas by appointment and they exchanged cars, Miss Massow driving away in the Chevrolet belonging to Thomas. She had the car in her possession on June 30, the date of the crimes. In the Chevrolet when it was delivered to Miss Massow were a target pistol, seven unfired rounds and a box of additional shells.

After Tucker had received Klinkenberg's agreement to cooperate as above related he sought a third man and asked one Frank Markevikio to join in the enterprise, offering him $50 for his services. The latter was not able to assist but suggested that one Hatfield might be interested. Markevikio said Hatfield had been a policeman and still had his auxiliary badge and permit and would be a good man to assist them. Tucker asked Markevikio to arrange a meeting with Hatfield for Sunday evening.

On Sunday, June 29, at about 8:30 p. m., Miss Massow in the Chevrolet called for Tucker at the latter's nursery. An appointment had been made for them to meet Hatfield, Markevikio having described the car Hatfield would be driving. When Miss Massow and Tucker arrived at the meeting places at about 9:30 P.M. Hatfield was not there. They drove away and came back later and found him waiting. He had received a telephone call and had left his home about 10:00 o'clock with a "sap" or blackjack in his car. He went to the meeting place and remained until Miss Massow and Tucker arrived in the Chevrolet. This was their first meeting with Hatfield. They drove alongside his car and Tucker said: "Did Frank call you"? Hatfield replied in the affirmative. Tucker asked if Markevikio had explained everything and Hatfield said Markevikio had told him what Tucker wanted him for. Tucker said, "Well, let's go," and then asked whether Hatfield had anything with which to protect himself. Hatfield said he had a gun and handcuffs at home and had a "sap" with him. Tucker said: "Toss the sap in the car and let's go." Hatfield then placed the blackjack in the Chevrolet. At that time Miss Massow was seated in the center of the front seat. Hatfield came to the right-hand side of the car, sat down and pushed the blackjack under the seat, having it in his right hand as he opened the door with his left. He did not try to conceal it. Tucker, Hatfield and Miss Massow then drove away.

On the evening of June 29, at about midnight, Tucker went alone to the home of his friend Barbara Whitworth and asked her if she would stay with Miss Massow while he took care of some business, to which she assented. She was with defendants Massow, Tucker, Klinkenberg and

Hatfield from midnight on June 29 until the morning of June 30 at the motel. The two women occupied one room and the men were in another.

A waitress in the cafe where Klinkenberg worked had seen Tucker in conversation with Klinkenberg several times during June. On two occasions during the evening before the commission of the crimes she saw Klinkenberg come from the kitchen and join Miss Massow and Tucker in a booth. Tucker was in and out of the cafe during the evening. The waitress saw Miss Massow at about 11:45 p. m. in a booth with Tucker, Hatfield and Klinkenberg. Just at midnight, which was closing time, the waitress let Tucker into the cafe with Miss Whitworth. She saw Miss Massow, Miss Whitworth, Tucker, Hatfield and Klinkenberg leave the cafe together shortly after midnight.

Klinkenberg was driven to his home where he changed his clothes. They drove to Tucker's nursery from which the five persons named proceeded to the motel, arriving there at about 1:30 or 2:00 a. m. After about 15 minutes the three men proceeded to the vicinity of the Magnolia house where Tucker was absent from the car for a few minutes. The men all returned to the motel arriving at about 5:00 a. m. on June 30. After knocking on the door they were admitted to the cabin occupied by the two women who dressed and remained awake thereafter. They did not complain about being disturbed at the early hour. Tucker and Klinkenberg went to the cafe in the motel and remained about an hour, drinking coffee and liquor, then returned to one of the cabins where Tucker showed Klinkenberg how to operate a .45 caliber Colt automatic. Klinkenberg put the gun in his coat pocket. Tucker also handed Klinkenberg a .22 caliber target pistol and showed him how to operate it.

Tucker asked Miss Whitworth to go into Hollywood and rent a car for him, stating he needed a rented car for use in some business. Miss Massow, at Tucker's request, drove her to a motor livery in Hollywood. This was the first occasion on which Miss Whitworth had rented a car for Tucker. Before the women left the motel Tucker had asked Miss Massow whether she had some money. Upon arriving at the motor livery Miss Massow gave Miss Whitworth $50 for the deposit required for the rental. Upon making the deposit Miss Whitworth received a Nash sedan. When the women separated Miss Massow said she was going to take care of some business, and asked Miss Whitworth to tell Tucker to meet her, Miss Massow, near Laurel Canyon. The message was delivered when Miss Whitworth returned to the motel with the Nash car and Tucker said it was all right. She saw Tucker, Klinkenberg and Hatfield in one of the rooms at the motel. Later Miss Massow appeared.

While Tucker and Klinkenberg were in the cafe of the motel early in the morning of June 30 the assistant manager saw them and because he noticed a bulge in Tucker's hip pocket and a bulge under Klinkenberg's left arm he began watching them; both appeared to be nervous. Klinkenberg made several telephone calls at the pay station and seemed excited. After each call Tucker and Klinkenberg would converse in a whisper or an undertone. The assistant manager noticed a large scar on the left side of Tucker's face which, from his experience in having worked in motion picture studios, he recognized as make-up.

On the morning of the crime Miss Whitworth saw Miss Massow helping Tucker to apply make-up to his face. Over the initial application a large scar about two inches long was simulated. At Klinkenberg's request Miss Whitworth darkened his mustache and put eyebrow pencil on Hatfield's mustache. Miss Whitworth testified that a blackjack and a piece of wire were taken from the Chevrolet which Miss Massow had been driving. Miss Whitworth saw on the dresser at the motel some adhesive tape and scissors. Tucker had taken the scissors from Miss Whitworth's home on the previous evening. Miss Whitworth heard Tucker say something to Klinkenberg and Hatfield about "the Greek" and "Mugsie," these being names applied respectively to Gianaclis and Davis.

About 9:30 a. m. all four defendants, Massow, Tucker, Klinkenberg and Hatfield, left the motel, the three men in the rented

Nash going first, followed by Miss Massow in the Chrevrolet. Just before entering the car Tucker gave Klinkenberg the .45 caliber gun, showing him the safety catch. The latter put the weapon into his coat pocket and had it in his possession until their subsequent arrival at Lopez Canyon. The target pistol was on the front seat between Tucker and Klinkenberg. Tucker had the make-up on when the Nash left the motel.

When Miss Whitworth first saw the blackjack it was under the seat of the Chevrolet. Hatfield asked her to reach under the seat and "get that sap," which she did. The same blackjack was at the motel. Hatfield confirmed Miss Whitworth's testimony and said he took the "sap" into the motel. He next had possession of it after the occurrence at the Hairpin Turn when Tucker returned it to him. Tucker testified the blackjack was at the motel and Hatfield furnished it.

Miss Whitworth saw two guns at the motel; one resembling the target pistol was in Klinkenberg's inside coat pocket and the automatic was on top of a closet when she first saw it. Later she observed a bulge on Tucker where he had his coat over it. Tucker testified the gun was his; he bought shells when he purchased the gun; he put shells in it at the motel on the morning of June 30. On the same morning Klinkenberg saw two loaded guns and a blackjack at the motel.

When the three men left the motel in the Nash car Tucker was driving, Klinkenberg was in the front seat with him, and Hatfield was lying on the back seat. Tucker mentioned that now they were to meet the two men Tucker had previously spoken about to Klinkenberg. The Nash proceeded up Laurel Canyon Drive in the direction of the Magnolia property. Just before they turned into Kirkwood Drive the Chevrolet came toward them from the general direction of the Magnolia house.

Klinkenberg testified that it appeared to be the same car in which he had ridden on the previous night; Tucker waved his hand to a woman in the Chevrolet and there was a responsive wave from her; the men continued in the Nash on Kirkwood Drive and turned into Ridpath Drive where they parked facing Kirkwood; in a short time Gianaclis and Davis came down the hill in a car from the direction of the Magnolia house; Tucker directed Klinkenberg's attention to the car; in less than five minutes the same car returned up the hill with the Chevrolet immediately in front of it; the woman was the only person in the Chevrolet; both cars were going toward the Magnolia house.

Davis, the other person assaulted by defendants, was a common laborer who had known and worked for Gianaclis for several years. The latter was in the habit of leaving the Magnolia house at 9:00 o'clock in the morning. On June 30 he and Davis left at about that hour in a Ford pick-up truck with Gianaclis driving. On their way down Laurel Canyon they saw Miss Massow alone traveling slowly in the opposite direction in the Chevrolet. She slowed her speed, smiled and waved to Gianaclis with a sweeping motion of her arm in a manner indicating her desire that he should turn and follow her, which he did. She drove to Hairpin Turn with Gianaclis and Davis behind her. When they passed the point where the Nash was parked Tucker said: "There they are; let's go." The men in the Nash proceeded toward Hairpin Turn following Gianaclis and Davis at some distance. There was no rear-vision mirror in Gianaclis' car and he did not observe the Nash following. At Hairpin Turn Miss Massow stopped and blocked the road. Gianaclis and Davis recognized her when they had stopped both heard her yell: "There they are boys, get them." The three men jumped from the Nash sedan, having two guns and a blackjack. Tucker took the "sap" which Klinkenberg handed to him.

When Tucker and Hatfield left the Nash Tucker spoke to Gianaclis. Davis and Hatfield did not say anything. After Tucker had spoken to Gianaclis the latter and Davis alighted from the car on Tucker's command. When he told them to lie down they dropped to their knees. Davis saw a blackjack and was struck two or three times on the back of his head with it or with a gun. The men beat Gianaclis severely. He was hit on the head 18 or 20 times with a gun in the hands of Tucker, resulting in a scar on his forehead. They beat his back and legs also.

Miss Massow was the only occupant of the Chevrolet at Hairpin Turn. She heard screams and knew some one was being hurt. She did not reply to Hatfield when he inquired whether the men had been molesting her. After he had instructed her how to back her car and turn it she drove down the hill.

Hatfield heard a noise behind him and walked to the front of Gianaclis' car where he saw Gianaclis and Davis on the ground. Tucker was standing by the feet of the two men who were lying down. Hatfield saw Gianaclis had been beaten and was badly injured. Tucker then said: "Let's get out of here." The two men on the ground got up and Tucker told them to get into the Nash. Klinkenberg held the door open and Gianaclis and Davis got into the back seat of the Nash or were pushed in. Blankets were placed over their heads. Hatfield said, "I don't want any part of this." Tucker replied: "Shut up and get in the car." At that time Tucker was in the car with a pistol which he waved at Hatfield. The Nash then left Hairpin Turn with the five men in it and proceeded down a side road. They drove for about an hour and a half. On the trip down the canyon Gianaclis was struck again. He asked the men if they wanted money, saying he would give it to them. One of the men replied they were getting $2,000 from Miss Massow and Thomas to have Gianaclis "bumped off" and they did not want his money.

At Laurel Canyon Hatfield said he was not needed and requested to be allowed to leave the car. Tucker said: "Never mind that, you are riding along." At Lopez Canyon all alighted from the car. Tucker cut adhesive tape and Klinkenberg placed it over the eyes of Gianaclis and Davis. The two men were compelled to crawl on their hands and knees over rocks and rough ground. Tucker put a gun under Gianaclis' chin and said: "I will blow your brains out if you make a move." Gianaclis and Davis were left alone with Klinkenberg. Tucker told the latter to guard the two men and to shoot them if they made a move.

Tucker handed the .22 caliber gun to Klinkenberg and the latter returned the .45 caliber automatic to Tucker. Tucker and Hatfield then left the scene. Tucker told Klinkenberg he was getting $5,000 to do what he was doing. As Tucker and Hatfield rode from Lopez Canyon the latter received $50 from Tucker who said, "You were along on it, I want to pay you for your time." Apparently with the intent to discredit Gianaclis and to justify the acts that Hatfield had witnessed, Tucker made disparaging statements about Gianaclis, saying the latter had committed several crimes, including embezzlement from various people and a criminal attack on a girl.

After about three hours Gianaclis and Davis escaped from Klinkenberg. They met one Howell who reported their plight to deputy sheriffs. The latter, while responding to the call, encountered Klinkenberg by the roadside, not far from where the men had been left in his custody, and took him with them. They found Gianaclis and Davis in an injured, excited and nervous condition. The latter, after relating their account of the assault to the deputies, were taken, together with Klinkenberg, to the sheriff's substation where they identified Klinkenberg as the person who had guarded them.

A doctor examined Gianaclis and said his injuries could have been inflicted at about 10:00 o'clock in the morning. He was bleeding from a scalp injury, had contusions on the neck and on the back of his right hand. The scalp injury was about three inches long, the skin being broken, exposing the skull. Ten stitches were required to close the wound. Davis' injuries were treated at a receiving hospital.

Edwin Grooney, an employee at Tucker's nursery, testified that about noon on June 30 Tucker and Hatfield drove to the nursery in the Nash sedan. Tucker was still wearing his make-up and at first was not recognized by Grooney because of the unusual scar on his face. At Tucker's direction Grooney bought soap and Tucker washed off the make-up. Tucker then told Grooney to clean up the Nash sedan with a steam cleaning equipment. Blankets on which there were stains that looked like blood were removed from the back seat of the Nash. At Tucker's order Grooney purchased gasoline and poured it over the blankets and some sheets and burned them. Tucker told Grooney not to say anything about what he had seen. Grooney saw stains that resembled blood on the cushion of the back seat. Tucker explained that he had run over a dog and had thrown it on the seat. In his testimony at the trial Tucker himself admitted there was blood on the cushion and said he did not want to return the car to the rental agency in that condition.

Tucker worked on the entire inside of the Nash with the steam cleaner for about half an hour, after which Grooney continued with the cleaning operation. Miss Massow arrived at the nursery in the Chevrolet while the Nash was being cleaned. She looked into the interior while Grooney was working. Hatfield also was present.

Tucker, Hatfield and Miss Massow left the nursery in the Chevrolet about 2:00 o'clock in the afternoon. Hatfield was taken to the place where he had left his car on the previous night. Tucker returned the "sap" to Hatfield in Miss Massow's presence. Between 3:30 and 4:00 o'clock Tucker and Miss Massow arrived at Miss Whitworth's house in the Chevrolet and all three went to Lopez Canyon to look for Gianaclis, Davis and Klinkenberg. Not finding them Tucker fired his automatic in the air several times, saying he wanted Klinkenberg to hear him. After driving around for awhile they met Mr. Howell who had called the deputy sheriffs and asked if he had seen the men but he did not give them any information.

They returned to the nursery where Miss Whitworth observed that the seats of the Nash were wet. They had not been in that condition when she rented the car. On the next day she returned it to the motor livery.

Miss Whitworth testified that shortly after 10:00 a. m. on June 30 Miss Massow returned to the motel without the men; she was crying, and said "It was terrible the way they screamed," and that one of the men told her to leave.

On July 1, the morning after the assault, Tucker and Miss Massow went to another motel in the Chevrolet, Tucker driving, where at her request he registered as "Mr. and Mrs. A. W. Tucker, 7246 Lankershim," this being the address of Tucker's nursery. Miss Massow paid the rent at the motel office on the following morning. On July 3 some of Tucker's clothing was found by officers at the same motel.

Tucker and Miss Massow knew they were being sought by the police. Prior to her surrender and his arrest they were together eight or ten hours talking over the predicament in which they were involved. They discussed parking the Chevrolet at a distant point. She told Tucker everybody was on the lookout for the red Chevrolet and she had been advised by her attorney not to be apprehended on the way to his office. She took the Chevrolet to Orion Street, near Sepulveda Boulevard, Tucker following in a pick-up truck. She parked and locked the car and put the keys on the left rear tire under the fender. On July 3d deputy sheriffs found the car at the place mentioned with the keys hidden as described.

Miss Massow surrendered to officers in the afternoon of July 2d. At that time she did not give them the name of any of the men involved in the assault. She testified that she knew where Klinkenberg had been employed as a cook, she knew Hatfield had been a police officer in Beverly Hills, and she knew where Tucker's nursery was located; she did not give such information to the police because Tucker had asked her not to do so. She told the officers she had never before seen the occupants of the Nash car and that only one had got out of the car at Hairpin Turn. She testified Tucker told her "The reason we had Hatfield along was because when we disclose this whole matter to the police we will have a former policeman to tell all about these things."

Tucker read the newspaper accounts of the kidnaping and knew the police were looking for the persons who had committed the crimes but did not impart his knowledge to them, did not inform them Gianaclis had arranged a fictitious holdup, nor did he seek any law enforcement officers to return to Lopez Canyon and look for Gianaclis, Davis and Klinkenberg after he ascertained they had departed from there. He drove Miss Massow to the place arranged for her surrender and about seven hours thereafter he was placed under arrest.

[1] The foregoing facts negate defendants' fanciful argument that the evidence is insufficient to sustain the verdicts and the judgments. They would have us disbelieve all the evidence above related and adopt their version of the events leading up to the assault. Miss Massow professes to have been without knowledge of the contemplated crime and asserts that it was merely by chance that she was on her way to the Magnolia property when Gianaclis followed her and was in turn followed by Tucker, Hatfield and Klinkenberg in the Nash. No explanation is offered as to why, just prior to the commission of the crimes, she turned her Ford car over to Thomas and received from him the Chevrolet which was used in the manner related. No doubt it was deemed inadvisable to permit her Ford car to be seen at the motel or at the agreed point of ambush. She offers no explanation as to why she participated in putting the make-up on Tucker's face. She did not deny knowledge of the presence of the two guns and the "sap" at the motel and in the automobiles. When she and Tucker met Hatfield on the night before the crime she heard Tucker tell Hatfield to toss the "sap" into the car. Other matters pointing unmistakably to her participation in the conspiracy are likewise without explanation.

The jury found Tucker's story to be equally incredible. He asserts Gianaclis planned to have Miss Massow present while he would be "held up" by Tucker and two other men with guns and blackjacks and taken to some place in the mountains, and that Gianaclis offered him $5,000 to help "frame" Miss Massow. The jury disregarded the preposterous theory advanced by Tucker that Gianaclis arranged and agreed to pay for a villainous assault upon himself that might have resulted in his death or serious injury merely for the purpose of "framing" Miss Massow. The jury found that the so-called "farce" or "frame-up" was in truth a tragedy with Tucker as its director and chief actor and Miss Massow as assistant director, make-up artist and leading woman.

In arguing that if the evidence is viewed "in the light of human experience" it must be held to be implausible and improbable defendants overlook the fact that a great deal of the most damaging evidence against them came from one or more of the persons who were engaged in the nefandous venture, and some of it from the appealing defendants themselves.

Much ado is made concerning discrepancies in the evidence fixing the exact hour and minute at which some of the events occurred, for example, the time when make-up was applied to Tucker's face. It is freely admitted by all parties that make-up, including the simulated scar, was applied before defendants started from the motel to Laurel Canyon and Hairpin Turn. Contradictions and conflicts in the evidence as to other incidents are discussed in defendants' briefs, vainly, however, since the jury has reached its determination as to the facts, presumably after they had heard the same arguments that have been made to this court.

Defendants contend that the evidence is insufficient to prove their guilt beyond a reasonable doubt, and that the following language quoted from People v. Zammora, 66 Cal.App.2d 166, 201, 152 P.2d 180, 198, requires a reversal of the judgments: "The sufficiency of the jury's verdict must be tested in the light of whether the evidence upon which the verdict is framed was of such a character that it can be said therefrom that no reasonable doubt of the defendants' guilt existed." Defendants have misconceived the meaning intended by the quoted passage. The court had concluded that "there is a complete lack of material and relevant evidence from which the jury could properly find or infer that appellants formed a conspiracy of the kind * * * claimed by the prosecution. The most shown by the evidence is that appellants banded themselves together to 'have it out * * * with their fists' * * * in retaliation for the fistic encounter that had taken place earlier that night." There was no proof that any of the defendants murdered the victim and only unsatisfactory evidence that any defendant committed an assault with a deadly weapon. In short the reviewing court discovered no substantial proof of the crimes charged.

No such situation confronts us in the instant case. The events heretofore recited leave no doubt that the jury had an abundance of competent evidence to warrant their verdict. When they rejected the evidence of the defense and adopted that of the prosecution the latter supported the finding of guilt.

[2-6] The above quotation from the Zammora case cannot be construed to mean that the rule of reasonable doubt which is binding on the jury in weighing the evidence likewise circumscribes an appellate court in its consideration of the record upon which the verdict rests. Defendants' suggestion that such is the rule to be followed by a reviewing court runs counter to the law as it has been firmly established in this state. It is not within the province of this court to determine conflicts of evidence or inferences reasonably to be drawn from the evidence. The sole question with which we are concerned is whether there is substantial evidence to support the judgment. Before an appellate court may set aside a judgment of conviction it must appear that upon no hypothesis whatsoever is there sufficient substantial evidence to support it. People v. Warnick, 86 Cal.App.2d 900, 195 P.2d 552; People v. Lindley, 26 Cal.2d 780, 791, 161 P.2d 227; People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778; People v. Hills, 30 Cal.2d 694, 701, 185 P.2d 11; People v. Smith, 35 Cal.App.2d 73, 76, 94 P.2d 633. The determination of a criminal case involves proof (1) that the offense charged was committed (2) by the person or persons accused thereof. Every fact which the jury could have reasonably deduced from the evidence will be assumed in favor of the verdict, and the appellate court will then determine whether such facts are sufficient to support it. If the verdict is justified by the circumstances a reviewing court will not interfere with the jury's determination even though the court might be of the opinion that such circumstances might also be reasonably reconciled with the innocence of the defendant. People v. Newland, supra.

[7] The foregoing citations are only a few of many which declare that the reviewing court is not concerned with the question of reasonable doubt but only with whether there is sufficient substantial evidence to support the verdict. While there is conflicting evidence in the instant case, the jury has resolved the conflicts against the defendants and has not accepted the theory advanced by them. The jury may disregard the testimony of a defendant even though uncontradicted and need not accept it as proof of facts leading to the commission of a crime when other circumstances warrant the disbelief of such testimony. People v. Toliver, 90 Cal.App.2d 58, 202 P.2d 301; People v. Benning, 84 Cal.App. 168, 172, 257 P. 903; People v. McDonnell, 32 Cal.App. 694, 699, 163 P. 1046; People v. Barrego, 211 Cal. 759, 765, 297 P. 17.

It is manifest from the record that the evidence is more than adequate to sustain the verdicts.

[8-10] Defendants advance the absurd and untenable contention that the judgment should be reversed because the evidence of the prosecution is inherently improbable. A reviewing court cannot reject statements of a witness that have been believed by the trier of facts unless it is a physical impossibility that they be true or their falsity be apparent without resorting to inferences or deductions. People v. Huston, 21 Cal.2d 690, 693, 134 P.2d 758. Evidence which discloses circumstances that are unusual cannot be said to be inherently improbable. Kidroski v. Anderson, 39 Cal.App.2d 602, 605, 103 P.2d 1000. In order to say that a statement is inherently improbable it must appear that what has been related or described could not have occurred.

Alleged Misconduct of District Attorney.

[11] Defendants contend that the verdict was based on passion and prejudice induced by inflaming and prejudicial statements made and questions asked by the deputy district attorney. We are not

directed to a single instance of alleged misconduct which defendants objected to, moved to strike, assigned as error, or requested the court to instruct the jury to disregard. The general rule is that having failed so to do, the objection cannot be raised for the first time on appeal. People v. O'Donnell, 11 Cal.2d 666, 671, 81 P.2d 939; People v. Wong Toy, 189 Cal. 587, 595, 209 P. 543.

[12, 13] Defendants recognize the foregoing rule but maintain that the misconduct occurred so many times that they were prevented from having a fair trial, and so inflamed the jury that they were induced to find defendants guilty even though an impartial consideration of the evidence alone would have resulted in their acquittal. They contend that the case is within the exception stated in People v. Podwys, 6 Cal.App.2d 71, 76, 44 P.2d 377; and People v. Simon, 80 Cal.App. 675, 679, 252 P. 758, 760, that where the "record fairly shows that the acts complained of are of such a character as to have produced an effect which, as a reasonable probability, could not have been obviated by any instructions to the jury, then the absence of such assignment and request will not preclude the defendant from raising the point in this court." This contention requires us to consider the several instances of alleged misconduct and to determine whether the prosecutor's acts were wanton and without foundation or were justified by the record.

(a) Defendants assert that by inferences and innuendo the prosecutor attempted to implant in the minds of the jury untrue ideas that in a spirit of altruism Gianaclis was responsible for Miss Massow's advancement and "when she was on the road to success she got rid of him." We have referred to evidence of the assistance given by Gianaclis to Miss Massow in fulfilling her desire to appear in motion pictures. One witness testified, without objection from defendants, that Miss Massow had said to the witness that Gianaclis had started her on her career and had more or less built her up to where she was at that time, and "that so far he was just an angel to her and that when she got this part in 'The Robe' she would be on her own and get rid of him. She laughed about it."

(b) Error is asserted in the intimation by the prosecutor that when the Magnolia property increased in value Miss Massow tried to keep it all for herself by asserting Gianaclis loaned her money, rather than having invested on equal terms with her. The question as to the ownership of the house was threaded through the entire trial. It is in evidence that it was first agreed Gianaclis, Kachel and Miss Massow were to have equal interests in the property; later Kachel was eliminated, Gianaclis deposited the money for the purchase of the property, and Miss Massow actually claimed he had no interest in it except a trust deed. The civil action to which we have referred was brought by her for the purpose of establishing her claim of ownership.

(c) The next assignment is that reference was made to Miss Massow as a "home breaker" and that she broke up the marriages of both Gianaclis and Tucker. The evidence as to the divorce of Gianaclis and his wife was brought out by Miss Massow's trial attorney in his cross-examination of Gianaclis, who testified that she "brought my wife to sue for divorce," and "she brought her down here to break my home up." He further testified that he and his wife had become reconciled and were living together at the time of the trial. The prosecutor's questions upon the subject were on redirect examination immediately following the closing of the cross-examination upon the matter of the divorce. Furthermore, it was stipulated by counsel for all parties that a divorce action was filed but did not result in a decree. On cross-examination of Miss Massow she testified she had never "planned on marrying Gianaclis."

As to Tucker, it was brought out, without objection that he was divorced in April, 1947, some months after he had met Miss Massow and about three months before the date of the commission of the crimes; that he frequently took her out socially. It was admitted that prior to the crimes Tucker and Miss Massow had driven in Thomas' Chevrolet to the first motel at which they registered and that at her suggestion he registered as "Mr. and Mrs. A. W. Tucker." On the evening of the date of the crime they registered at the other motel under the same names.

Such references to Miss Massow's conduct with Gianaclis and Tucker were justified by the evidence, a part of which was elicited by questions of counsel for defendants, and the fact that Tucker denied he had had any immoral relations with her did not preclude the prosecutor from commenting on the uncontradicted evidence concerning their association.

(d) Objection is also made to inferences that Miss Massow had immoral relations with Tucker and Barclay Thomas, Gianaclis' former son-in-law. Her relations with Tucker have been sufficiently discussed. It was established that Thomas and Miss Massow met somewhere in another state and he brought her to Los Angeles in his Chevrolet. It was further established, as previously related, that Thomas loaned his car and a gun to Miss Massow which were used in the commission of the crimes.

(e) Defendants complain also of the prosecutor's intimation that she was not a respectful daughter, had had trouble with her parents, and preferred a motel to a rooming house for girls. During her cross-examination concerning her alleged difficulties with Gianaclis she testified she stayed in a motel because she was afraid of him. She was asked the single question "Did you try any rooming houses for girls" and she answered in the negative. There was evidence that she discussed with Kachel and Gianaclis the changing of her name because of her mother. There was no error in the prosecutor's conduct in making reference to such matters. Miss Massow's parents objected to her association with Gianaclis and for this reason the Magnolia house was bought without the knowledge of her parents. After they discovered the purchase had been made and that Miss Massow and Gianaclis were living in the house they visited her and later, at the suggestion of Gianaclis, moved in and resided there.

(f) With respect to the prosecutor's conduct in mentioning Miss Massow's effort to avoid paying a real estate commission, the testimony of the secretary in the real estate office was sufficient to justify such reference.

(g) The next objection made is that the prosecutor improperly implied that Miss Massow was addicted to the use of vulgar language. This finds justification in the evidence of the secretary in the real estate office that in her conversation with the real estate broker Miss Massow applied a vile epithet to him. The witness had not been asked specifically with reference to any improper language but had been requested to relate conversations of Miss Massow with the witness and the real estate broker in reference to her claim of ownership of the Magnolia property. In response to the question she told the entire conversation including the offensive epithet.

[14] (h) During the prosecutor's argument to the jury he referred to corrections that had been made in the reporter's transcript. We find nothing improper or objectionable in his statements. It is admitted that the transcript had been corrected through the cooperation of counsel and the court, and in one instance the correction was made in open court. By reason of what had occurred in the presence of the jury there was a factual foundation for the argument. In any event, there was nothing prejudicial in the prosecutor's statements and no objection was made or exception taken during the trial.

[15] (i) During the cross-examination of Miss Massow she was asked whether she would waive the privilege of attorney and client in order that her former attorney might be asked to disclose certain information. This form of examination has been declared to be unfair but not prejudicial misconduct. People v. Moore, 111 Cal.App. 632, 633, 634, 295 P. 1039.

(j) Defendants' assignment of error that in the guise of attempted impeachment on an immaterial matter the deputy district attorney introduced testimony with respect to an asserted quarrel between Miss Massow and her mother is without foundation. It was brought out in the evidence, without objection, that on occasions the relations between Miss Massow and her parents were not harmonious; that her mother's objection to her association with Gianaclis brought about the purchase of the Magnolia house unknown to her parents. Evidence with relation to these matters was offered for purposes entirely foreign to the matter of the impeachment of Miss Massow.

Since (1) each question asked by the prosecutor and each statement made by him was asked and made without objection or exception by either defendant, (2) some of the questions had a direct relation to previous questions asked by counsel for defendants, and (3) all had foundation in the record, they need not receive further attention.

Alleged Errors in Giving and Refusing Instructions.

Defendants do not contend that the instructions given by the court on the subject of circumstantial evidence are incorrect in any particular but they assign error in the failure of the court to give additional instructions which they requested on that subject. Defendants' requested instructions are based on the erroneous theory that the case against them rested entirely on circumstantial evidence. One of the proposed instructions was to the effect that where circumstantial evidence "is relied upon" each circumstance necessary to complete the chain must be established to a moral certainty and beyond a reasonable doubt. Another would have told the jury that when the case "rests entirely or chiefly on circumstantial evidence" each fact essential to complete the chain of circumstances must be proved beyond a reasonable doubt. Another was to the effect that the jury was not permitted "on circumstantial evidence alone" to find a defendant guilty unless the proved circumstances are not only consistent with guilt but are irreconcilable with any other rational conclusion.

[16] The requested instructions contained erroneous statements and were justifiably refused. Circumstantial evidence was "relied upon" only as incidental to and corroborative of direct evidence and not as the sole proof of defendants' guilt. The case against them did not rest "entirely or chiefly" on circumstantial evidence. The greater part of the evidence connecting them with and establishing their guilt of each crime of which they were convicted is direct, as will appear from a review of the evidence recited in this opinion.

As to defendant Massow there is direct evidence that (1) she obtained the Chevrolet and used it instead of her own car in preparation for and in the commission of the crimes; (2) with Tucker she met Hatfield and obtained the "sap" from him; (3) she assisted in disguising Tucker; (4) she aided in renting the Nash which was used in the preparation of the crimes; (5) she decoyed Gianaclis and Davis to the place of ambush; (6) she called to the other defendants "There they are boys, get them," referring to Gianaclis and Davis; (7) she went with Tucker and Miss Whitworth in search of Gianaclis, Davis and Klinkenberg; (8) she was at Tucker's nursery while the blood was being removed from the Nash.

As to Tucker, some of the direct evidence is that (1) he procured the assistance of Klinkenberg and Hatfield; (2) with defendant Massow he obtained the "sap" from Hatfield; (3) he sent Miss Whitworth to rent the Nash; (4) he provided two guns and showed Klinkenberg how to operate them; (5) he disguised himself with Miss Massow's aid; (6) he drove the Nash to the scene of ambush, taking with him his codefendants Klinkenberg and Hatfield; (7) he assaulted and beat Gianaclis and Davis; (8) he kidnaped them; (9) he prepared tape to cover their eyes; (10) he instructed Klinkenberg to guard them; (11) he paid Hatfield for his services; (12) he ordered the bloodstained blankets burned; (13) he cleaned the blood from the Nash.

[17] Where, as in the case at bar, there is direct evidence connecting the defendants with the commission of the crimes charged and the circumstantial evidence is only incidental or corroborative, the court is not required to instruct the jury on the rules of law applicable to circumstantial evidence. People v. Jerman, 29 Cal.2d 189, 197, 173 P.2d 805; People v. Lapara, 181 Cal. 66, 70, 183 P. 545, and cases cited.

[18-20] It is not the law, as proposed in one of defendants' rejected instructions, that each fact in a chain of circumstances that will establish a defendant's guilt must be proved beyond a reasonable doubt. People v. Nunn, 65 Cal.App.2d 188, 195, 150 P.2d 476; People v. Parker, 119 Cal.App. 246, 251-252, 6 P.2d 82. The doctrine of reasonable doubt applies to proof of guilt and not to the establishment of each incident or event inculpating the defendant. People v. McGill, 10 Cal.App.2d 155, 160, 51 P.2d 433. A reasonable doubt that would warrant acquittal is one that results or arises from a "consideration of all the evidence" in the case. Penal Code, sec. 1096, 1096a; People v. Nunn, supra; People v. Shimonaka, 16 Cal.App. 117, 125, 116 P. 327.

The court instructed the jury sufficiently on the question of reasonable doubt: (1) Defendants were presumed to be innocent until their guilt was proved beyond a reasonable doubt; (2) in case of a reasonable doubt of their guilt the defendants were to be acquitted; (3) any fact may be proved by direct or circumstantial evidence, both of which were defined; (4) if the evidence is susceptible of two constructions or interpretations, each of which appears to be reasonable, one pointing to guilt and the other to innocence, the jury must adopt the one pointing to their innocence and reject the other; (5) such rule applies only when both of the two possible opposing constructions appear to the jury to be reasonable; (6) should one of two possible conclusions be reasonable and the other unreasonable the jury must adopt the reasonable; (7) even if a reasonable deduction points to guilt, the entire proof must carry the convincing force required by law to support a verdict of guilt.

[21-23] Defendants assign error in the giving of the following instruction: "Even though you might believe that the witness, Nicholas Dan Gianaclis may have intentionally or mistakenly made a different claim than that to which he was entitled, as to an interest in the house or property at 8444 Magnolia Street, such conduct would not justify any person in kidnaping or assaulting him in any manner, nor for any purpose. Any provocation that might have been created by reason of the claim of the witness Nicholas Dan Goanaclis as to his interest in the property located at 8444 Magnolia Street, either verbally or in civil litigation, would not constitute a defense by these defendants * * *, and would not justify the defendants, or either of them, in kidnaping, assaulting, robbing, or in violating the Deadly Weapons Act, or in conspiring so to do." There is no error in the instruction. Defendants concede that Tucker assaulted Gianaclis and Davis and he, with other defendants, removed them to another part of the county, but their theory is that no crimes were committed because of Gianaclis' connivance in and consent to all the acts which defendants committed. It is conceded that (1) Gianaclis claimed an interest in the Magnolia property, (2) Miss Massow denied his claim and asserted ownership of the entire title, (3) defendants had possession of two guns and a blackjack, (4) they did not have permits therefor, hence such possession was unlawful. The instruction does not indicate that in the court's opinion any of the matters referred to in the instruction were true or that defendants did any of the acts mentioned. People v. Weatherford, 78 Cal.App.2d 669, 692-693, 178 P.2d 816. The instruction does not assume that Gianaclis was assaulted or kidnaped. The language is carefully qualified. The court told the jury that "Even though [they] might believe" Gianaclis either "intentionally or mistakenly" claimed an interest in the house that fact "would not" (not "did not") justify "any person" in committing the crimes charged and "would not" constitute a defense. The law is correctly stated that a claim to ownership of property, even though without foundation, does not justify the commission of a crime, nor does it constitute a defense to a prosecution. Defendants were not entitled to have the jury instructed solely along the line of their theory of the case. It is the duty of the court to instruct the jury not as to theories of either prosecution or defense but as to all matters of law necessary for their deliberations. People v. Darrow, 212 Cal. 167, 184-185, 298 P. 1; People v. Wright, 167 Cal. 1, 5, 138 P. 349. Since

the matters covered by the instruction had been developed by the evidence it was the duty of the court to inform the jury as to the law in reference to them. People v. Holt, 25 Cal.2d 59, 64-65, 153 P.2d 21; People v. Putnam, 20 Cal.2d 885, 890, 129 P.2d 367.

No one contends that Davis consented to the crimes or that he was a party to the arrangement asserted to have been made by Gianaclis. He was the victim of an unprovoked and indefensible assault. The instruction complained of did not operate to dispossess Tucker of his defense that Gianaclis instigated the crimes for the purpose of discrediting Miss Massow. Tucker's evidence on that matter was before the jury and it had been instructed correctly as to its duty in considering all the evidence in the case. It was further instructed that (1) it was to be governed solely by the evidence; (2) it was to weigh the evidence conscientiously and dispassionately; (3) it was the sole and exclusive judge of the effect and value of the evidence; (4) the court does not determine the weight to be given the evidence nor the credibility of the witnesses; (5) no emphasis was intended or to be inferred as to a statement in varying ways of a rule, direction or idea.

[24, 25] Defendant Massow requested (Tucker did not join in the request) the following instruction and contends that it was error to refuse it: "Before you can find the defendants, or either of them, guilty of the possession of a blackjack, as charged in Count VI of the Information, you must believe from the evidence to a moral certainty and beyond reasonable doubt that they knowingly had such possession, and if after a full and fair consideration of all of the evidence, you entertain a reasonable doubt as to whether or not any particular defendant had any knowledge of the possession of such weapon, then it will be your duty to return a verdict of not guilty as to that particular defendant." Since (1) the court gave an instruction as to what constitutes possession of a blackjack and defendant Massow does not contend that such instruction is incorrect in any particular, (2) the jury was given the statutory instruction on the doctrine of reasonable doubt, Penal Code, sec. 1096, (3) the foregoing instruction was an iteration of the doctrine of reasonable doubt applied especially to the possession of the blackjack, (4) only one instruction as to reasonable doubt is required by law, Penal Code, sec. 1096a; People v. Hill, 76 Cal.App.2d 330, 339, 173 P.2d 26, no further instruction on the topic was necessary. Moreover, the subject of the rejected instruction is fully covered by an instruction given at defendants' request reading as follows: "The mere fact that a person is present at the time a criminal offense is committed, or that he in some way aided, such as furnishing the means used in the commission of a crime, is not sufficient of itself to make him guilty of such offense. Before a person, who himself did not commit the act constituting a crime can be convicted thereof, it must also be shown beyond a reasonable doubt that he knowingly and with criminal intent aided and abetted, or advised and encouraged the commission of such crime, or was a member of a criminal conspiracy, and that such crime was committed in pursuance of the object of the conspiracy."

[26] Defendant Massow requested an instruction to the effect that evidence that a defendant was in the company of one or more persons who were members of a criminal conspiracy is not in itself sufficient to prove that such defendant was a member of the conspiracy. The instruction was properly refused. It would have been superfluous since (1) the court instructed the jury in almost the same language as that requested by the defendant, and (2) all four defendants were present at the time of the commission of the offenses charged and were active participants in the antecedent preparations therefor.

Verdict on Conspiracy Count.

[27-30] Defendants contend that since (1) they were charged in count 2 with robbery and in count 7 with conspiracy to commit several crimes including robbery, and (2) the jury acquitted them of the latter crime, the verdict is inconsistent. Their contention is that if robbery was not actually accomplished a finding of conspiracy to commit robbery cannot be sustained.

This contention is untenable. People v. Clement, 97 Cal.App. 238, 241, 275 P. 511; People v. Rodriguez, 37 Cal.App.2d 290, 293, 99 P.2d 363; 12 C.J. 551; 15 C.J.S., Conspiracy, § 43, p. 1070. Conspiracy is a distinct offense from the crime which is planned to be committed. People v. Gordon, 71 Cal.App.2d 606, 628, 163 P.2d 110. Proof that two or more individuals conspired to commit a crime and engaged in overt acts leading to its commission will sustain a conviction of conspiracy even though they failed to accomplish the object of their intrigue. People v. George, 74 Cal.App. 440, 454, et seq., 241 P. 97. In the instant case there is evidence that each of the five overt acts alleged in the information was committed and that defendants Massow and Tucker each had an active part in some or all of them. The record is replete with evidence that in the furtherance of the conspiracy both engaged in many activities in addition to those set forth in the information. Even though some of the overt acts were not in themselves criminal, yet, if they were performed in preparation for the commission of the criminal act, they are sufficient overt acts to sustain the charge of conspiracy. People v. Gilbert, 26 Cal.App.2d 1, 23, 78 P.2d 770. Furthermore robbery is not alleged as one of the overt acts. The only substantive offense charged as an overt act is the last, which accuses Tucker and Hatfield of having obtained a blackjack. Defendants were charged with three other substantive offenses, to wit, kidnaping, assault with a deadly weapon, and violation of the Deadly Weapons Act, and in addition with conspiracy to commit those crimes. Since they were found guilty of the three named offenses the fact that they were acquitted of the charge of robbery does not warrant interference with the verdict on the conspiracy charge. People v. Guerrero, 22 Cal.2d 183, 187-188, 137 P.2d 21; People v. Gilbert, 26 Cal.App.2d 1, 22, 78 P.2d 770. In People v. Dukes, 2 Cal.App.2d 698, 700, 38 P.2d 805, wherein the defendants were charged with conspiracy to commit robbery, nine overt acts other than robbery were charged. It was held that although an acquittal of the crime of robbery in a previous trial would have precluded conviction of conspiracy if robbery had been charged as the sole overt act, yet since other overt acts were alleged the acquittal on the former charge was not a bar to prosecution for conspiracy.

[31-33] Defendants' further contention that the verdict is deficient in that it failed to specify the degree of robbery involved is likewise untenable. The crime of conspiracy is not divided into degrees and the jury is not required to find the degree of that crime. People v. Clement, 97 Cal.App. 238, 241, 275 P. 511. In a trial for conspiracy the fact that robbery may be of the first or second degree, Penal Code, sec. 211a, does not require either allegation, proof or verdict as to the degree of robbery which defendants are alleged to have conspired to commit.

[34, 35] Sections 183 and 184 of the Penal Code do not limit the charge of conspiracy to an agreement to commit only one crime. People v. Welch, 89 Cal.App. 18, 21, 264 P. 324. The crime of conspiracy consists in an unlawful agreement or combination to commit a crime and is separate and distinct from the substantive crime which constituted the object of the defendants' conspiracy. People v. Yant, 26 Cal.App.2d 725, 731, 80 P.2d 506.

[36] An examination of the record consisting of approximately 2,100 pages, reveals it to be remarkably free of error. Such as occurred are minor and inconsequential; none is prejudicial. There has not been a miscarriage of justice. See Const. art. VI, sec. 4½.

[37] The judgments and the orders denying motions for new trials are affirmed. The purported appeal from the verdicts is dismissed.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

90 Cal.App.2d 768

BARCUS v. CAMPBELL et al.

Civ. 3748.

District Court of Appeal, Fourth District, California.

March 22, 1949.

Hearing Denied May 19, 1949.

1. Automobiles ⟹242(6), 245(26)

In action for injuries sustained from automobile collision, question whether operator of automobile had permission from owner to drive was question of fact and burden of proof was upon plaintiff seeking to establish permissive use under statute providing that owner of a motor vehicle is liable for injury to a person resulting from negligence in operation of such motor vehicle operated with his permission. Vehicle Code, § 402(a).

2. Automobiles ⟹242(6), 244(22)

Under statute providing that every owner of a motor vehicle is liable for death of or injury to person or property resulting from negligence in operation of such motor vehicle operated with permission of owner, permission cannot be left to speculation or conjecture nor be assumed, but must be affirmatively proved. Vehicle Code, § 402(a).

3. Appeal and error ⟹933(1), 1015(1)

Where a motion for a new trial has been granted on grounds of insufficiency of evidence to sustain verdict, District Court of Appeal will not disturb order if there is any evidence which, if believed, would have sustained verdict for respondents even if there were other and conflicting evidence, and all presumptions in favor of order must be indulged.

4. Appeal and error ⟹979(2)
New trial ⟹70

Trial court is not only authorized, but must grant a new trial whenever, in its opinion, evidence upon which former decision rests is insufficient to justify decision, and its action in granting a new trial on such ground is discretionary to extent that if any appreciable conflict exists in evidence court's action may not be disturbed on appeal.

5. Automobiles ⟹244(26)
New trial ⟹70

Evidence that employee of corporation, who was authorized to use company automobile only on business, authorized stepson to use automobile only in case of emergency and stepson did use it to purchase medicine but thereafter proceeded in a direction away from home when automobile collision occurred, justified belief by trial judge that plaintiff had not met burden of establishing permissive use of automobile at time and place of accident so as to subject owner of automobile to liability under statute and authorized new trial for corporate owner. Vehicle Code, § 402(a).

◆

Appeal from Superior Court, Tulare County; Frederick E. Stone, Judge.

Action by Lee Barcus against Clark Bros., Inc., James D. Campbell, and another for property damage and personal injury sustained in an automobile collision. From an order granting the corporate defendant a new trial, plaintiff appeals.

Affirmed.

L. Kenneth Say and Joseph L. Joy, both of Fresno, for appellant.

Maddox & Abercrombie and James K. Abercrombie, all of Visalia, for respondents.

GRIFFIN, Justice.

On September 11, 1945, plaintiff Lee Barcus was driving his Chevrolet "pick-up" north on Highway 99, about one-half mile south of Tulare. Defendant James D. Campbell was driving a Plymouth automobile owned by defendant Clark Bros., Inc., a New York corporation, south on Highway 99 behind a Model A Ford. He suddenly pulled out from behind to pass it and struck plaintiff's car while so doing. As a result of the collision plaintiff's left arm had to be amputated at the shoulder. The question of the negligence of Campbell and the amount of damages is not involved on this appeal. The jury returned a verdict in favor of plaintiff and against defendant Campbell for $16,300.26, and a limited recovery against defendant Clark Bros., Inc., for $5,000 plus $1000 property damage. Defendant Campbell did not move for a new trial nor appeal from the judgment, and it has become final as to him. Defendant Clark Bros. Inc. moved for a new trial on the ground of insufficiency of the evidence to show "permissive use" of the Plymouth car by Campbell. There was no contention made during the trial that Campbell was the employee or agent of defendant corporation. By its answer it denied Campbell had its permission and consent to drive the car.

At the outset, counsel for plaintiff, in all fairness, states that he is not unmindful of the general rule of law that appellate courts will not disturb on appeal an order granting or denying a new trial where there is a conflict in the evidence, citing such cases as Sweeley v. Leake, 87 Cal.App.2d 636, 197 P. 2d 401; and Broadfoot v. Leather Supply Co., 69 Cal.App.2d 729, 735, 160 P.2d 59, but argues that in the instant case there is no conflict on the question involved; that the evidence on that subject was therefore a question of law because it was undisputed and was amply sufficient to sustain the verdict of the jury as to the defendant corporation, and the trial court abused its discretion in granting a new trial. Citing Moss v. Stubbs, 111 Cal.App. 359, 362, 295 P. 572, 296 P. 86; and Harvey v. Machtig, 73 Cal. App. 667, 677, 239 P. 78.

The head office of respondent Clark Bros. Inc. is in New York. Its executive officer of the Pacific Coast, one Hagemen, is located in Los Angeles. A Mr. Doyle, living near Visalia, was in the employ of respondent company as service superintendent under Hagemen. Defendant Campbell was a step-son of Doyle and lived with his wife and two children at the home of Doyle. He was employed in a near-by cannery. Prior to the trial of this action Doyle died. According to his deposition, taken prior to his death, his duties were to install engines in recycling and compressure plants and he was subject to call into several western states. The respondent company furnished him with a Plymouth car. He also had his own Pontiac car. On August 29, he and his wife left for Pennsylvania in his car due to the death of his father, and he left the Plymouth car, owned by the company, in his private garage at his home and put the key to it in a drawer in the house. Campbell's wife knew where he placed the key. Campbell was working at the time.

As to the use of the Plymouth car while he was away, Doyle testified: "That wasn't left for him to use. It was only in case of emergency. I will tell you how it happened. * * * You see * * * I have two small children which is of the ages of 4 and 6, and Jack Campbell has a baby born in July, and another little boy 2 years old, so when I left, I told him if they got sick or anything, to use the car, and that was the only way the car could be used." Mr. Doyle did not return to Visalia until September 15, 1946, after the accident happened.

Hagemen testified that no one on the west coast was vested with any executive power for the company except himself; that Doyle had been employed by the company, for about 20 years, and came to Los Angeles in 1944; that he supervised installation of compressors on the Pacific Coast and educated crews who were to run them; that the company Plymouth was turned over to him for that purpose and that he said to him: "Of course, Art, it is hardly necessary to tell you, an old employee like you, that the company rule is that the car is to be used for company business only and not to be driven by any non-employee"; that "He responded to the effect that he realized it". He then testified that Doyle was authorized to go to the various West Coast states from time to time on company business in the Plymouth; that forms were furnished to him as a service report showing his daily mileage, starting point and destination; that another form for a weekly report was required whereon Doyle was instructed to enter the speedometer reading for the week and that he used such report and they were then sent to Hagemen who checked them. Specimens of these particular forms of report were received in evidence. He then related that to his knowledge Doyle had never used the Plymouth for any other purpose than business for the company; that he never told Doyle that he could let anyone else use the car for any particular purpose; that he had never seen defendant Campbell before and that he did not operate the car with his consent or knowledge; that the gasoline for the car was paid for by the company, according to the report sheet submitted by Doyle.

Regarding the "permissive use" defendant Campbell testified that he obtained the key from the drawer and took the Plymouth from the garage at 5 p. m.; that his stepfather Doyle had told him where the key was left and told him, in the presence of his wife, that in "case of an extreme emergency" he could use the Plymouth (Campbell's son had had rheumatic fever and was under the care of a doctor); that he took the car and went to refill two prescriptions because "the medicine was getting low"; that he was "going up town" (to Visalia) and met a girl (now his wife) and they "had some things to talk about" and that she got into the car. They evidently proceeded on through Visalia and past the drug store where the prescription had been previously filled, to Tulare (about 10 miles from Visalia) and were proceeding southerly on Highway 99, at which point he "was going out to find a place to turn around and get the medicine back home" when the accident occurred; that he knew from the time he left Visalia that he was not acting as to any emergency in connection with any illness of his family. He testified that he had taken his former wife and son to the doctor on a previous occasion while his parents were in Pennsylvania; and that he had picked the car up once at the garage and brought it home at his mother's request at a time when Mr. Doyle was not there.

On these facts the trial court, by its order granting a new trial, held that the evidence was insufficient to support the verdict against the company as owner of the Plymouth car.

As we view the question, it is not whether, as a matter of law, the respondent company would have been entitled to a nonsuit or to a reversal on appeal if the appeal had been from the judgment against them rather than from the order granting a new trial, but whether, upon the facts stated, the trial judge, sitting as a "thirteenth juror" had the discretionary right to conclude that the evidence was insufficient to award a verdict against respondent company based upon the claimed permissive use of its automobile by Campbell.

The trial court had the right to believe from the evidence, notwithstanding the verdict of the jury, that Campbell was not authorized by Hagemen, as executive officer of the company, to use the Plymouth under any circumstances or, if authorized by Doyle to use it, he was only authorized to use it for the purpose limited to an "emergency", and that Campbell was not so using it at the time and place of the accident.

The statute upon which plaintiff predicates his claim that this respondent is liable for damages caused by the defendant Campbell while operating respondent's automobile, is sec. 402(a) of the California Vehicle Code, reading:

"Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same *with the permission, express or implied, of such owner,* and the negligence of such person shall be imputed to the owner for all purposes of civil damages." (Italics ours.)

[1, 2] Whether or not permission to drive the car had been given by the owner, under the facts related, was a question of fact and the burden of proof was upon the plaintiff seeking to establish permissive use. Permission, under that section, cannot be left to speculation or conjecture nor be assumed, but must be affirmatively proved. Engstrom v. Auburn Automobile Sales Corp., 11 Cal.2d 64, 68, 77 P.2d 1059; Krum v. Malloy, 22 Cal.2d 132, 137 P.2d 18; Casey v. Fortune, 78 Cal.App.2d 922, 179 P.2d 99; Helmuth v. Frame, 46 Cal.App.2d 381, 115 P.2d 852; Henrietta v. Evans, 10 Cal.2d 526, 75 P.2d 1051. In the latter case it was held (quoting from syllabus two):

"Where permission is granted to operate a car for a limited time or purpose, or in a particular locality, a substantial violation of such limitation terminates the original express consent and makes any subsequent use without permission, absolving the owner from liability; and where a car was entrusted to the driver for the purpose of driving to town to complete the sale of the car, and there was no evidence of authority to use the car for any other purpose, the only evidence being to the effect that any other use was expressly prohibited, the driver, by driving to another city, terminated the original express consent, and the owners were absolved from liability for an accident in such other city."

Counsel for appellant argues, with some force, that the purpose of enacting sec. 402 of the Vehicle Code was to protect innocent third persons from the careless use of automobiles and to make this protection paramount to the rights of an owner who permits the use of his car by others, citing Souza v. Corti, 22 Cal.2d 454, 139 P.2d 645, 147 A.L.R. 861; Burgess v. Cahill, 26 Cal. 2d 320, 158 P.2d 393, 159 A.L.R. 1304; Stapleton v. Hertz Drivurself Stations, 129 Misc. 772, 222 N.Y.S. 579; Bayless v. Mull, 50 Cal.App.2d 66, 122 P.2d 608; Blank v. Coffin, 20 Cal.2d 457, 462, 126 P.2d 868; Davidson v. Ealey, 69 Cal.App.2d 254, 158 P.2d 1000; and that from the ownership of the automobile a presumption arises that it was being used for the owner's purposes, citing Cope v. Goble, 39 Cal.App.2d 448, 103 P.2d 598, where it was held that where the owner was present in the car such a presumption might arise. In Reed v. Cortez, 88 Cal.App.2d 416, 198 P.2d 911, the court held that if the evidence shows that an automobile was being driven by an employee of the owner, at the time, the jury may *infer* that the employee was operating it with the permission of the owner. Such is not the case here. Stapleton v. Hertz Drivurself Stations, supra, relied upon by appellant, was reversed. See Stapleton v. Hertz Drivurself Stations, 131 Misc. 52, 225 N. Y.S. 661.

[3, 4] As pointed out, we are not here dealing with the question of weighing presumptions or inferences against the testimony of the witnesss in order to support the judgment, or whether a judgment against the company, under the evidence, could have been supported. The rule is that where a motion for a new trial has been granted on the grounds of insufficiency of the evidence to sustain the verdict, this court will not disturb the order if there is any evidence which, if believed, would have sustained a verdict for respondent, even if there were other, and conflicting, evidence. All presumptions in favor of the validity of the order must be indulged. The trial court is not only authorized, but it is its duty, to grant a new trial whenever in its opinion the evidence upon which the former decision rests is insufficient to justify the decision, and its action in granting a new trial on this ground is discretionary to the extent that if any appreciable conflict exists in the evidence the court's action may not be disturbed on appeal. Clippinger v. Reiss, 17 Cal.App.2d 604, 62 P.2d 418. As said in Green v. Soule, 145 Cal. 96, at page 103, 78 P. 337, 340:

> "The parties are entitled to the judgment of the jury in rendering a verdict in the first instance, but upon a motion for a new trial they are equally entitled to the independent judgment of the judge as to whether such verdict is supported by the evidence."

[5] There is evidence that would justify the belief, by the trial judge, that plaintiff had not met the burden of proof in establishing permissive use of the Plymouth by Campbell at the time and place of the accident involved. Engstrom v. Auburn Automobile Sales Corp., supra; Helmuth v. Frame, supra; Di Rebaylio v. Herndon, 6 Cal.App.2d 567, 44 P.2d 581.

Order affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

Hearing denied; GIBSON, C. J., and SHENK and CARTER, JJ., dissenting.

90 Cal.App.2d 775

BLACKBURN v. UNION OIL CO. OF CALIFORNIA et al.

Civ. No. 3751.

District Court of Appeal
Fourth District, California.
March 22, 1949.

1. Licenses 🔑18½(17)

Transfer of a landowners' oil and gas interest is a transfer of a "security" within the Corporate Securities Act requiring permit from Commissioner of Corporations for sale of securities. Gen.Laws, Act 3814.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Security".

2. Licenses 🔑18½(17)

Instruments evidencing transfer of fractional interests in oil and gas production were certificates of interest, and permit from Corporation Commissioner was required for transfer of interests described therein. Gen.Laws, Act 3814.

3. Licenses 🔑39.17

Under the Corporate Securities Act prohibiting sale of securities to the public without a permit, purchasers of fractional interests in oil and gas production from seller without permit could not be considered in pari delicto and were entitled to have title quieted in interests obtained by such transfers. Gen.Laws, Act 3814.

4. Licenses 🔑39.17

Executor of estate of one who sold fractional oil and gas interests without permit from Commissioner of Corporations under the Corporate Securities Act could not take advantage of decedent's wrong to set aside transfers and quiet title to interests involved for benefit of seller's estate. Gen.Laws, Act 3814.

5. Appeal and error 🔑205, 692(1)

Where court refused to admit oral evidence relating to writing, but record did not disclose what evidence plaintiff sought to introduce and plaintiff did not disclose purpose of question propounded to witness, and objected to, and made no offer of proof, court's refusal afforded no ground for complaint on appeal.

6. Appeal and error 🔑205
Trial 🔑45(1)

Mere general offer of proof without producing witness or stating evidence whereby fact in issue is to be proved, or, if witness be present, without putting a question to him in such form as to give opportunity for objection, is not correct trial procedure, and affords no ground for appeal.

◆

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by O. V. Blackburn, as executor of the estate of Oliver P. Blackburn, also known as O. P. Blackburn, deceased, against the Union Oil Company of California, a corporation, and others, to quiet title to fractional oil and gas interests. From the judgment, plaintiff appeals.

Judgment affirmed.

Porter C. Blackburn, of Los Angeles, for appellant.

Harvey, Johnston, Baker & Palmer, of Bakersfield, for respondents.

MUSSELL, Justice.

Plaintiff appeals from a judgment for defendants quieting title to fractional oil and gas interests.

Plaintiff's complaint contains the usual allegations in actions to quiet title. Some of the defendants disclaimed any interest in the property described in the complaint and the others filed answers setting forth their respective claims to interests in the property involved.

Defendants George Galatas and his wife claimed title to one-half of one percent of all oil, gas, and other hydrocarbon substances produced, saved, and sold from a part of the property described in the complaint and base their claim thereto on a "Landowner's Oil Royalty Contract" executed by O. P. Blackburn and others dated June 2, 1937. Defendants Warren E. Ten Eyck and his wife allege that since September 12, 1934, they have been and now are the owners of one per cent of all oil, gas, or other hydrocarbon substances produced, saved, and sold from a portion of the property involved, and base their claim to title on a grant deed to them executed by O. P. Blackburn and others on September 12, 1934.

Defendants A. B. Ruddock and his wife claim title to one per cent of the oil and gas, etc., in the same property obtained by them through deed from Blackburn and others in November 1934, of which interest these defendants now own six tenths of one percent, the other four tenths of their interest having been by them conveyed to defendant Robert H. Miller on December 28, 1934.

At the trial the plaintiff admitted the due execution, recording and delivery of the instruments by which defendants claimed title but claimed that the transfers of these interests were violations of the Corporate Securities Act, Gen.Laws, Act 3814, in that no permit to sell had been obtained as required by the act. After introducing in evidence certificates from the Corporation Commissioner to the effect that O. P. Blackburn did not have a broker's or agent's license to sell securities in his name for the year 1934, or thereafter, plaintiff called defendant George Galatas as a witness. The following testimony was then taken and proceedings had:

"Q. You are one of the defendants in this case? A. Yes sir.

"Q. And did you buy a one half of one percent interest in an oil development at one time? A. That is right.

"Q. And that was in the Weed Patch area? A. That is right.

"Q. And who did you buy that from? A. From Mr. Fred Blackburn.

"Q. Did you have any conversation with him at the time? A. Yes.

"Q. And who was there? A. The conversation was, he said 'I will sell you a one half of one per cent'—

"Mr. Baker: (Interrupting) I would like to get in an objection before he does testify.

"The Court: I don't know what good an objection is. You can always show a conversation surrounding the execution of an instrument, not to interpret it, or to change it. He said there was no conversation except he sold him a one half of one per cent. The conversation is not admissible unless the Court cannot tell what the assignment means. Conversations are admitted, not to find out what people said, but to find out what they meant by what they did say, and if the instrument is plain, then the conversation is not admissible.

"Mr. Blackburn: It has nothing to do with what the instrument says.

"The Court: Q. Can you understand the instrument?

"Mr. Blackburn: Yes.

"The Court: Then I will sustain the objection. You admit this means what it says then?

"Mr. Blackburn: Yes.

"The Court: Then I will sustain the objection.

"Mr. Blackburn: Then we can shorten this very quickly. I was going to put on the other defendants and ask them the same question.

"The Court: That is all right. I think the courts say about what I say. They say it is never admitted to vary the contract, if there is some question about what people mean by what they say, then you can introduce it, but if it is an ordinary assignment, I will sustain the objection for the purpose of the record. If you want to offer to prove the document—

"Mr. Blackburn: No, we rest.

"Mr. Baker: We rest."

Plaintiff argues that "landowners royalties are securities, and are void; that vendees of void securities are not protected if in pari delicto; that the court erred in refusing to admit evidence as to whether the instruments of transfer were securities and that plaintiff was entitled to introduce oral evidence to determine if defendants were in pari delicto."

[1-3] It is settled that the transfer of a landowners royalty interest is a transfer of a security. Morello v. Metzenbaum, 25 Cal.2d 494, 497, 154 P.2d 670. The instruments which evidenced fractional or

percentage interests in oil and gas production were certificates of interest and a permit from the Corporation Commissioner was required for the transfer of the interests described therein. People v. Sidwell, 27 Cal.2d 121, 126, 162 P.2d 913. The seller, in this case the decedent O. P. Blackburn, and the purchasers, the answering defendants, were not in pari delicto as the inhibitions of the Corporate Securities Act, Deering's General Laws Supp. 1929, p. 3287, Act 3814, against sales of securities to the public without permits are meant to protect the public from imposition and deception—not primarily to benefit the seller. Domestic & Foreign Petroleum Co., Ltd., v. Long, 4 Cal.2d 547, 559, 51 P.2d 73.

[4] Plaintiff, as executor of the estate of O. P. Blackburn, deceased, seeks to take advantage of the decedent's wrong in selling securities without a permit. This he is not permitted to do. Domestic & Foreign Petroleum Co., Ltd., v. Long, supra, 4 Cal.2d at page 559, 51 P.2d 73. The defendants as purchasers are not here seeking to set aside the transfers to them, and to hold that plaintiff as executor, representing the sellers' estate, can do so, is to allow a premium for the wrong done by Blackburn and to defeat the purpose of the statute.

[5, 6] Plaintiff contends that the court erred in refusing to admit oral testimony, but the record does not disclose what evidence plaintiff sought to introduce. Plaintiff did not disclose the purpose of the last question propounded to the witness George Galatas, and the question was answered. No question was asked as to what was said and no offer of proof was made. Plaintiff's counsel merely stated to the court that he "was going to put on the other defendants and ask them the same question." If counsel had stated what he wished to prove, it is possible that its relevancy would have appeared. As was said in Stickel v. San Diego Elec. Ry. Co., 32 Cal.2d 157, 195 P.2d 416, 420:

"A mere general offer of proof without producing the witness or stating the evidence whereby the fact in issue is to be proved, or, if the witness be present, without putting a question to him in such form as to give opportunity for objection, is not correct trial procedure and it affords no ground for appeal."

We see no reversible error in the trial court's ruling under the circumstances.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

90 Cal.App.2d 809

DAVIDSON v. DAVIDSON.

Civ. 13952.

District Court of Appeal, First District, Division 1, California.

March 25, 1949.

1. Divorce 🔑165(5½), 184(6)

Whether wife knew what was happening at the time of divorce, whether she was so emotionally upset that she was unable to comprehend what was going on, whether husband and his attorney took unfair advantage of wife and whether divorce was secured by fraud were questions of fact on wife's motion to set aside interlocutory decree, and where evidence thereon was conflicting and judge saw fit to believe husband and his witnesses and to disbelieve wife, there was no abuse of discretion in denying motion.

2. Divorce 🔑184(10)

On appeal from an order denying a motion to set aside an interlocutory divorce decree, appellate court is bound by any substantial evidence that supports implied findings of trial court.

3. Divorce 🔑184(6)

Conflicts in testimony at hearing on motion to set aside decree of divorce are for trier of facts, and on such matters reviewing court has no power to interfere.

4. Divorce ⚷165(3)

Where husband determined to secure a divorce, regardless of whether wife contested it, and wife resolved not to contest divorce and to avoid all possible publicity, and repeatedly refused to employ independent counsel, although husband's attorney requested her to do so, act of husband's attorney in negotiating property settlement agreement directly with wife, in which she received as much or more than she would have received if represented by counsel and preparing for her an answer and waiver of notice, did not constitute unethical or fraudulent conduct which would authorize vacating of interlocutory decree.

Appeal from Superior Court, Contra Costa County; Harold Jacoby, Judge.

Action by Arthur B. Davidson against Glenn Martin Davidson for divorce. From an order denying defendant's motion to set aside the interlocutory decree and property settlement agreement, defendant appeals.

Affirmed.

Lucille F. Athearn and Fred G. Athearn, both of San Francisco, for appellant.

R. P. Wisecarver, of San Francisco, and Jas. F. Hoey, of Martinez, for respondent.

PETERS, Presiding Judge.

On August 12, 1947, respondent secured an uncontested interlocutory decree of divorce from his wife on the ground of extreme cruelty. About five and one-half months later, on January 27, 1948, appellant filed a notice of motion under § 473 of the Code of Civil Procedure to set aside the interlocutory decree and the property settlement agreement, which had been approved by the court in the divorce action, contending that the decree was taken against her through her mistake, inadvertence, surprise or excusable neglect; that it was secured by means of extrinsic fraud, threats, coercion, duress and undue influence; that the property settlement agreement was secured by threats, fraud, duress and undue influence, and requesting that, upon setting aside the interlocutory decree, she be permitted to file a verified amended answer and cross-complaint. Various affidavits were filed, a hearing had, and briefs filed. The trial court denied the motion, and from that order of denial the wife appeals.

These parties have been married for over twenty-five years. They have two children, an adult married son, and a daughter, aged twenty, attending the University.

The divorce action was filed by respondent on August 9, 1947. On August 11, 1947, the appellant signed an answer, in propria persona, generally denying all of the allegations of the complaint. This answer was drafted by the attorney for the respondent. On this same date the appellant also signed a waiver of notice of the time and place of trial which had been prepared by respondent's attorney. The answer was filed on August 12, 1947, and on that same day the divorce action was heard and decided by the same judge that decided the motion here involved. At the divorce hearing the appellant did not appear. The divorce was granted on the testimony of the respondent and of the adult son of the parties.

The property settlement agreement, which was drafted by respondent's attorney after several conferences with the respondent and appellant and the children, provided that the home of the parties, valued at over $30,000, is to remain in joint tenancy, with appellant having the right of possession for life. Respondent agreed to pay off the existing indebtedness on the house, which he has since done. He also agreed to pay all taxes on the house and to pay for all needed repairs. With certain minor exceptions, the furniture and personal effects, valued at $8,000, were awarded to appellant. Respondent received the family automobile, valued at $2,000. Appellant received $4,700 in bonds, which includes a little over $2,000 of bonds that were her separate property, all other bonds being community property. The husband received $2,250 in bonds. There were two life insurance policies. The agreement provided that appellant was to remain beneficiary of a $5,000 policy that had no cash value, and the respondent was to have full title to the other policy which he has since cashed in for $2,856.65. Five thousand shares of stock in the company with which he was associated, which had been given respondent by the president of that company and endorsed back to the company pursuant to an agreement that the company should retain them if respondent died or left the firm, the company agreeing to pay $1.50 a share in the event of the happening of either contingency, were retained by the respondent. The bank accounts in an undisclosed sum went to respondent. Respondent further agreed to pay to appellant $400 per month alimony during the life of appellant or until she remarries, and, in addition, to pay his daughter not less than $100 per month to enable her to finish her college education.

The theory of appellant is that, because of a prior illness, she was emotionally unbalanced at the time of the divorce and when she signed the waiver and answer; that she was misled by respondent and his attorney into the belief that she could not prevent the divorce; that she was told that the entire assets of the parties would be consumed by the expenses of litigation if she contested the divorce; that she was discouraged from securing the services of an attorney and had no independent legal advice during the negotiations; that the divorce proceedings were rushed through so rapidly that she was unable to secure legal advice as to her rights; that respondent closed out their joint bank account so that she was without funds to employ an attorney; that respondent threatened her with publicity and notoriety unless she consented to the granting of the divorce; that respondent's attorney represented both parties to the action; that this was unethical and fraudulent; that for these reasons she is entitled to have the divorce decree and property settlement set aside.

Respondent contends, and his evidence supports the contentions, that appellant was in full possession of her faculties at the time of the divorce and fully understood and agreed to everything that was done; that she was not represented by counsel because she did not want an attorney; that she did not want to discuss the matter with any one but respondent's attorney and the family; that his attorney repeatedly requested her to employ independent counsel, but that she refused to do so; that at all times prior to the entry of the decree the joint bank account of the parties was available to appellant for the hiring of counsel; that the rapidity of the divorce was occasioned by his desire to return to Los Angeles where he is manager of the office; that at no time did he threaten or coerce his wife, but merely told her that he intended to have a divorce even if he had to go to Reno to get it; that appellant was completely satisfied with the entire transaction until she learned he was keeping company with another woman, when she decided to start this proceeding to punish and harass him.

[1] As might be expected in such a proceeding, the evidence is highly conflicting. There can be no doubt that the evidence introduced at the time of the divorce proceeding and the evidence introduced on this proceeding amply support the conclusion that respondent was entitled to a divorce. The evidence of respondent and his witnesses is to the effect that, from almost the very inception of the marriage, appellant has been a nagging and fault-finding wife, has refused to permit members of respondent's family to visit the home, and since 1937 has refused to have marital relations with her husband. In both proceedings there is ample evidence to support the finding of extreme cruelty. That is, of course, not the issue here presented. In the instant proceeding we are solely interested in whether the trial court abused its discretion in refusing to set the divorce decree aside. The real issues are whether appellant knew what was happening at the time of the divorce, or whether she was so emotionally upset that she was unable to comprehend what was going on, whether respondent and his attorney took unfair advantage of appellant, and whether the divorce was secured by fraud. These are all factual matters on which the evidence was conflicting. The trial judge saw these parties and heard them testify. He has seen fit to believe respondent and his

witnesses and to disbelieve appellant. This being so, there was no abuse of discretion in denying the motion.

The evidence was directly conflicting as to the health and mental condition of appellant in August, 1947. In 1945 she had had a stroke which, for a short time, rendered her unable to walk or to speak. She claimed that, as a result of this condition, she is subject to great emotional disturbances and is easily upset mentally and emotionally; that she is frequently unable to understand the significance of matters presented to her, and that she was in such a condition in August, 1947, and did not then understand the effect of the property settlement and other papers signed by her. This evidence is directly refuted by respondent, his attorney and by the surrounding circumstances. In June and July of 1947 appellant and her daughter took a five-week trip to the East and to Canada. On this trip she was most active, far more so than her twenty-year-old daughter. Respondent and his attorney both testified that she was in good physical and mental condition during the time in question.

That she fully understood the property settlement is evidenced by the fact that it was she who suggested the $400 per month alimony allowance and the $100 allowance for the daughter, and that at her request the tentative agreement was changed in several material respects.

[2] Nor was any coercion, fraud or undue influence practiced by respondent or his attorney. On July 29, 1947, respondent told appellant that he wanted a divorce. After an unsuccessful attempt by appellant to dissuade respondent from seeking a divorce, respondent told appellant that he was going to invite his attorney, an old friend of the family, to the house to discuss the property settlement and other matters. Such a meeting was held shortly thereafter. It was attended by the respondent, appellant, the attorney, and by the two children. The evidence was highly conflicting as to what there occurred. We are, of course, bound by any substantial evidence that supports the implied findings of the trial court. Respondent and his attorney testified that appellant had computed her estimated expenses and suggested $400 a month alimony. After this had been agreed upon, respondent agreed to pay an additional $100 a month to the daughter while she is in college. That this was a reasonable and fair allowance is apparent. Respondent's salary is about $12,600 a year, which, after taxes, leaves him with about $835 a month take-home pay. In 1947 he received about $6,000 in bonuses and dividends on which the tax was about 35%. The other provisions of the property settlement have already been summarized. They are obviously fair to appellant.

Appellant suggested various material changes in the tentative agreement, and these were made. Appellant, nevertheless, contends that she was not consulted about anything, but merely was told what she would get. This conflict has been resolved against her, and is binding on this court.

Appellant testified that she was coerced into agreeing to an uncontested divorce by respondent's threats that a contested divorce would ruin the family financially, and that, in that event, she would get nothing. She also testified that she told respondent and his attorney that she wanted to see the judge and talk the matter over with him, but was told by both that this could not be done. She also testified that she was told by respondent that the joint checking account was closed, and that she therefore believed she had no money to hire an attorney, and that the attorney told her that it would be futile to get independent counsel. In almost every particular this evidence was directly contradicted by respondent and his attorney. Respondent admitted that he told appellant that he was determined to get a divorce even if he had to go to Reno. He denied telling her that the joint bank account was closed, testifying that he did not tell her that until after the interlocutory decree was secured. The joint account was available to her and she could have drawn on it had she so desired. Both respondent and the attorney testified that the attorney repeatedly requested appellant to get an attorney, but that she refused, stating that she did not want to talk to anyone outside the family about the divorce. All of these conflicts have been resolved against appellant by the trial court, and its determination is binding on this court.

After these conferences, the attorney drew up the property settlement, and delivered it to the Davidsons. Appellant testified that on the morning of August 8th her husband simply told her to sign it and that she did so without reading it or knowing its contents. Her daughter witnessed her signature. Both the daughter and appellant testified that the attorney was not then present. Appellant testified that she was under a great emotional strain, and signed simply because "it seemed the easiest way out." She was positive that the settlement agreement was not read to or by her before she signed it. This evidence was directly contradicted by respondent and his attorney. Both testified that it was read to or by appellant before she signed it. The attorney testified in detail as to the circumstances of this meeting. This conflict was resolved against appellant by the trial court, and its determination is binding on this court.

The attorney likewise, at this meeting, discussed with appellant the differences between a default, and answering and waiving notice of time and place of the hearing. Appellant quite definitely indicated that she did not desire to contest the divorce, and when the attorney left it was definitely understood by all concerned that he should draw up the papers so that the decree could be secured as quickly and quietly as possible.

On August 9, 1947, the complaint, charging cruelty and desertion was filed. On August 11, 1947, pursuant to an appointment made prior thereto, the attorney called upon appellant and served her with the complaint and summons. At the same interview he presented to her a proposed answer, in propria persona, and a waiver of notice of time and place of trial. These documents, according to the attorney, were read through by appellant and some of the provisions discussed and explained. Again he suggested that she get an attorney, but again she was positive in her refusal. At this same meeting, according to the attorney, appellant suggested certain further changes in the property settlement, and they were made. Appellant then expressed a willingness to sign the answer and waiver, and the attorney telephoned to make arrangements with a notary.

Appellant contradicted this testimony. She denied that the attorney suggested that she get counsel of her own choice. She testified that she was "emotionally upset" and "hurried all the time," and that she did not read the papers and did not understand them.

The attorney then took the appellant to the home of the notary where appellant admittedly signed the answer and waiver. The attorney testified that, in the presence of appellant, he told the notary that appellant did not wish to contest the divorce and did not want an attorney, and requested the notary not to mention the matter to any one. This was corroborated by the affidavit of the notary. Appellant contradicted most of this testimony, but this conflict again was resolved against appellant by the trial court.

[3] It is also urged that the adult married son of the parties, who was respondent's corroborating witness at the divorce hearing, was coerced into testifying. He testified that he was falsely informed by respondent and the attorney that his mother knew that he was going to testify at the divorce hearing, and that he would not have testified had he known she was unaware of his appearance; that he certainly would not have testified had he known his father was keeping company with another woman; that the attorney presented him with a list of questions and told him to answer "yes" or "no," and to offer no explanations; that the attorney told him that any attempt to explain his answers would result in his being held in contempt of court. He admitted, however, that every word of his testimony given on the divorce hearing was true "as far as it went." An examination of the transcript of that hearing shows that most of the important questions were asked by the trial judge, and were not answered "yes" or "no," explanations being given by the witness to most of them. The attorney testified that he told the son that he should not take sides in the

case; that his mother did not desire publicity and wanted to keep the entire matter within the family, so far as possible; that if the son could testify as to the facts it would be unnecessary to call in any outside witness; that he did not tell the son that the mother knew he was to testify, and did not tell him to answer "yes" or "no," or how to answer the questions; that he did not threaten that the judge would hold the son in contempt if he tried to explain his answers. These conflicts have been resolved against appellant by the trial court, and cannot be retried in this court.

Immediately after the decree was entered appellant received a copy. She made no objections of any kind for about five and one-half months. She testified that she became dissatisfied with the divorce decree and property settlement after talking to a San Francisco judge; that the judge had heard about the case from a neighbor and telephoned to her; that the judge told her that the case constituted a most glaring miscarriage of justice, and recommended that she get a lawyer; that the judge told her that she was not protected, and that it was her duty to protect herself and her children. The affidavit of the judge contradicts this story in several material respects. It is there averred that, while attending a dinner party, the hostess stated that she had a friend who was disturbed about her divorce; that the hostess then telephoned this friend and asked the judge to talk to her; that the judge, who had no knowledge of any of the facts, and so avers, then simply told the appellant that if she was dissatisfied she should seek the advice of an attorney who could tell her whether or not the interlocutory decree had been properly secured.

It is quite apparent that the problems here involved are primarily factual, and that in nearly every material respect the trial court has seen fit to believe respondent and his witnesses and to disbelieve appellant and her witnesses. Insofar as the case involves conflicts in the evidence, this court has no power to interfere. So far as the facts are concerned, we are faced with a record that shows that over the years this appellant has been guilty of extreme cruelty to her husband; that he finally determined to get a divorce, contested or uncontested; that he made an offer of a fair property settlement; that she agreed to it; that she did not desire to contest the divorce; that although she had available funds to hire an attorney, and although the attorney for the respondent repeatedly urged her to get an attorney, she refused to get one; and that she understood everything she was doing. This is not a case where one party to a divorce has been deprived of a fair share of community property by a property agreement, a factor that would be most important in determining whether to set aside an uncontested decree and property settlement. Without regard to the fact that the divorce decree establishes that appellant was guilty of cruelty, an examination of the property settlement demonstrates its fairness. Appellant secured a joint tenancy interest in the home, the right to possession for life, and respondent agreed to assume the indebtedness against the house, and to pay all the taxes and repairs. The wife got all the furniture. The community property bonds were about evenly divided. The insurance policies were divided, the respondent getting the one with a cash value, and also getting the automobile, the bank accounts and the stock. But he has agreed to pay appellant $400 a month for life or until she remarries, plus $100 a month to his daughter while she is in college. The agreement was quite fair to appellant.

[4] Faced with the face that on every major issue made there is a substantial conflict in the evidence, appellant urges that it was extrinsic fraud and unethical conduct, as a matter of law, for the attorney for respondent to have discussed the divorce with appellant, and to have prepared the answer and waiver for her. In the briefs, and at the oral argument, the attorney for appellant has bitterly assailed and condemned the attorney for respondent for what she terms his unethical and fraudulent conduct. Such conduct, she asserts, prohibited appellant from presenting her case and prohibited a fair hearing of the issues. After asserting that such con-

duct constitutes extrinsic fraud, the frequently cited case of United States v. Throckmorton, 98 U.S. 61, 25 L.Ed. 93, is relied upon, to establish the point that such extrinsic fraud warrants setting a judgment aside. Of course it is not and should not be the law that conduct such as is here involved, as a matter of law, constitutes extrinsic fraud. It is not the law that an attorney for one of the parties in a divorce proceeding may not discuss a proposed property settlement with the other party to the action, where that other party is advised that she should get an attorney, but is adamant in her refusal to do so. It is, of course, much better for all concerned if both sides have independent counsel, but there is no way by which a litigant can be compelled to secure an attorney. Where the attorney for one of the parties is compelled to deal directly with the other litigant he is under a most strict duty to deal with such litigant fairly and objectively, and the agreement will be scrutinized most carefully to be sure that there has been no overreaching. The evidence in the present case supports the trial court's implied finding that counsel for respondent scrupulously observed the proprieties in all respects, and in no way took advantage of the fact that appellant was unrepresented by counsel. Appellant received as much, or more, out of the agreement as she would have received had she had an attorney. Nor was it unethical conduct, as a matter of law, for the attorney for respondent, after the property settlement had been agreed upon, and after appellant had definitely and positively stated on several occasions that she did not wish to contest the divorce and would not contest it, to tell her that she could either default or answer and waive notice, and to have prepared for her the answer and waiver. This attorney was an old friend of the family. At the time, appellant was desirous of keeping the entire proceedings quiet and within the knowledge of as few people as possible. The evidence supports the implied finding that what was done by the attorney was done in exact accord with appellant's desires and with a full understanding on her part of what she was doing. Judicial decrees cannot and should not be set aside simply because one of the litigants changes her mind. The attack made upon counsel for respondent by the counsel for appellant is unjustified and legally unsound.

The order appealed from is affirmed.

WARD and BRAY, JJ., concur.

90 Cal.App.2d 680

Guardianship of GESTNER'S ESTATE.
DEPARTMENT OF MENTAL HYGIENE OF CALIFORNIA v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.
Civ. 13949.

District Court of Appeal, First District, Division 1, California.
March 18, 1949.
Hearing Denied May 16, 1949.

1. Insane persons 🔑58

Under statutes state Department of Mental Hygiene may proceed by action at law to recover for maintenance and care of incompetent in state mental hospital or by petition filed in probate court for an order requiring guardian to pay for such maintenance and care and where Department elects to file such petition, probate court must accept jurisdiction and entertain the proceeding. Welfare and Institutions Code, §§ 6655, 6658.

2. Appeal and error 🔑717

Opinion of trial court may be considered by appellate court to determine the process by which judgment was rendered or the basis on which court acted. Rules on Appeal, rule 5(a).

3. Insane persons 🔑86

The 1945 amendment of Welfare and Institutions Code, § 6650 expressly making the liability of insane person's relatives and estate for his maintenance and care in state institution applicable to persons committed to such institution during pendency of criminal proceedings against them merely clarified the existing law and did not establish a new liability. Welfare and Institutions Code, §§ 6650, 6655; Pen.Code, §§ 1026, 1368, 1369, 1370, 1372.

4. Insane persons 🔑86

Commitment to state mental hospital of a person found not guilty of crime by reason of insanity at time of commission of offense was custodial and not penal in character. Pen.Code, § 1026.

5. Insane persons 🔑86

If a person found not guilty by reason of insanity at time of commission of offense appears to be sane at time of verdict, he must be released from custody and may not be committed to a state hospital for criminal insane. Pen.Code, § 1026.

6. Insane persons 🔑86

Where one found not guilty by reason of insanity at time of commission of offense and committed to state mental hospital continued to be insane for more than a year thereafter, neither he nor his guardian could question the constitutionality of statute making his estate liable for his maintenance and care in hospital on ground that he must wait one year following commitment before having his restoration to sanity determined, whereas persons otherwise committed to such institution are entitled to release upon recovering their sanity. Welfare and Institutions Code, §§ 5050 et seq., 6650 et seq.; Pen.Code, § 1026.

7. Insane persons 🔑65

The statutory provision requiring guardian of estate of any person committed to state mental hospital having sufficient estate for the purpose to pay for his care in such institution applies to any person who is committed for custodial care. Welfare and Institutions Code, §§ 5050 et seq., 6650 et seq., 6655.

8. Statutes 🔑212.1

The legislature in adopting a statute is presumed to have known of prior court decisions.

9. Insane persons 🔑86

That one found not guilty by reason of insanity at time of commission of offense and committed to state mental hospital must be confined for at least one year before a hearing can be had to determine his restoration to sanity does not render such commitment penal in character instead of custodial. Pen.Code, §§ 1026, 1368 et seq.

10. Statutes 🔑147

An intent to change the law is ordinarily inferred from a material change in the language of a statute, but the circumstances may indicate merely a legislative intent to clarify the law.

11. Insane persons 🔑86

Estate of person found to be insane at time of commission of criminal offense and committed to state mental hospital was liable for his maintenance and care in such institution prior to 1945 amendment expressly making liability for care of persons in such institutions applicable to persons committed during pendency of criminal proceedings against them, and payment was properly made out of his estate for such care prior to amendment. Welfare and Institutions Code, §§ 6650, 6655; Pen. Code, § 1026.

12. Insane persons 🔑86

Statute making estate of person insane at time of offense liable for maintenance and care in state mental hospital is not unconstitutional on ground that such person is committed without a hearing of the type allowed persons committed under other statutes and must have his restoration to sanity determined at a court or jury trial, while others committed to such institutions may be released on certificate of medical superintendent. Welfare and Institutions Code, § 6650; Pen.Code, § 1026.

13. Constitutional law 🔑56
Insane persons 🔑86

Statute making estate of insane person liable for his maintenance and care in state mental hospital does not invade the constitutional jurisdiction of judicial branch of government to control the management of estates of insane persons and is not inconsistent with Veterans' Guardianship Act, since probate court has complete power to protect the ward and his rights and, if condition of estate does not justify payment for maintenance of ward, probate court may refuse to order such payment, whether ward is a veteran or otherwise. Welfare and Institutions Code, §§ 6650 et seq., 6655; Probate Code, § 1650 et seq.

WARD, J., dissenting.

◆

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Proceeding in the matter of the estate of Peter Gestner, incompetent, wherein the Bank of America National Trust & Savings Association, as guardian of the estate of Peter Gestner, incompetent, filed its annual account and the Department of Mental Hygiene of the State of California filed objections thereto and its petition for an order requiring the guardian to pay for care and maintenance of the incompetent at a State Mental Hospital. From an order of probate court approving the annual account and overruling objections thereto and from order denying the Department's petition for an order directing payment for maintenance and care of incompetent, the Department of Mental Hygiene of the State of California appeals.

Order reversed with instructions.

Fred N. Howser, Atty. Gen. and Elizabeth Palmer Deputy Atty. Gen., for appellant.

William J. O'Keeffe, of San Francisco, for respondent.

BRAY, Justice.

Two appeals by the Department of Mental Hygiene of the State of California: (1) from the order of the probate court approving the sixteenth annual account of the Bank of America National Trust and Savings Association, as guardian of the estate of Peter Gestner, an incompetent person, and overruling the department's objections to such account; and (2) from the order denying the department's petition for an order directing payment of board, care and maintenance of said incompetent at the Mendocino State Hospital.

There are two questions presented: (1) May the superior court, sitting in probate, refuse to hear and determine a disputed claim of the department against the estate of an incompetent for board, care and maintenance at a state institution? (2) Is the estate of an incompetent committed to a state mental hospital liable for care furnished prior to the 1945 amendment to section 6650 of the Welfare and Institutions Code?

Facts.

Peter Gestner was charged in Los Angeles County with the crime of burglary. He pleaded not guilty and not guilty by reason of insanity. On May 13, 1931, a jury found him guilty of first degree burglary. The following day, on the trial under the second plea, the jury returned a verdict that he was insane at the time of the commission of the offense. Section 1026 of the Penal Code provides, in effect, that upon such verdict, the trial court, unless it appears that the defendant has fully recovered his sanity, shall direct that the defendant be committed to the state hospital for the criminal insane. Pursuant to this section, on May 20, 1931, the trial court committed Gestner to the Mendocino State Hospital, where he has remained ever since.

In November, 1931, the Bank of America was appointed guardian of his estate. It immediately qualified, and ever since has been such guardian. From its appointment, to and including April 30, 1945, the guardian paid to the Department of Institutions (appellant's predecessor) upon demand the sum of $2,049.67 for board, care and maintenance of the incompetent at the hospital. For the period commencing May 1, 1945, no payment has been made.

The guardian filed its sixteenth annual account. The appellant immediately filed its objections to the account and its petition for an order directing the guardian to pay the department the sum of $840, being the unpaid board, etc., at the rate of $40 per month for the period from May 1, 1945, to December 31, 1947, and to pay $40 per month thereafter as long as Gestner might be confined in the hospital. No objection was made to any of the items appearing in the account. Appellant's only objection to the account was the failure of the guardian to include therein the above mentioned $840. The estate has sufficient assets to pay the department's demands. The Veterans Administration was represented at the hearing (the estate receives from it a pension of $72 per month). It and the guardian took the position that as Gestner was confined in the hospital under section 1026 of the Penal Code there was no liability for his care and maintenance prior to a change in the law, effective September, 1945; that the $2049 paid by the guardian was erroneously paid out and should be offset against the liability from 1945 on. In view of the correctness of the items of receipt and disbursement in the account, the attack here is not on the denial by the court of the objections to the account, but to the denial of the petition for an order directing the payment by the guardian of the care and maintenance of the incompetent. The court felt that all matters in this respect could be threshed out better in a civil action, and denied the petition.

1. Had the Probate Court the Right to Refuse to Consider Appellant's Petition?

Both sides agree that at the present time there are two statutes providing methods for the enforcement of the payment by the incompetent's estate of his care at a state hospital. One is section 6658 of the Welfare and Institutions Code, which reads: "The Department of Institutions may in its own name bring an action to * * * recover for the use and benefit of any State hospital or for the State the amount due for the care, support, maintenance, and expenses of any patient or inmate therein * * * against any person, guardian, or relative liable for such care, support, maintenance, and expenses." This section is based on former Political Code section 2197, as added by Stats.1903, chap. 364, sec. 1, page 513, as amended. The other is section 6655 of the Welfare and Institutions Code, based on former Political Code section 2181, as added by Stats.1903, chap. 364, sec. 1, p. 506. This section reads in part: "If any person committed to a State mental hospital has sufficient estate for the purpose, the guardian of his estate shall pay for his care, support, maintenance, and necessary expenses at the mental hospital to the extent of the estate. Such payment may be enforced by the order of the judge of the superior court where the guardianship proceedings are pending. On the filing of a petition therein by the department, showing that the guardian has failed, refused, or neglected to pay for such care, support, maintenance, and expenses, the court, by order, shall direct the payment by the guardian. Such order may be enforced in the same manner as are other orders of the court."

[1] It is respondent's position that while the department may proceed under either or both of these sections, if it proceeds under the latter section, the probate court may, in its discretion, because of press of business or other reason, refuse to accept jurisdiction. Appellant, on the other hand, contends that the two sections give the department the choice of election, and if it proceeds under the second section, the probate court must accept jurisdiction and entertain the proceeding. We agree with this latter contention.

In 1901, in Guardianship of Breslin's Estate, 135 Cal. 21, at page 22, 66 P. 962, the Supreme Court held: "The superior court sitting in probate has no jurisdiction to hear and determine a disputed claim against the guardian or the estate. It can settle a guardian's account, and can allow or reject any item of expenditure which he had deemed a proper charge and had paid; but, when there is a claim against the estate which the guardian contests as invalid, the issue thus raised between the claimant and the guardian is the proper subject of a civil action, and can be legitimately brought before a court only by such action. There is no provision of our Code on the subject of guardian and ward which undertakes to give to the probate court jurisdiction to determine contests between alleged debtors and creditors such as the one involved in this appeal." It is significant that two years later the Legislature adopted both section 2181 of the Political Code, which is now section 6655 of the Welfare and Institutions Code, and section 2197 of the Political Code, which is now section 6658 of the Welfare and Institutions Code. Now, because of section 6655, it can no longer be said with reference to claims for care at a state mental hospital, as was said in the Breslin case, supra 135 Cal. at page 22, 66 P. at page 962: "There is no provision of our Code on the subject of guardian and ward which undertakes to give to the probate court jurisdiction to determine contests between alleged debtors and creditors * * *."

Section 6655 provides "Such payment *may* be enforced * * *."[1] Section 6658 provides "The Department of Institutions *may* in its own name * * *."[1] However, if the department elects to file a petition in the probate court, section 6655 provides "* * * the court, by order, *shall* direct the payment by the guardian."[1] Section 6655 contains nothing that would justify the conclusion that the probate court may refuse jurisdiction of a petition filed under that section. Nor is there any reason why that court may not try all issues which could be raised in a proceeding under section 6658. Such a trial would not be as onerous or time-consuming as most will contests which must be tried in the probate court. That such issues may be tried in the probate court is shown by the decision in Estate of Jacobson, 56 Cal.App.2d 255, 132 P.2d 229. There the Department of Institutions had applied to the probate court for an order requiring the guardian of an incompetent's estate to pay its claim for care of the ward at a state hospital. At the hearing, the guardian contended that a part of the claim was barred by section 345 of the Code of Civil Procedure which provides in part that "actions for the recovery of money due on account of the support of patients at the state hospitals" is barred after four years. The department took the position that this was a "proceeding" and that section 345 could not apply as it referred only to "actions." In holding that the section did apply the court said 56 Cal.App.2d at page 258, 132 P.2d at page 230: "The instant proceeding has all the characteristics of an action at law. * * * The fact that the proceeding is one within the administration of the incompetent's estate does not distinguish it in its essentials from an ordinary action at law or in equity. The department could have sued the guardian in an independent action. Welfare & Institutions Code, sec. 6658, St.1937, p. 1157. The adjudication is just as conclusive on the parties as if rendered in an action at law, except perhaps for the power of modification or termination by order of court." The reference to the fact that the department could have sued the guardian in an independent action, coupled with the holding that the probate proceeding has all the characteristics of an action at law, supports our holding that the election as to which proceeding to bring is that of the department and not that of the court. The probate court, being more familiar with the affairs of the incompetent's estate, may be even in a better position to pass upon the questions raised than would the civil department. It would be a rather strange action of the Legislature to provide, in effect, that the department may choose its forum when a guardian refuses to pay for the care of its ward at a state hospital and then when the department exercises its choice of the probate court as the forum, that court could force the department to start all over again in another court.

[2] The dissenting opinion herein intimates that because of certain recitals in the order, the denial of the petition was because the court exercised an independent judgment on the merits by weighing certain factors, such as the condition of the estate, against the department's claim. The respondent does not claim this. It concedes that the probate court refused to hear the petition, but attempts to justify its action on the ground that the court had the power to require that the questions involved be heard in a civil action. The record supports this concession, as the court so stated. That this statement of the court may be considered by us to determine the "process by which judgment was reached, or the basis on which the court" acted, is well established in Union Sugar Co. v. Hollister Estate Co., 3 Cal.2d 740, 47 P.2d 273, 278. See Rule 5(a), Rules on Appeal, which permits the opinions of the trial court to be brought up. See also Noble v. Kertz & Sons Feed & Fuel Co., 72 Cal.App.2d 153, 164 P.2d 257.

2. Liability of Estate.

The liability of the estate for care of the incompetent subsequent to September 15, 1945, the effective date of the amendment of that year to section 6650, Welfare and

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[1] Emphasis added.

Institutions Code, is conceded. The controversy is over the question of liability prior to that amendment, during which time there was no statute expressly requiring the estate of a person committed to a state hospital pursuant to the provisions of section 1026 of the Penal Code, to pay for his care while there. Section 6650, Welfare and Institutions Code, then read: "The husband, wife, father, mother, or children of an insane person or inebriate, the estates of such persons, and the guardian and administrator of the estate of such insane person or inebriate, shall cause him to be properly and suitably cared for and maintained, and shall pay the costs and charges of his transportation to a State institution for the insane or inebriates. The husband, wife, father, mother, or children of an insane person or inebriate, and the administrators of their estates, and the guardian and/or administrator of the estate of such insane person or inebriate, shall be liable for his care, support, and maintenance in a State institution of which he is an inmate."

In 1945 the section was amended by adding: "* * * such liability shall exist whether the mentally ill person or inebriate has become an inmate of a state institution pursuant to the provisions of this code or pursuant to the provisions of Sections 1026, 1368, 1369, 1370, and 1372 of the Penal Code."

Appellant contends that this amendment was merely a clarification of existing law, while respondent contends that it provided a liability where none existed before, and hence that the estate is entitled to an offset of the $2,049 total payments made by it over a period of approximately 13 years, under the mistaken assumption that it was liable for the ward's care, and is not liable for the period May 1 to September 15, 1945.

[3-5] The amendment did not establish a new liability, but merely clarified the existing law. Section 6650 as it stood prior to amendment in no wise limited the liability of relatives and estates of persons committed to state mental institutions for their care. Nor was there anything in Penal Code section 1026 or the following sections which did so. Nor is the commitment under that section penal in character. The section provides: "If the verdict or finding be that the defendant was insane at the time the offense was committed, the court *unless it shall appear to the court that the defendant has fully recovered his sanity* shall direct that the defendant be confined in the state hospital for the criminal insane * * *." (Emphasis added.) Thus, if a person found not guilty by reason of insanity appears to be sane at the time of the verdict, he may not be committed to a state hospital. The section provides that a hearing must be had. In re Slayback, 209 Cal. 480, 288 P. 769, held that such hearing is the type then provided for in Political Code section 2168 et seq., now Welfare and Institutions Code section 5050 et seq. If found sane, the person must be released from custody. If the person is committed under section 1026 to the state hospital, section 1026a provides that a hearing upon the question of his restoration to sanity cannot be held for one year. Concerning the confinement for that period, the court in In re Slayback, supra, said 209 Cal. at page 491, 288 P. at page 774: "The restraint and detention imposed is not, as we have seen, for the purpose of inflicting punishment upon a defendant, but to permit a sufficient length of time to elapse to enable those who may be called upon to pass upon the sanity of the patient to intelligently give their judgment as to whether or not he has recovered his reason."

[6] At the oral argument, it was suggested, and the dissenting opinion contends, that because one not committed under section 1026 is entitled to release upon recovering his sanity, while one committed under that section must wait one year before having the recovery of his sanity determined, a construction of section 6650, as amended which requires a person who has become sane during that period, to pay for his care at the state hospital while he is awaiting the expiration of the year when a hearing may be had, would make the section unconstitutional. The incompetent here admittedly was insane during that year and still is. Therefore, as he is not in the class of persons as to whom the section is claimed to be unconstitutional, neither he nor his guardian is in a legal posi-

tion to raise that question. Moreover, the court in In re Slayback, supra, expressly held, contrary to this very contention, that the section is constitutional.

[7] Section 6655 at all times has read: "*If any person* committed to a State mental hospital has sufficient estate for the purpose, the guardian of his estate shall pay for his care * * *." Emphasis added. This applies to "any person" who is committed for custodial care, and is not limited to those committed under section 5050 et seq. of the Welfare and Institutions Code.

[8] There are no decisions interpreting section 6650 as it read prior to the amendment, as to whether the liability therein set forth applied to sections 1026, 1368, 1370 and 1372 of the Penal Code. The latter three sections apply to situations where doubt as to the sanity of a person charged with a crime appears at any time during the pendency of a criminal action. Hence, cases like Whitley v. Superior Court, 18 Cal.2d 75, 113 P.2d 449, holding that in adopting a statute the Legislature is presumed to have known of prior court decisions, does not apply.

Respondent contends that the fact that prior to the amendment there was no liability for care of persons committed under section 1026 is attested by the attorney general's opinions theretofore given. Respondent refers particularly to Opinion NS5737, March 16, 1945, in which opinion, after referring to previous opinions No. 9875, April 14, 1935, and No. 10,009, June 18, 1935, the attorney general states that in view of the previous opinions, plus "the apparent departmental construction of Sections 6650 and 6651 in connection with commitments under Section 1370 of the Penal Code, we are of the opinion that persons committed to a State hospital under Sections 1026 and 1026a and 1367 et seq., their estates or their responsible relatives are not liable for the charges for hospital care and maintenance. As there appear to be no other reasons for not holding such persons, their estates and their relatives liable for hospital care and maintenance, we suggest that if the Department of Institutions feels a charge proper it endeavor to have the Welfare and Institutions Code amended to specifically include liability of persons committed under Sections 1026 and 1370 of the Penal Code, their estates and their relatives."

Respondent contends that the Legislature is presumed to know of opinions of the attorney general interpreting statutes, and therefore, the fact that the Legislature, almost immediately following the date of this opinion, adopted the amendment to section 6650, shows that it was creating a liability which theretofore did not exist. If the Legislature is presumed to know of the attorney general's opinions, a point we do not now decide, then it must have known of the confusion that existed in some 25 prior opinions as to liability under sections 1026 and 1368, 1370 and 1372 of the Penal Code. From 1899 to December 1, 1931, the Department of Mental Hygiene had been uniformly advised by the attorney general that a county was responsible for the criminally insane, without any reference to section 1026, and that where the county was responsible it was authorized to collect from their estates or responsible relatives. The history of the later opinions is succinctly set forth in appellant's reply brief: "Opinion 7851 issued December 1, 1931, held that persons committed under Penal Code Section 1026 are not the responsibility of a county, but no opinion was rendered as to the liability of their estate or relatives for their care. On December 7, 1934, Opinion 9708 held that the estate of a convict committed to a State Hospital pursuant to Section 1587 of the Penal Code was legally responsible for his support after the expiration of the term of sentence. This holding was at least an indirect authorization for the Department of Mental Hygiene to collect the cost of maintenance of one committed under Penal Code Section 1026 inasmuch as he was in the hospital merely for the duration of his mental illness and was not undergoing a term of imprisonment nor under sentence. * * * Opinion 9875, issued April 18, 1935 * * * directly advised that the guardian of an estate of an insane person so committed was not liable for his support. This opinion was based on the theory that such a person was restrained by the State for the protection of the public. In Opinion 10678 issued May 7, 1936, the view was expressed that the estate of a person committed under Penal Code Section 1368 et seq. is liable for his maintenance under the provisions of Political Code Sections 2176 and 2181, now Sections 6650 and 6655, Welfare and Institutions Code, which opinion is confirmed by Opinion 10678a issued May 26, 1936, in regard to the liability of legally responsible relatives. This opinion constitutes an indirect repudiation of Opinions 9875 and 10009 in that it upholds the right of the Department to collect for maintenance charges of persons committed pursuant to the provisions of the Penal Code, in permitting the application of Welfare and Institutions Code sections for collection of maintenance charges by the Department. Opinion 10679 followed on May 23, 1936, to the effect that under the provisions of Penal Code Section 1374 providing that any person charged with the commission of a public offense in any county, who is committed pursuant to the Political Code sections covering regular commitment, the maintenance of such persons shall be a county charge. Opinion No. 110822 issued July 3, 1936, again in effect repudiated the 1935 Opinions by holding that when Penal Code Section 1373 was amended in 1929 deleting responsibility of the county for maintenance claims for persons committed under 1369 et seq. that the estate and relatives of the incompetent became responsible for his support under the provisions of Political Code Section 2176, now Welfare and Institutions Code Section 6650. No reference is made to this opinion in the opinion * * * [opinion NS5737, March 16, 1945] which stated that no collections had been made for persons committed under Section 1370 since the legislature repealed Section 1373 in 1929. Section 1373 has never been repealed, but was simply amended in 1929 deleting county responsibility. * * * Opinion NS702 issued November 9, 1937, held that the county was responsible for maintenance of any incompetent who had been committed while charged with the commission of a public offense and specifically held that this included the commitment of any person after May 25, 1937, under Penal Code section 1026 * * * NS702, issued April 30, 1938, amended that opinion to hold that the county is primarily liable and in turn could collect from the estate of the incompetent and responsible relatives for any one committed under Penal Code Section 1026 either before or after May 25, 1937. * * * Opinion NS702 was overruled by Opinion NS2958 issued September 26, 1940, following an amendment to Welfare and Institutions Code Section 6664 and held that that section did not impose liability upon a county for persons committed under Penal Code Sections 1026 and 1367 et seq. and * * * that even prior to the amendment that Section 6664 did not impose such liability. It was determined however that where the county had paid such support in reliance upon Opinion NS702 that there was no provisions authorizing a refund to such counties or making provision for the credit of such payment to future obligations of the counties. None of the opinions issued since November 9, 1937, included consideration of the question of responsibility of an estate or relative for support of the incompetent but merely considered county liability."

[9, 10] Therefore, prior to the March, 1945, opinion, the last opinion concerning liability of the estate of a person committed during a criminal proceeding was that of July 3, 1936, holding liable the estate of a person committed under section 1368 et seq. It is obvious that the situation as disclosed by the multitudinous opinions of the attorney general needed clarification. The department has always collected maintenance charges for persons committed under section 1368 et seq. of the Penal Code, from their estates or relatives. There is no real difference as to persons committed under these sections and those committed under section 1026. They are both committed during the pendency of criminal proceedings against them. The type of confinement is the same. It is not penal but custodial. The only important difference between a commitment under section 1368 et seq. and under section 1026 is that in the latter case the confinement must be for at least one year. But even that fact does not make the commitment a penal one. In re Slayback, supra, 209 Cal. 480, 288 P. 769.

For over 13 years, until the attorney general's opinion in March, 1945, the department collected for Gestner's care. These facts show an administrative interpretation of the law prior to the amendment, which the amendment merely continues in effect and clarifies. It is true that courts ordinarily infer an intent to change the law from a material change in the language of a statute. W. R. Grace & Co. v. California Employment Comm., 24 Cal.2d 720, 151 P. 2d 215; People v. Weitzel, 201 Cal. 116, 255 P. 792, 52 A.L.R. 811. However, as said in the Grace case, supra, 24 Cal.2d at page 729, 151 P.2d at page 221: "* * * the circumstances may indicate merely a legislative intent to clarify the law."

The following statement in Hise v. McColgan, 24 Cal. 2d 147, 159, 148 P.2d 616, 622, applies here: "Under appropriate circumstances an amendment to a statute may be for the purpose of clarification rather than new matter or an alteration of the former law. [Citing cases.] Inasmuch as we have determined that the act prior to the amendment was applicable to the instant case, and the stated purpose of the amendment, we believe the amendment was only for clarification purposes."

Napa State Hospital v. Yuba County, 1903, 138 Cal. 378, 71 P. 450, cited by respondent, was a case brought to determine the liability of a county under section 1373 of the Penal Code, since repealed, for the care at a state hospital of a person committed under section 1370 of the Penal Code. In holding the county liable and section 1373 constitutional, the court used the following language, 138 Cal. at page 381, 71 P. at page 451: "Persons charged with crime who are or become insane naturally belong to a class distinct and different from insane persons who are not so charged with crime. Under the general law the expense of capture, detention, and prosecution of persons charged with crime is to be borne by the county. The party, though insane, is still detained under the law to answer for his crime when he shall become sane. If he were not charged with crime, though he were insane, he might not be sent to the asylum. His insanity might be of a nature not requiring that he be restrained, or his friends, relatives, or guardian might take care of him or consign him to a private institution." This language in no wise conflicts with the holding in the later case of In re Slayback, supra, 209 Cal. 480, 288 P. 769. While such a person is in a class different from persons not charged with crime who become insane, such difference is not sufficient to make their confinement a penal rather than a custodial one.

[11] Inasmuch as the amendment merely clarified the law theretofore existing, the payments made by the guardian for care of the ward for approximately 13 years were properly paid and the estate is liable for his support from May 1, 1945, on. The probate court should hear the petition of the department, and unless the guardian has other defenses to the petition than those considered here, the petition should be granted.

[12] The dissenting opinion raises a question not raised by respondent, namely, that section 6650 as amended, as applied to persons committed under section 1026, is unconstitutional in another particular, namely, that such persons have not been found insane or mentally ill by a hearing of the type allowed persons committed under other statutes; that here, the person is committed only because it did not "appear to the court that the defendant has fully recovered his sanity"; and further, that persons committed other than pursuant to section 1026 may be released from the state hospital on certificate of the medical superintendent, whereas persons committed under this section must have their sanity considered at a court or jury trial. But a jury preceding that finding by the court has found that the defendant was insane on the day of the commission of the crime. While there is a difference in the test of insanity as between that which will excuse a homicide and that which will cause a person ordinarily to be placed in a mental institution, still the defendant has had his jury hearing on the question of insanity. Moreover, although the test which the jury considered in Gestner's case was the lack of ability to distinguish right from wrong, it still is insanity, and as said in Re Slayback, supra, 209 Cal. at page 490, 288 P. at page 773. "* * * it is

proven that such person is not only insane, but has developed criminal tendencies as a result of his mental derangement which has caused him to take the life of a human being under circumstances which, *but for his mental state,* would amount to murder." (Emphasis added.) "As to the necessity for a finding as to the continuance of the insanity of one acquitted on that ground, as a prerequisite to his confinement, it is usually held that the insanity of such a person is presumed to continue until the contrary is shown, and that it is not necessary to hold the inquisition generally required by statute in the case of persons alleged to be insane before their commitment." 209 Cal. at page 485, 288 P. at page 771, quoting from 14 R.C.L. p. 609.

As to the necessity for another hearing to determine the defendant's sanity at the time of the commitment, the court said that "the commitment resulting from the express command of the statute, the trial and verdict upon the criminal charge was only an equivalent of proceedings provided to determine the question of insanity in cases not involving a charge of crime." 209 Cal. at page 487, 288 P. at page 772, quoting from Ex parte Clark, 86 Kan. 539, 121 P. 492, 495, 39 L.R.A.,N.S., 680, Ann. Cas.1913C, 317.

There is nothing unreasonable in requiring that persons who have been found by a jury to have been insane at the time of the commission of the offense, and whose insanity is presumed to continue, be required to have their sanity established by a jury, rather than by a medical superintendent's certificate. It is a reasonable classification and requirement.

As the court held in the above quoted excerpt from In re Slayback, that it was not unreasonable to leave to the judgment of the trial court the question whether a person so adjudged insane appears to have recovered his sanity, and if it does not so appear, to require such person to receive treatment in a state hospital for a period of a year before any other test of his sanity is made, and as that case also holds that his confinement during that period is not penal, there is no good reason why, if financially able, such person should not be required to pay for his care and maintenance, just as all other persons committed to the state hospitals are required to do.

[13] There is no inconsistency between section 1026, Penal Code, and section 6650 et seq., Welfare and Institutions Code, on the one hand, and the provisions of the "Uniform Veterans' Guardianship Act", Probate Code, sec. 1650 et seq., on the other. This act merely provides the procedure for appointment of a guardian of an incompetent veteran and the procedure in handling his estate. Just as in any other guardianship proceeding, the probate court has the complete power to protect the ward and his estate, and if the condition of the estate does not justify payment to a state institution of the cost of care and maintenance of such ward, the probate court would have the right to refuse to order such payment, whether the ward be a veteran or otherwise. Section 6650 does not invade the fundamental and constitutional right of the judicial branch of the government of this state in that it interferes with the right of the judiciary to control the management of the estate of insane persons. Sections 6650 and 6655 establish the liability, but just as with any other liability of an incompetent, the probate court determines whether the estate is financially able to discharge that liability.

The dissenting opinion refers to the statement in the order settling the account "that all of such present assets have been carefully examined and considered by the guardian; that their retention by the guardian in the guardianship estate has been for the best interests of the guardianship estate and those interested therein", examines the assets of the estate, and primarily because to be able to pay the $840 claim of the department, the guardian might have to sell some of the bonds of the estate, holds that the above quoted statement is a finding on the merits of the department's petition, and further holds, in effect, that the probate court did not abuse its discretion in refusing to order the guardian to pay the department's claim. That matter is not before this court, first, because such a contention was never made by the parties, and secondly, because, as heretofore pointed out, the court refused to consider the petition on its merits. The above statement in the order referred only to the items of receipts and disbursements set forth in the account as presented. As to these, the appellant made no objection.

The order is reversed and the probate court instructed to hear the petition and proceed in accordance with the views herein expressed.

PETERS, P. J., concurs.

WARD, Justice.

I dissent.

All parties to this proceeding agree that this is a dispute between the Veterans Administration and the Department of Mental Hygiene of the State of California. The appellant herein will be referred to as the "department".

The appeal involves an "order settling sixteenth annual account and report dated January 6, 1948 and the order denying the petition of the Department of Mental Hygiene for order directing payment of board, care and maintenance of an incompetent person at a state hospital". The main question involved is whether the estate of an inmate of an insane asylum may be forced to *pay* for the inmate's support and maintenance, regardless of his sanity, if he was not afforded a trial on the issue of sanity before he was committed to the asylum. Welf. & Inst. Code secs. 6650, 6651, 6652 and 6655.

A mistaken impression appears to have arisen that the probate judge refused to consider and determine "objections" to the annual account of the guardian filed by the department and the petition of the department for an order directing *payment* for board and maintenance of the alleged insane person. It is true that the probate judge suggested that on account of the busy condition of the probate calendar and the legal and equitable questions involved "it would be better to bring an action and determine the thing once and for all". The probate judge's views of the condition "of the business of the Court" in the absence of evidence to the contrary should be accepted on appeal. An action could have been filed under the provisions of Welfare and Institutions Code section 6658. The problems submitted on this appeal indicate that the probate judge was justified in suggesting that the department should have filed the claim as an independent action at law or in equity so as to have given the alleged insane, Peter Gestner, his guardian and the Veterans Administration the privilege of litigating the legal and equitable rights of the respective parties. The guardian may have desired to request an amendment to his annual account for the purpose of claiming that prior payments should be declared offsets to future payments for the inmate's maintenance. The Veterans Administration might have attempted to intervene. A veterans' representative appeared at the hearing and stated, "There was no legal obligation to pay, and I should say that we requested the guardian to secure reimbursement for the 13 years they had paid in error, and the matter was heard before the State Board of Control, I believe, and a claim made." Likewise the State of California through one of its numerous governmental agencies might be interested in the former disposition of funds of the Gestner Estate. The department takes the position that it is for its "convenience" to proceed under Welfare and Institutions Code section 6655.

The impression that the probate judge refused to hear the objections probably arose from the following statement in the department's opening brief: "The Probate Court in denying the petition of the Department of Mental Hygiene ruled that it was without jurisdiction and that the Department of Mental Hygiene should sue the guardian in a civil action." There is not one word in the reporter's transcript or in the clerk's transcript to the effect that the probate court did not have jurisdiction to decide the question presented by the pleadings. The following appears in the department's closing brief: "Does the Superior Court, sitting in Probate, have the discretion to refuse to hear and determine a claim of the Department of Mental Hygiene against the estate of an incompetent person for board, care and maintenance at a State Hospital, when the said claim is disputed, said refusal to hear and determine the matter being based on the ground that the matter could be better determined in a civil action and on the ground that the Probate Court is too busy to hear and determine the matter?" That the last statement is incorrect appears in an order on the stationary of the attorneys for the department. The order relates that the "objections" were filed "pursuant to the provisions of Section 6655," and "said matter having been regularly heard; evidence oral and documentary having been offered and received; and said matter having been regularly submitted and *considered* by the Court; now, therefore, good cause appearing therefor, * * *" (Italics added) it was ordered, adjudged and decreed that the objections "be overruled" and the petition "be denied".

The written opinion of a judge may be enlightening as to the *reason* for making or refusing to make an order or decree, but it may not be considered if it is in direct conflict with a finding of fact or a judgment order or decree. Union Sugar Co. v. Hollister Estate Co., 3 Cal.2d 740, 47 P.2d 273. It was stated in Goldner v. Spencer, 163 Cal. 317, at page 320, 125 P. 347, at page 348, "But, as has often been said, we cannot consider these written opinions in determining whether or not the findings are sufficiently supported by the evidence." This being true of the written opinion of the judge, it is even more so of the mere oral comment made by him during the consideration of the case.

Refusal to make an order for an allowance payable from a ward's estate is appealable, Prob.Code secs. 1600 and 1630, but the appeal is specifically from the filed order and not from some comment made by the judge. After preparing and presenting a proposed order and obtaining the probate judge's signature that he had "considered" the objections of the department to the petition of the guardian the department is bound by such order.

The appeal is pending before this court and all matters that are designated in the notice of appeal and that are necessary for a decision may be considered. Ordinarily, appellate courts are confined to the determination of the questions raised in the briefs, but in the present matter the real party in interest is an alleged incompetent. The appeal involves the status of such alleged incompetent in his relationship with the department, the guardian and the Veterans Administration from which comes the money which has caused a three party dispute. Some questions are suggested in this dissent that are not referred to in appellant's or respondent's briefs. During the period of litigation an incompetent, or an alleged incompetent, is a ward of the court. The court as the representative of government is the supreme guardian. 25 Am.Jur. 128, sec. 205. The courts have the duty as well as the right to protect those alleged to be insane and to be vigilant to safeguard their rights. Cubbison v. Cubbison, 45 Ariz. 14, 40 P.2d 86, 89; 25 Am. Jur. 7, sec. 2. The probate judge determined the matter in such manner that all pertinent questions may be decided on this appeal.

The constitutionality of the Welfare and Institutions Code section 6650 et seq., which provide that persons and estates shall be jointly and severally liable for the maintenance of an inmate of a state institution committed without trial under Penal Code section 1026, has never been passed upon judicially in this state.

The questioned payments in this proceeding are separated into three periods. The guardian agrees that the department is entitled to payment during the last period. That admission, however, is not binding on this court, particularly in view of a possible claim by the Veterans Administration. If it should develop that the provision of the Welfare and Institutions Code covering payments for maintenance for an inmate committed without a hearing is unconstitutional, then neither the particular period involved nor the sanity of the inmate are vital questions.

It should be further noted that in the Welfare and Institutions Code there has been an effort made to declare the word "insane" synonymous with the words "mentally ill". Sections 5040, 5041, Stats. of 1947, Ch. 919, secs. 1 and 3. The designation may be convenient and appropriate in the Welfare and Institutions Code, but it cannot change the long established definition of insanity as a test in a criminal case, namely, one who is unable to distinguish right from wrong.

The real question is the constitutionality of Welfare and Institutions Code section 6650 et seq. as applied to the facts of this case. The question should not be confused with the constitutionality of Penal Code sections 1026 and 1026a with regard to the *liberty* of an alleged insane person. The latter sections may be considered preliminarily. Art. I, section 13, of the California State Constitution and the fourteenth amendment of the Federal Constitution containing the due process clause refer to distinct and separate subjects: (1) life, (2) liberty and (3) property. A provision relative to the deprivation of liberty may have been declared constitutional, but if the deprivation of *property* is contrary to constitutional rights and inconsistent with other reasonable laws, that may be held *un*constitutional. In re Slayback, 209 Cal. 480, 488, 288 P. 769, 772, held that one "acquitted of a crime by reason of his insanity at the time the offense was committed may be without any further hearing committed to a place of confinement". It was also held that incarceration in an insane asylum is not imprisonment for the punishment of a crime and that one year was a reasonable time to determine by observation whether the committed party had recovered from a condition of insanity. Whatever the views of a member of an intermediate appellate court as to a *decision* of the Supreme Court, the decision stands as the law of the state and is absolutely controlling on the precise issue involved until the Supreme Court should see fit to make a change. The presumption that a person who *was* insane at the time of the commission of an offense is insane after his trial for the commission of such offense is a judicial presumption used to bolster a legislative pronouncement that one may be deprived of his liberty without a trial. In re Slayback, supra. That, however, is not the question presented on this appeal. Here it is the deprivation of property—not liberty—that is involved.

It may be suggested that because the Supreme Court has declared that the deprivation of liberty without a trial—in such a situation as the Slayback Case—is constitutional that the deprivation of property follows the same rule. To my mind it would be just as logical to hold that because one may be deprived of his liberty without due process that he could be deprived of his life without due process. The purpose of the due process rule is to secure a reasonable notice and opportunity to be heard before a tribunal authorized to hear the matter. Suckow v. Alderson, 182 Cal. 247, 187 P. 965. The right may not be taken away by indirect legislation. (Lux v. Haggin, 69 Cal. 255.)

The Welfare and Institutions Code, section 6650 et seq., provides that certain relatives or an estate are liable for the care and maintenance of an "insane person or inebriate". It is the department's contention that the amendment of 1945 to section 6650 of the Welfare and Institutions Code regarding those committed without trial under Penal Code section 1026 and its adjunct, 1026a, "was for the purpose of clarification of the existing law". The department overlooks the fact that there was no existing law except the arbitrary rule of the department to require payment of relatives or the estate of the inmate for one so committed *without trial.* The attorney general over a period of years had rendered various opinions on this and kindred subjects. In 1936 an opinion was rendered that a person committed under Penal Code section 1368 et seq., providing for a trial by jury if demanded, was liable for expenses to the state. Penal Code section 1026 was not involved. In March of 1945 an opinion was issued holding that there was no estate responsibility under Penal Code section 1026 and other sections, including 1368. *Under the provisions of the other sections a trial was permitted.* The legislature was in session and immediately amended the Welfare and Institutions Code sections 6650 and 6655 to include Penal Code section 1026 and other sections. It was an insertion of a legal provision relative to 1026 that never existed before. It is impossible to clarify a nonexistent provision of a code section.

Upon the principle that there is no capacity to form a criminal intent insane persons are declared incapable of committing crimes. Pen.Code sec. 26. Prior to 1927 there was no provision for a plea of "not guilty by reason of insanity". If at the time of the commission of an offense an accused was incapable of knowing and understanding that he was doing wrong he was entitled to an acquittal and release from custody. People v. Kelley, 7 Cal.App. 554, 95 P. 45. If it appeared to any person, official or civilian, that subsequent to the time of acquittal such person was insane or incompetent, proceedings could be instituted in which the alleged insane or incompetent person was entitled to a trial upon that issue. Pen.Code sec. 1367 et seq. If adjudged insane, *after hearing,* the court had power to direct the insane's estate or certain relatives to contribute toward the expenses of his confinement.

Peter Gestner, the party confined in a state insane asylum, is not a felon. The return of the verdict of not guilty by reason on insanity was in effect a declaration that the accused was not guilty of the offense charged. The restraint in the insane asylum is not for the *purpose* of inflicting punishment. In re Slayback, 209 Cal. 480, at page 491, 288 P. 769. Peter Gestner was committed to the state asylum wherein criminally insane are confined because a jury had declared he was insane at the time the alleged crime was committed and because *it did not appear* to the trial court that Gestner had "fully recovered his sanity". The "insanity" referred to in Penal Code sec. 1026 is determined by the person's capability of determining right from wrong. All this procedure is in accordance with the provisions of Penal Code section 1026. Strange to say, if it had appeared to the court that Gestner had *"fully recovered his sanity"* it would have been encumbent upon the court to remand Gestner "to the custody of the sheriff until his sanity shall have been finally determined in *the manner prescribed by law*". (Italics added.) Sec. 1026. Such a person is entitled to a trial.

Welfare and Institutions Code section 6655 provides a limitation in venue to the county in which an inmate is confined or the county in which the criminal proceedings originated. The probate court in the county in which the confined person may have an estate is not permitted to determine whether the inmate is sane.

Gestner, committed without trial because he *appeared* to be insane, may only apply to the court for release from the state asylum once each year. On each yearly hearing, though committed without trial, the "burden of proving that his sanity has been restored shall be upon the applicant". Pen. Code sec. 1026a.

One strange feature in relation to an inmate of an insane asylum who is committed without trial and thereafter forced to pay for his incarceration is that if a trial judge has some doubt as to the same person's sanity *during* the pendency of a trial of "not guilty by reason of insanity", which is part of the criminal prosecution of the original offense charged, "the court must order the question as to his sanity to be determined by a trial by the court without a jury, or with a jury, if a trial by jury is demanded." "If the jury finds the defendant insane, the trial or judgment must be suspended until he becomes sane, and the court must order that he be in the meantime committed by the sheriff to a state hospital for the care and treatment of the insane, and that upon his becoming sane he be redelivered to the sheriff." "When he becomes sane, the superintendent must certify that fact to the sheriff and district attorney of the county." In brief, under Penal Code sec. 1368 et seq., if *during* the trial of the accused "a doubt arises as to the sanity of the defendant" an accused *is entitled* to a *trial* before commitment to an asylum where he will be forced to pay for his incarceration, Welf. & Inst. Code secs. 6650–6655, but, under Penal Code sec. 1026, if at the termination of the sanity trial which is part of the criminal trial it shall *appear* to the court that the accused has not fully recovered his sanity, the court shall direct that the accused be confined *without trial* on the question of present sanity "in the state hospital for the *criminal* insane" (italics added), or if such hospital is not available then to some other hospital where, the department claims, he may be forced to pay for his incarceration.

The preceding sections, Pen.Code sec. 1026 and Welf. & Inst. Code sec. 6650 et seq., are inconsistent and contrary to the provisions of the "Uniform Veterans' Guardianship Act". Prob.Code, Div. IV, Chap. XV. As will be noted later, all of the "benefits" obtained by the veteran Gestner are received from the Veterans Administration. Probate Code section 1651 provides that, "Whenever, pursuant to any law of the United States or regulation of the *Veterans Administration, it is necessary,* prior to payment of benefits that a guardian be appointed, the appointment may be made in the manner hereinafter provided." Probate Code section 1652(d) provides that, "In the case of a mentally incompetent ward the petition shall show that such ward has been rated *incompetent* by the *Veterans Administration on examination* in accordance with the laws and regulations governing the *Veterans Administration.*" (Italics added.) A guardian may apply a portion of the income or the estate for the support of some other person, but only upon the order of the "court after a hearing". Prob.Code sec. 1661. The chapter contains other provisions relative to the conduct of the estate emphasizing the complete power of the probate *court* to protect the insane or incompetent veteran.

If it should be held that In re Slayback, supra, is controlling, though property interest was not involved in that decision, then it is necessary to proceed forward to an examination of the mechanism provided in the Welfare and Institutions Code to force an inmate to pay for his own incarceration without a jury determination of insanity at the time of incarceration.

The adoption of Welfare and Institutions Code section 6650 et seq. is an invasion of the fundamental and constitutional right of the judicial branch of the government of this state, and particularly of the right of the judiciary to control the management of the estates of insane persons. The Probate Code, which became effective in 1931, is a revision, consolidation and adoption of new provisions applying to probate matters generally, including the appointment of guardians and the *administration* of estates of insane and incompetent persons. Stats.1931, Chap. 281, Prob. Code secs. 1460, 1461.3, 1470 et seq.

Under the provisions of the Welfare and Institutions Code the amount of the payment for the support and maintenance of insane persons confined in a state hospital may not be fixed by the judicial branch of the government. The Welfare and Institutions Code section 6651 provides that the monthly rate for the care of the insane "where there is liability to pay for such care, support, and maintenance, shall be determined by the *Director of Institutions,* and shall be payable in advance." (Italics added.) See also Welf. & Inst. Code sec. 5105.6. Section 6652 provides that, "The Department of Institutions shall collect all the costs and charges mentioned in section 6650, or see that they are collected." Section 6655 provides that, "On the filing of a petition therein by the department, showing that the guardian has failed, refused, or neglected to pay for such care, support, maintenance, and expenses, the court, by order, *shall direct* the payment by the guardian. Such order may be enforced in the same manner as are other orders of the court." (Italics added.) In the Welfare and Institutions Code, "shall" is mandatory and "may" is permissive. Sec. 15. There is also a provision that if there is not sufficient money on hand the court *may* make an order directing the guardian to sell personal or real property to pay for such maintenance.

Section 6655 also provides that, "If a certificate from the medical superintendent of the State hospital in which the person is confined as a patient *is filed in the office of the county clerk* with the papers in the guardianship proceedings of the patient, in which certificate the medical superintendent states that the patient is suffering from a chronic form of insanity, and that in his opinion a recovery is beyond reasonable hope and that the patient will in all probability continue to be a charge in a State hospital until death, such certificate shall be a prima facie evidence that the patient is not likely to recover or to be released from the hospital, and *the guardian shall pay* the amount due for his care, support, maintenance, and expenses at the hospital and such other charges as are allowed by law out of any moneys of the estate in his possession." (Italics added.) It is interesting to note that section 6655 only applies to estates. It is impossible to apply it to "relatives". Section 6658 provides that the department "may in its own name bring an action" against "his estate or any person" who may be liable. It was the latter section that the probate judge suggested the department should invoke.

This court is bound by the order obtained by appellant that the probate court "considered" the petition of the guardian and the objections of the department filed thereto. In my opinion the conclusion is inevitable that the Welfare and Institutions Code sections giving unlimited power to force an inmate of an insane asylum or the estate of the inmate to pay for the inmate's incarceration on a commitment without a trial is unconstitutional. California Constitution, art. I, Sec. 11, Sec. 13; art. III, Sec. 1; art. IV, Sec. 25, third and twelfth; art. VI, Sec. 1a, subd. (5). The probate judge was justified in overruling the objections of the department.

Confining attention to point one in the notice of appeal directed to the probate court's approval of the annual account of the guardian, no objection is noted in the pleadings and none in the briefs to the correctness of the items listed or the propriety of the expenditures.

The report of the guardian shows that $72 is received from the Veterans Administration as a monthly pension. Several government bonds have been purchased for the account of Peter Gestner. Certain ordinary payments have been made as fees to the guardian and $5.11 as traveling expenses to the attorney representing the guardian. $20 is paid each month to a woman bearing the name of Gestner, though the record does not show her relationship to the inmate Gestner. Eliminating the bonds, the annual report shows *a net balance of $217*. The claim made by the department is *$840*. The report does not indicate that any allowance has been made for the inmate's personal comfort, known as a personal deposit fund. It is apparant that the only way the $40 monthly payment to the department could be allowed would be to resort to the sale of the present bonds and probably refrain from further purchases. In solving this problem, many involved and complex questions may be considered: Whether the relative of the inmate is adequately protected; the interest of the Veterans Association who caused the monthly stipends to be paid the inmate; and the disposition of any surplus fund, upon the death of the inmate.

These facts and problems indicate that in exercising an independent judgment the probate judge was justified in finding, "that all of such present assets have been carefully examined and considered by the guardian; that their retention by the guardian in the guardianship estate has been for the best interests of the guardianship estate and those interested therein".

On appeal the department does not argue that the probate judge should "hear the petition" or that it be sent back for reconsideration. It is urged that the order denying the petition should be reversed and that the probate court be directed to allow the department's claim and that it continue for so long as Gestner remains an inmate of the state asylum.

The order overruling the objections of the Department of Mental Hygiene of the State of California and the order, judgment and decree settling the sixteenth annual account should be affirmed.

Hearing denied; SHENK and SCHAUER, JJ., dissenting.

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90 Cal.App.2d 854

REMMER v. MUNICIPAL COURT OF CITY AND COUNTY OF SAN FRANCISCO.

MENLO SOCIAL CLUB, Inc. v. BROWN et al.

Civ. 13926.

District Court of Appeal, First District, Division 2, California.

March 29, 1949.

Rehearing Denied April 28, 1949.

Hearing Denied May 26, 1949.

1. Gaming ⚷68(1)

Draw, and draw low ball poker, when played for money, are "gambling games".

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Gambling Game".

2. Municipal corporations ⚷589

The control of gambling activities is a matter concerning which local governments possess power to enact and enforce local regulations not in conflict with general laws, for purpose of supplementing those laws. Const. art. 11, § 11.

3. Municipal corporations ⚷592(1)

Police Code of San Francisco prohibiting keeping and maintaining a gambling house, as invoked against games of chance not specified in state statutes prohibiting playing of specified games of chance, is not invalid as being in conflict with state statutes. Pen.Code, §§ 330, 331; Const. art. 11, § 11.

4. Municipal corporations ⚷592(1)

Police Code of San Francisco prohibiting keeping and maintaining a gambling house does not conflict with state statute prohibiting the prevailing upon another to enter a gambling house. Pen.Code, § 318; Const. art. 11, § 11.

5. Gaming ⚷96

Under statute prohibiting the "prevailing" upon another to enter a gambling house, it is not sufficient merely to prove invitation, but "prevailing" must be proved. Pen.Code, § 318.

6. Municipal corporations ⚷592(1)

Police Code of San Francisco prohibiting keeping and maintaining a gambling house is not invalid as unreasonable and oppressive legislation because it prohibits maintenance of gambling games which the state itself has not seen fit to prohibit. Pen. Code, §§ 330, 331; Const. art. 11, § 11.

◆

Appeal from Superior Court, City and County of San Francisco; Edw. P. Murphy, Judge.

Proceeding by Elmer Remmer against the Municipal Court of the City and County of San Francisco and others, for a writ to prohibit trial of the plaintiff and others who had been arrested in raids of the Menlo Social Club, Inc., for keeping and maintaining a place where draw poker and draw low ball poker were carried on in violation of Police Code of San Francisco, consolidated with an action by Menlo Social Club, Inc., against Edmund Gerald Brown, as district attorney, and others, for an injunction to prevent further raids and arrests on similar charges. From judgments denying writ of prohibition and injunction, the petitioner in the first proceeding and plaintiff in the second action appeal.

Affirmed.

John R. Golden, of San Francisco, for appellant.

Edmund G. Brown, Dist. Atty., and Norman Elkington, Asst., both of San Francisco, for respondent.

GOODELL, Justice.

In Remmer v. The Municipal Court et al., the petitioner sought a writ to prohibit the trials of appellant and others who had been arrested in raids of the Menlo Social Club for keeping and maintaining a place where draw poker and draw low ball poker were carried on and conducted in violation of section 288 of the Police Code of San Francisco. In Menlo Social Club, Inc. v. Brown, as District Attorney, et al., an injunction was sought to prevent further raids and arrests on similar charges. The court denied both the writ of prohibition and the injunction, and these two appeals were taken, and are presented on one record.

Appellants challenge the constitutionality of section 288 on the grounds (1) that it is a duplication of state law, hence in conflict therewith; (2) that the portions thereof which are not conflicting are so inseparable from those which are, that the whole section must fall, and (3) that the legislation is unreasonable.

The first two grounds may be discussed together.

Section 330 of the Penal Code reads as follows: "Every person who deals, plays, or carries on, opens, or causes to be opened, or who conducts, either as owner or employee, whether for hire or not, any game of faro, monte, roulette, lansquenet, rouge-et-noir, rondo, tan, fan-tan, stud-horse poker, seven-and-a-half, twenty-one, hokey-pokey, or any banking or percentage game played with cards, dice, or any device, for money, checks, credit, or other representative of value, and every person who plays or bets at or against any of said prohibited games, is guilty of a misdemeanor * * *."

Section 331 provides that every person who knowingly permits any of the games mentioned in section 330 (and 330a, not here involved) to be played, conducted, or dealt in any house owned or rented by such person, in whole or in part, is punishable as provided in those sections.

Section 11 of article XI of the constitution provides that "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

In 1903 the City and County of San Francisco enacted an ordinance, now section 288 of its Police Code, reading as follows: "It shall be unlawful for any person to keep or maintain, or visit, or to contribute to the support of any house or place where gambling is carried on or conducted, or to knowingly let or underlet, or transfer the possession of, any house or premises for use by any person for said purpose."

[1] Draw, and draw low ball, poker, when played for money, are gambling games. People v. Philbin, 50 Cal.App.2d Supp. 859, 864, 123 P.2d 159; Lavick v. Nitzberg, 83 Cal.App.2d 381, 188 P.2d 758. Keeping and maintaining a place where those games were played gave rise to the raids.

The first contention of appellants is that section 288, Police Code, is in conflict with state law. Section 288 uses comprehensive language. Unlike section 330, Penal Code, it does not enumerate certain games, but deals with *gambling*—all gambling. If the section were applied to any of the 12 or more games prohibited by section 330, Penal Code, it would be to that extent in direct conflict with sections 330 and 331. In re Sic, 73 Cal. 142, 14 P. 405; Ex parte Hong Shen, 98 Cal. 681, 33 P. 799; In re Hoffman, 155 Cal. 114, 99 P. 517, 132 Am.St.Rep. 75; In re Iverson, 199 Cal. 582, 250 P. 681; In re Simmons, 199 Cal. 590, 250 P. 684; Stanislaus etc. Association v. County of Stanislaus, 8 Cal.2d 378, 65 P.2d 1305; In re Portnoy, 21 Cal.2d 237, 131 P.2d 1, 2.

Respondents concede this, but they couple their concession with the claim that *as to games not prohibited by state law there is no conflict and the ordinance remains valid and operative.*

[2] The court in the Portnoy case, supra, said: "The control of gambling activities is a matter concerning which local governments possess power to enact and enforce local regulations not in conflict with general laws, for the purpose of supplementing those laws. Const. art. XI, § 11; In re Murphy, 128 Cal. 29, 60 P. 465; cf. Mann v. Scott, 180 Cal. 550, 556, 182 P. 281; In re Hoffman, 155 Cal. 114, 99 P. 517, 132 Am.St.Rep. 75."

[3] Neither draw, nor draw low ball, poker, is prohibited by state law, hence respondents contend that section 288, Police Code, when invoked against places where those gambling games are played as it was here, is not in conflict with sections 330 or 331, Penal Code, or any other state law. We are satisfied that this position is supported by the authorities.

The early case (1887) of In re Sic, 73 Cal. 142, 14 P. 405, 408, supra, involved an ordinance of the city of Stockton, comprising 7 sections, dealing with opium smoking. Section 3 was held to be a duplication of state law, therefore in conflict therewith and unconstitutional. The court, however, was careful to say: "It will be observed that *we only hold that there is a conflict where the ordinance and the general law punish precisely the same acts.* We do not wish to be understood as holding that the sections of the ordinance which make criminal *other acts not punishable under the general law* are void because the legislature has seen fit to legislate upon the same subject." (Emphasis added.)

In the Iverson case, 199 Cal. 582, 586, 250 P. 681, supra, the court drove home the severability point by citing In re Sic, and repeating the last sentence just quoted.

Another case directly in point is In re Murphy, 1900, 128 Cal. 29, 60 P. 465. There an ordinance of the city of Vallejo made it illegal to play "any game played with cards, dice or any device for money." The claim was made, as it is here, that the ordinance was void because in conflict with section 330, Penal Code. In denying a writ of habeas corpus the court said: "It may be that the ordinance includes all that is denounced in the statute, and it may also be that *it includes much more.* The defendant was convicted for playing the game of 'keno' * * *. Keno is not mentioned in the Code. * * * *Since it was competent for the city, by ordinance, to prohibit all games not denounced by the statute, lack of jurisdiction is not made to appear.* * * * The ordinance describes the games prohibited with sufficient definiteness. *It condemns all games of chance played for money. From this comprehensive description we must exclude those condemned by the statute.* * * * This method of defining offenses is not to be recommended as a model, but we cannot hold that it renders the ordinance void." (Emphasis added.)

Substitute "draw poker" and "draw low ball poker" for "keno" and you have this case. Appellants, indeed, concede that the language of the Vallejo ordinance is "in legal effect exactly like Section 288 * * *."

Appellants claim that the Murphy case and the Portnoy case, supra, are irreconcilable one with the other. As we have just seen, the Vallejo ordinance and the San Francisco ordinance are in legal effect exactly alike. The same parallel can not be drawn between the San Francisco ordinance (in this case), *which is simple,* and the Riverside county ordinance (in the Portnoy case), *which was complicated.* People v. Commons, 64 Cal.App.2d Supp. 925, 148 P.2d 724, involved a Los Angeles ordinance prohibiting concealed weapons. It was contended that the ordinance duplicated the state law and was therefore conflicting. The Portnoy case was there relied on by the defendant, just as it is here on the claim that the Los Angeles ordinance was inseverable. The court, 64 Cal.App.2d Supp. at page 935, 148 P.2d at page 730, said with respect to the Portnoy case: "But the ordinance there in question was, as the court suggests, complicated and the disentanglement of valid from invalid provisions was difficult. Here we see no such difficulty." The court then goes on to say that it is necessary simply to exclude from the operation of the ordinance such of its provisions as are covered by the state law. "This", says the court, "seems to us no more difficult than the exclusions necessary to be made from the ordinances upheld in the cases above cited." This reference is addressed to the Murphy, Hoffman, Iverson and Simmons cases, supra, which are cited at page 934 of 64 Cal.App.2d Supp., at page 729 of 148 P.2d in support of the following statement: "The fact that the ordinance is so framed that its entire prohibition, including both the valid and the invalid parts thereof, is stated by the same words, does not necessarily show that the valid part is inseparable from the invalid * * *." The Commons case contains an excellent discussion of this whole subject and we are in complete agreement with Judge Shaw's treatment therein of these questions of severability and adopt it as our own.

It is difficult for appellants to sustain their contention that the Portnoy case has weakened the authority of In re Murphy, or is inconsistent with it, in view of the fact that the former cites the latter as a live precedent. In re Murphy has been followed also in the Hoffman, Iverson and Commons cases, supra, and In Ex parte John, 17 Cal.App. 58, 64, 118 P. 722, and Witt v. Klimm, 97 Cal.App. 131, 134, 274 P. 1039, and it seems never to have been criticized. Because it is parallel with the present case we are bound to follow it.

In the Sic case, 73 Cal. 142, 14 P. 405, supra, the possibility of double jeopardy arising from prosecutions under both state law and ordinance appears as one of the reasons for the conflict rule. That could not happen here, since there could be no prosecution under section 331, Penal Code, for keeping or maintaining a place where draw poker is played, as "draw" is not prohibited by section 330. See Monterey Club v. Superior Court, 48 Cal.App.2d 131, 119 P.2d 349.

[4, 5] Nor could there be any such conflict between section 288, Police Code, and section 318, Penal Code, since the former prohibits keeping and maintaining a gambling house while the latter prohibits prevailing upon another to enter one. Under

318 it is not sufficient merely to prove invitation, but "prevailing" must be proved. In re Chase, 119 Cal.App. 432, 434, 6 P.2d 577; People v. Chase, 117 Cal.App.Supp. 775, 779, 1 P.2d 60. The acts denounced by the two sections are entirely different.

These considerations furnish further reasons why no inseverability problem is presented.

[6] Lastly, appellants contend that the legislation is unreasonable and oppressive. They concede that a municipality may properly *regulate* gambling, but argue that it is unreasonable to *prohibit* (by legislation against the maintenance of gambling houses) games which the state itself has not seen fit to prohibit, such, for instance, as draw poker.

In Ex parte Tuttle, 91 Cal. 589, 27 P. 933, 934, the Supreme Court definitely held that gambling in the various modes may be either suppressed and prohibited or merely regulated, and that "a wide discretion is committed to the law-making body." That case contains strong language respecting the state's policy on the subject of gambling in general. Several later cases have spoken on the same subject. In People v. Haughey, 48 Cal.App.2d 506, 511, 120 P.2d 121, 123, this court said "The policy of the state toward commercial gambling is clear and unequivocal. A mere superficial reference to the Penal Code reveals that commercial gambling in all of its phases has been uniformly condemned for many years." To the same effect is People v. Sullivan, 60 Cal.App.2d 539, 542, 141 P.2d 230, where numerous cases are cited.

This general policy of the state finds expression in section 318, Penal Code, just discussed. Section 330 makes it unlawful to play 12 or more specified games and section 331 makes it unlawful for anyone to permit *such specified games* to be played in any house owned or rented by him. Section 318, on the other hand, makes it unlawful to prevail "upon any person to visit any room, building, or other places kept for the purpose of gambling * * *." It is "an indirect, partial, protection of the public" against *all* gambling whether outlawed by section 330, or not. People v. Philbin, 50 Cal.App.2d Supp. 859, 864, 123 P.2d 159, 161.

In Ex parte McClain, 134 Cal. 110, 66 P. 69, 54 L.R.A. 779, 86 Am.St.Rep. 243, an ordinance was attacked as is section 288 on the ground that it was unreasonable. At page 111, of 134 Cal., at page 69 of 66 P., the court said: "It may be concluded * * * that in a reasonable exercise of its police powers a municipality may pass any ordinance in furtherance of the avowed general policy of the national and state government. In this regard our cities and counties draw their power, not from legislative permission, but from the direct grant of the constitution itself, which by article XI, § 11, empowers them to make and enforce within their limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

Section 288, Police Code, falls squarely within the doctrine of the McClain case. Its provisions against keeping or maintaining a place where gambling is carried on are directly in furtherance of the avowed general policy of the state. By section 318, Penal Code, the legislature puts this policy into action by prohibiting any person to prevail upon another to enter a place where gambling *of any kind* is carried on; by section 288 the municipality gives expression to the same state policy by prohibiting the keeping or maintenance of such a place.

The case of In re Hall, 50 Cal.App. 786, 195 P. 975, relied on by appellants, is readily distinguishable since there exists no such public policy with respect to dancing—the subject of the Pasadena ordinance held invalid in that case. Gambling and dancing are, of course, altogether different.

The orders are affirmed.

NOURSE, P. J., and DOOLING, J., concur.

91 Cal.App.2d 15

ARNOLD et ux. v. HANSON et ux.

Civ. 7537.

District Court of Appeal, Third District, California.

March 30, 1949.

1. Boundaries 🔑3(6)

Survey as made in the field, and lines actually run on surface of earth at the time blocks are surveyed and plats filed, control over courses and distances, and those who purchase the blocks have a right to rely on such lines and monuments.

2. Boundaries 🔑3(6)

Where a survey, as made and marked on the ground, conflicts with plat, survey must prevail.

3. Boundaries 🔑3(6)

Where stakes are set in ground to indicate boundaries of lots, and purchaser finds stakes and relies thereon as monuments fixing boundaries, as did others, such stakes must control though thereafter a discrepancy is discovered between the stakes and field notes of surveyor.

4. Boundaries 🔑3(6)

Where wooden stakes were driven into ground to mark corners and side lines of lots when tract was surveyed into lots, and thereafter subdivider of tract located wooden stakes and, beside them, drove into the ground iron pipe stakes, and certain of the lots were sold to purchasers who relied on the iron stakes as marking the boundaries of the lots, the iron stakes would prevail in boundary suit over a surveyor's survey which indicated that the iron stakes did not properly mark the boundaries of the lots.

5. Boundaries 🔑37(3)

In action to quiet title, trial court was not compelled to accept testimony of defendants' surveyor as to true location of boundary line, but was justified in accepting monuments set by original survey as correct.

6. Boundaries 🔑43

Where findings in boundary dispute recited that defendants pulled up iron pipe marking boundary on south line of lot 20 of plaintiffs, about 91 feet west of the street, and moved plaintiffs' fence over five feet eight inches north from where iron pipe was driven into ground on south line, 91 feet from the street, and all lots involved were 50 feet wide and rectangular in shape, judgment for plaintiffs was not so vague as to be unintelligible because it did not describe plaintiffs' lots by metes and bounds so as to fix division line between plaintiffs' lot 20 and defendants' lot.

◆

Appeal from Superior Court, Lake County; Benjamin C. Jones, Judge.

Suit by John R. Arnold and Lucille B. Arnold, his wife, against Oscar Hanson and Dorothy Hanson, his wife, to quiet title and to recover damages for acts of defendant in cutting down plaintiff's berry bushes and a tree, and for moving fence. From a judgment for plaintiffs, the defendants appeal.

Judgment affirmed.

Morse & Richards, of Oakland, for appellants.

Lovett K. Fraser, of Lakeport, for respondents.

ADAMS, Presiding Justice.

This is an appeal by defendants from a judgment quieting plaintiffs' title to lots 19 and 20, Block 1, of Clear Lake Highlands Club House addition in Lake County, which judgment also ordered defendants to restore to its original position the line fence between lots 20 and 21, which fence had been constructed by plaintiffs and moved by defendants; and further awarded plaintiffs damages in the sum of $200 caused by the acts of defendants in cutting down plaintiffs' berry bushes and a tree, and moving the fence.

The controversy involves the location of the boundary line between lots 20 and 21. In April, 1924 Clear Lake Highlands, Inc., owned a large tract of land on or near the shore of Clear Lake which it surveyed and subdivided into numerous lots and blocks. The survey was made by D. R. Morgan, a licensed surveyor, assisted by

Carol Hale as transit man; and thereafter a plat of the survey showing lots, blocks and streets, which plat had been made by surveyor Morgan, was approved by the board of supervisors and filed for record July 25, 1924. The lots in question, namely, lots 19, 20 and 21, face Hambaugh Avenue, sometimes called Lake Shore Drive, on the east, while the west ends of the lots are covered by the water of Clear Lake. As shown on the plat, lots 4 to 26, inclusive, are 50 feet in width and rectangular in shape.

When the tract was surveyed into lots in April, 1924, wooden stakes were driven into the ground to mark their corners and side lines. In 1931 Carol Hale, with John T. LaBree who was or had been vice president of Clear Lake Highlands, Inc., subdivider of the tract, and was then owner of lots 19 and 20, located the original wooden stakes, most of which were still in place, and beside them drove into the ground three-quarter inch iron pipe stakes about thirty inches long.

In 1937 Mr. LaBree and his wife contracted with plaintiffs for the purchase of lots 19 and 20, and when the parties were negotiating for such sale Mr. LaBree showed the iron stakes to Mr. Arnold who accepted such stakes as marking the boundaries of the lots. They went into possession in 1937, built a house upon lot 20, erected a fence along the south line for a distance of approximately 81 feet from Hambaugh Avenue, planted berry bushes and a tree near the fence, and later placed a stone wall along the remaining portion of the south boundary of the lot extending toward the lake. Plaintiffs completed the purchase and obtained a deed of conveyance in 1943.

In the spring of 1945 defendants acquired lot 21, a 50 foot lot facing on Hambaugh Avenue and paralleling lot 20 on the south. In the same year they engaged a licensed surveyor, Hamlin A. Witham, to survey lot 21. Mr. Witham concluded that the official plat (plaintiffs' Exhibit 1 in evidence) did not correctly match with monuments on the land, to wit, the iron pipes of which there is one at practically each corner, every 50 feet. He concluded that the bearing on the original plat was off, that the survey had been carelessly made, and that while the lots were staked as approximately shown by the original iron pipes on the front of the lots, the bearings on the original plat were erroneous. He admitted at the trial that his survey would disturb the side lines of lots in the tract numbered from 11 to 21, inclusive, and would have the effect of throwing the line between lots 20 and 21 over onto lot 20, and taking therefrom a triangular section 10.30 feet wide at a point 147 feet from Hambaugh Avenue, and 18.24 feet at the rear of the lot.

On receiving the report of surveyor Witham, defendants, without consultation with plaintiffs, took down plaintiffs' fence, removed the berry bushes and tree, and began the construction of a garage extending over into plaintiffs' lot 20.

This action was thereupon brought by plaintiffs, and after trial by the court, without a jury, findings in favor of plaintiffs were filed and the judgment from which this appeal has been taken was entered.

We think that the judgment must be affirmed.

[1-3] In Kaiser v. Dalto, 140 Cal. 167, 172, 73 P. 828, the court said that the survey as made in the field, and the lines as actually run on the surface of the earth at the time the blocks were surveyed and the plats filed must control; that the parties who own the property have a right to rely upon such lines and monuments, and that, when established they control courses and distances. And in Burke v. McCowen, 115 Cal. 481, 486, 47 P. 367, it was held that where a survey as made and marked upon the ground conflicts with the plat, the survey must prevail. There Whiting v. Gardner, 80 Cal. 78, 22 P. 71, was cited, in which latter case it was said that in the absence of evidence to the contrary it will be presumed that the map correctly represents the survey, and the latter need not be looked to; but that if it be shown that a discrepancy exists between the map and the survey upon which it is based, the survey must prevail. A comparable case from Iowa is Tomlinson v. Golden, 157 Iowa 237, 138 N.W. 448, where it was held that where stakes were set in the ground to

indicate boundaries of the lots, and a purchaser found the stakes and relied thereon as monuments fixing the boundaries, as did others, such stakes must control though in a later survey the same surveyor found a discrepancy between the stakes and his field notes—that the field notes and paper plat must give way thereto. In support of its ruling that court cited, among other cases, Burke v. McCowen, supra, and O'Farrel v. Harney, 51 Cal. 125.

In accord are Brauss v. Fayette County, 164 Iowa 606, 146 N.W. 6, and Langle v. Brauch, 193 Iowa 140, 185 N.W. 28, 29. In the latter case the court said: "It is well established that the lines as actually run by the original government surveyor become the true boundary lines. If these lines can be ascertained and determined by reason of monuments erected by the government surveyor, they will control, and courses, distances, measurements, plats, and field notes must all yield to such established monuments."

[4] Appellants' surveyor testified that the official plat does not match the monuments on the land, that is, the iron stakes set in the ground. Under the foregoing authorities the monuments must prevail. This surveyor admitted that his survey would disturb the lines of all of the lots from 11 to 21, inclusive, many of which lots had already been sold. All of those lots are admittedly of the same width, and their side lines are parallel.

[5] Furthermore, we are of the opinion that the trial court was not compelled to accept the testimony of appellants' surveyor as controlling on questions of fact which were involved, but was justified in accepting the monuments set by the original survey as correct. Lohman v. Lohman, 29 Cal.2d 144, 149, 173 P.2d 657.

[6] The only other question raised by appellants is that the judgment is so vague as to be unintelligible because it does not describe plaintiffs' lots by metes and bounds so as to fix the division line between lots 20 and 21—that it does not describe that line so that appellants will know where to replace the fence which it removed. The language used by this court in Morris v. George, 57 Cal.App.2d 665, 677, 135 P.2d 195, 201, is applicable, to wit: that "if appellants desired to have what they were required to do described with such meticulous particularity as their brief would indicate, they should have had a detailed survey and description of said ditch made before they destroyed it." Furthermore, the findings (Finding IV) recite that defendants pulled up the iron pipe on the south line of lot 20, about 91 feet west of the street, and moved the fence over 5 feet 8 inches north from where the iron pipe was driven in the ground on the south line, 91 feet from the street. Also all of the lots numbered 11 to 21, inclusive, are 50 feet wide, and rectangular in shape, so appellants should have no difficulty in finding the original location of the fence and restoring it, as the judgment directs, "to its original position."

The judgment is affirmed.

PEEK and THOMPSON, JJ., concur.

PEARSON v. TIDE WATER ASSOCIATED OIL CO., Inc.

Civ. 13800.

District Court of Appeal, First District, Division 2, California.

March 29, 1949.

Rehearing Granted April 28, 1949.*

1. Seamen 🔑29(5.16)

In action under the Jones Act for damages for injury to eye, conflicting evidence as to whether earlier treatment was unreasonable and added to plaintiff's suffering, and as to whether delays in getting plaintiff to hospital were unreasonable was for jury. Jones Act, 46 U.S.C.A. § 688.

2. Seamen 🔑29(1)

In action by seaman under the Jones Act for negligent injury, where the only evidence offered on the subject showed that it was not necessary or customary to put the vessel in a shipyard for a minor repair such as plaintiff was engaged in when injured, alleged ground of negligence for such failure could not be sustained. Jones Act, 46 U.S.C.A. § 688.

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* Subsequent opinion 223 P.2d 669.

3. Seamen 🔑29(5.14)

In action under the Jones Act for alleged negligent injury to eye, evidence showed that the seaman was an experienced mechanic, knew the danger of the operation, and knew that goggles could be had and voluntarily elected not to use them. Jones Act. 46 U.S.C.A. § 688.

4. Seamen 🔑29(5.14)

In action by seaman under the Jones Act for alleged negligent injury to eye while attempting to remove a grease cup fitting, evidence showed that the seaman was not ordered to strike the fitting with a hammer. Jones Act, 46 U.S.C.A. § 688.

5. Master and servant 🔑107(1)

The "simple tool doctrine" means that ordinarily the master is not liable in negligence where a servant is injured in the use of a simple tool which is without patent defect if the servant has complete knowledge of and experience in the use of such tool.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Simple Tool Doctrine".

6. Appeal and error 🔑1064(1)
Seamen 🔑29(5.17)

In action under the Jones Act for alleged negligent injury to eye, where evidence showed that seaman had choice of simple tools and made an unwise choice, an instruction that if jury found that accident was not one which would ordinarily have happened if those having management of ship and its equipment had used reasonable care, then negligence of the defendant, if any, might be inferred by jury and a verdict in favor of plaintiff might be based thereon was prejudicial error as an incorrect statement of the res ipsa loquitur doctrine and the law applicable to the facts. Jones Act, 46 U.S.C.A. § 688.

7. Master and servant 🔑285(3)

The "res ipsa loquitur" doctrine applies only where the thing causing the accident is under the exclusive control of the master and the accident is not explained.

8. Appeal and error 🔑1064(1)
Seamen 🔑29(5.17)

In action by seaman under Jones Act for alleged negligent injury to eye, where specific acts of negligence were alleged, an instruction that a seaman does not assume the risk of working in any unsafe or improper place and does not assume the negligence of a fellow employee, and that shipowner was under an absolute duty to keep the ship and its appliances seaworthy, safe and in proper condition was prejudicial error. Jones Act, 46 U.S.C.A. § 688.

9. Seamen 🔑29(2)

Under the Jones Act, a shipowner is not under an absolute duty to keep the ship and its appliances seaworthy, safe and in proper condition, but is obliged only to use due and reasonable care to that end and to refrain from any act of negligence. Jones Act, 46 U.S.C.A. § 688.

10. Trial 🔑296(3)

In action for damages for negligence under the Jones Act, an instruction that the shipowner was under an absolute duty to keep the ship and its appliances seaworthy, safe and in a proper condition was not cured by later instruction that the shipowner did not guarantee or warrant that the seaman would not be injured in the course of his employment. Jones Act, 46 U.S.C.A. § 688.

11. Trial 🔑251(4)

Where action under Jones Act was based on specific acts of negligence and there was no proof of alleged unseaworthiness, jury should not have been charged in effect that it could find that the ship was unseaworthy and thus unsafe solely because the injury occurred. Jones Act, 46 U.S.C.A. § 688.

12. Appeal and error 🔑1064(1)
Workmen's compensation 🔑2139

The superior courts are without jurisdiction of an action for compensation irrespective of the fault of any party and an instruction which in effect told jury that it could render a verdict for compensation without fault was prejudicial error. Labor Code, § 5300; Const. art. 20, § 21.

◆

Appeal from Superior Court, City and County of San Francisco; Edw. P. Murphy, Judge.

Action by Cedric E. Pearson against the Tide Water Associated Oil Company, Inc., for damages under the Jones Act. From a judgment for plaintiff for $10,447, the defendant appeals.

Judgment reversed.

Hoge, Pelton & Gunther, Leo V. Killion, John H. Black and Edward R. Kay, all of San Francisco, for appellant.

Gladstein, Andersen, Resner & Sawyer, of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued for injuries incurred while employed as a pump man aboard a tanker operated by defendant. The complaint alleged "That plaintiff brings and maintains this action under the provisions of Section 33 of the Act of June 5, 1920, C. 250, 41 Stat. 1007, commonly known as the Jones Act" 46 U.S.C.A. § 688. The cause was tried to a jury in the superior court and resulted in a verdict for the plaintiff.

Plaintiff was a member of and under the direct supervision of the engineer's department. While the vessel was at sea and about twenty miles from the nearest port the chief engineer ordered plaintiff to remove a grease cup fitting which was chipped in use. Plaintiff endeavored to remove the fitting by the use of a hammer and drift. A blow of the hammer caused a chip of the metal to strike him in the eye causing the injury in suit.

The accident occurred when the ship was about twenty miles out of Estero Bay. He was given first aid treatment by the mate and, when the ship docked about an hour later he was sent ashore and taken by automobile to a doctor in San Luis Obispo who treated and bandaged the eye. Plaintiff returned to the ship and was landed at El Segundo from where he was taken to the United States Public Health Station at San Pedro by the ship's officers and then sent by train to a hospital in Pasadena.

On the case so made plaintiff specified, as acts of negligence, (1) the failure to provide goggles; (2) the order that he strike the fitting with a hammer; (3) the failure to provide a "seaworthy" ship; and (4) the failure to provide proper medical care. There is also a suggestion of negligence in the failure to have had the repairs made in a ship yard.

[1] The evidence offered by defendant relating to medical treatment shows that everything was done for him that could have been done under the circumstances. The evidence offered by plaintiff shows that some of the delays in getting him to the hospital and earlier treatment were unreasonable and added to his suffering. With this conflict the jury could have found either way and we cannot say that a finding of lack of proper care would be unsupported.

[2] Likewise the only evidence offered on the subject showed that it was not necessary or customary to put the vessel in a ship yard for a minor repair such as we have here. These claims of negligence can therefore be dismissed without further comment.

Specifications numbered (1) and (2) may be considered together as they both relate to the same type of claim of negligence.

[3] On the matter of the asserted claim that appellant failed to provide goggles for respondent's protection there is ample evidence that the engineer's department in which respondent worked had on hand available to respondent six or more pairs of goggles, any one of which could have been used by him. If the contention is that appellant should have demanded that respondent wear goggles while doing the work it is unmistakable that no such demand was made. If the question of negligence in this respect depends on the duty of appellant to provide goggles, it is equally clear that the evidence showed

that goggles were provided and made available to him if he had desired to use them, also that he did not make inquiries to his superiors, or look for them where he should have known they could be found. In this connection appellant contends that respondent was an experienced mechanic, knew the danger of the operation, knew that goggles could be had, and voluntarily elected not to use them. The evidence supports these contentions.

[4] The argument of respondent based on the premise that he was ordered to strike the fitting with a hammer is faulty because the evidence does not establish the premise. The evidence is undisputed that respondent was not directed to use a hammer, that a Stillson pipe wrench was available for him to use, that a Stillson was a safe and proper tool for the purpose, and that, following the accident, another witness used a Stillson and removed the fitting "without difficulty." When asked the direct question respondent testified, "Yes, there were Stillson wrenches available." Some evidence was offered that another tool known as an "easy out" was better for this particular work. It was shown that this tanker was not equipped with an "easy out", that it was a tool not generally found on vessels. But there was substantial evidence that it was no better than a Stillson wrench.

[5] But assuming that the evidence on these issues may have been sufficient to support an inference of negligence the instructions on the subject must be examined the more critically to determine whether appellant was prejudiced by those complained of. On both instances the question of negligence or no negligence really rests on the well known "common, or simple, tools" doctrine. This means that ordinarily the master is not liable in negligence where a servant is injured in the use of a simple tool which is without patent defect if the servant has complete knowledge of and experience in the use of such tool. Newbern v. Great Atlantic & Pacific Tea Co., 4 Cir., 68 F.2d 523, 91 A.L.R. 781, Note 786; 35 Am.Jur. p. 573; 56 C.J.S., Master and Servant, § 216, p. 925 and cases there cited. Ordinarily the question of the application of this rule arises in relation to its effect under statutes denying the defense of assumption of risk. If that were the only issue here we would have no reason to discuss it further. But it has a distinct bearing on the criticism of the instructions given.

[6, 7] At the request of respondent the jury was instructed:

"If you find from the evidence that the accident was not one which would ordinarily have happened if those having management of the ship and its equipment had used reasonable care, then carelessness and the negligence of the defendant, if any, may be inferred by you and a verdict in favor of the plaintiff may be predicated thereon." The instruction was error for two reasons—it was an incorrect statement of the res ipsa loquitur doctrine, and the doctrine had no application under the facts of the case. There is no authority for the statement that negligence may be inferred from the simple fact that the accident was one which would not ordinarily have happened if the master had used reasonable care. This doctrine applies only where the "thing" causing the accident is under the exclusive control of the master and the accident is not explained. In omitting this element of control the instruction took the core out of the doctrine. Dryden v. Western Pac. R. Co., 1 Cal.App.2d 49, 54, 36 P.2d 394; 16 Cal.Jur. pp. 1042 et seq.; 38 Am.Jur. p. 996.

But if the instruction had included this essential element of control it would have been error to give it under the facts of this case. The undisputed evidence is that the employee alone exercised control over the operations, that he was given the choice of proper and safe tools, and chose badly. The case is on a par with Dryden v. Western Pac. R. R. Co., supra; White v. Spreckles, 10 Cal.App. 287, 293, 101 P. 920; Gerhart v. Southern Cal. Gas Co., 56 Cal.App.2d 425, 431, 132 P.2d 874; Asprodites v. Standard Fruit & S. S. Co., 5 Cir., 108 F.2d 728.

[8] The jury was instructed as follows: "A seaman such as the plaintiff does not assume the risk of working in any unsafe

or improper place and he does not assume the negligence of any fellow employee. In other words, there are no defenses of assumption of risk or contributory negligence available to the defendant *in this case under the Jones Act.* The shipowner is under an absolute duty to keep the ship and its appliances seaworthy, safe and in proper condition." (Emphasis ours.)

[9, 10] The error in this instruction is inherent from the nature of the cause of action. Respondent sued for damages under the Jones Act and so alleged in his complaint. The trial was conducted on that basis, and the court correctly instructed the jury that the action was prosecuted under that statute. The instruction complained of threw the case into one under the general maritime law for "unseaworthiness." The distinction is this—a suit under the Jones Act is one for damages for negligence and lies in the law side of the court; an action for compensation, maintenance and cure under the maritime act is one originally in admiralty which permits recovery for injuries without negligence as is done under the common workmen's compensation acts. Here the respondent sued for damages for negligence specifying certain acts of negligence. He also alleged that the vessel was unseaworthy for the reasons specified as negligence, but the final paragraph of the complaint reads: "That plaintiff brings and maintains this action under the provisions of Section 33 of the Act of June 5, 1920, C. 250, 41 Stat. 1007, commonly known as the Jones Act." It cannot be disputed that under the Jones Act the shipowner is not "under an absolute duty to keep the ship and its appliances seaworthy, safe and in proper condition." He is obliged to use due and reasonable care to that end and to refrain from any act of negligence, but this is far from an "absolute duty" to keep the ship safe. The effect of the instruction was that the jury was told that it should treat the shipowner as an insurer and guarantor of the safety of all the employees and that no question of negligence of the owner need enter into their consideration. Later the court instructed the jury that the shipowner did not "guarantee or warrant" that the seaman "would not be injured" in the course of his employment, but that did not cure the error of the instruction complained of which put the "absolute duty" on the shipowner to keep the ship "safe." A guarantee that the employee would not be injured is far different from a guarantee that the ship owner would pay "damages" for injury without negligence. The instruction could mean nothing else than that it was an absolute duty, uninfluenced by contributory negligence, assumption of risk, or the act of a fellow servant, to assure every seaman that he would be secure from injury, and that if any injury were suffered the ship owner would pay. This would be an acceptable theory under employer's liability, workmen's compensation, and similar acts where compensation, as distinguished from damages, irrespective of negligence is allowed, but it is not maintainable in an action for damages "for negligence" under the Jones Act. By imposing on the shipowner the "absolute duty" to keep the ship "safe" the jury was told that it could award damages for a breach of that duty.

[11] Here the appellant was informed at the outset that it was called on to defend an action for negligence under the Jones Act. No intimation was made throughout the trial that respondent relied on his allegation of unseaworthiness. His defense of the instruction rests on the claim that the ship was unseaworthy because not equipped with proper tools or goggles. No other evidence of "unseaworthiness" was offered. Though the evidence failed to prove that the ship was not properly equipped the respondent now defends the verdict on the strength of this instruction. Manifestly though the ship may have been equipped with the best of tools and would thus have been "seaworthy" when it left port, it may nevertheless have become unsafe when such tools were improperly used or used by unskilled hands. The issue of "unseaworthiness" raises the question of inspection, patent and latent defects, custom and practice, and similar matters all of which are questions of fact and subjects of proof. Where the issue is not fairly tendered and no proof is made the jury should not have been charged in

effect that it could find that the ship was unseaworthy and thus unsafe solely because the injury occurred.

[12] Under Section 21 of Article XX of the Constitution, and Section 5300 of the Labor Code, our superior courts are without jurisdiction of an action for "compensation" irrespective of the fault of any party. This instruction in effect told the jury that it could render a verdict for "compensation" without fault and thereby created a cause of action which the superior court had no jurisdiction to try.

Assuming that we can follow our own Constitution relating to "prejudicial error" rather than the federal rule that prejudice is presumed from error, we still cannot say that the errors of these instructions were not prejudicial. The jury returned a verdict for $10,447. The verdict expressly stated that such sum was assessed as "damages." Thus, through these instructions, the jury was permitted to award "damages" rather than "maintenance and cure", without the necessity of finding negligence on the part of appellant.

Judgment reversed.

GOODELL, and DOOLING, JJ., concur.

90 Cal.App.2d 848

PEOPLE v. ONE 1947 OLDSMOBILE CLUB SEDAN, ENGINE NO. 8–83854 et al.

Civ. 13870.

District Court of Appeal, First District, Division 2, California.

March 29, 1949.

1. Forfeitures 🔑5

Evidence that witness saw driver of automobile leave automobile and walk to rear of signboard, dig up a glass jar, reach in his coat pocket, take out several papers, insert them in jar, place jar back in hole and cover it up, and that witness then went over and dug up the jar, and found that it contained pieces of paper which he turned over to police, and which were identified as "bindles" containing narcotics, justified finding that automobile had been used to transport narcotics, authorizing forfeiture of the automobile. Health and Safety Code, §§ 11612, 11613.

2. Constitutional law 🔑319

Automobile taken from owner without his consent and used by taker in unlawful transportation of narcotics, cannot be declared forfeited to state without violating due process of law. Health and Safety Code, § 11619.

3. Forfeitures 🔑5

Whether owner of vehicle consented to its use at time narcotics were illegally transported in it, is a matter of defense in an action to forfeit the vehicle, and must be pleaded and proved or the interest of the owner must be forfeited. Health and Safety Code, § 11619.

Appeal from Superior Court, City and County of San Francisco; Thomas M. Foley, Judge.

Proceeding by the People of the State of California against one 1947 Oldsmobile Club Sedan, Engine No. 8–83854, wherein Ernest Schultz and General Motors Acceptance Corporation, claimants, filed interventions. From a judgment of forfeiture, the claimants appeal.

Judgment affirmed.

John R. Golden and Partridge & O'Connell, all of San Francisco, for appellants.

Fred N. Howser, Atty. Gen. and Ralph W. Scott, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

The registered and legal owners of a 1947 Oldsmobile appeal from a judgment of forfeiture entered under Health and Safety Code, sections 11612–11613 on the ground that the car was used for the transportation of narcotics. The legal owner offered no proof of having made any investigation of the character or responsibility of the registered owner. The only question raised is the sufficiency of the evidence to support the forfeiture.

The witness Woodward testified that as he was painting around the front windows of his upper flat on McAllister Street he saw the car park about one hundred feet from his house. The driver of the car was alone. The witness saw him leave the car and walk to the rear of a signboard standing directly across the street from his home and this man "reached down and he dug something out of the hole that he was digging in, and he picked up a glass jar and when he picked up the glass jar he straightened up and reached inside his left hand coat pocket, and he took out several papers and inserted them in the jar and he put the cover back on the jar, and put the jar back in the hole and covered it up. Then he looked around for a marker to put over the place he had covered up, and he picked up a piece of glass and he put the piece of glass over it." The witness waited for about three hours and, observing that no one had approached the spot, walked across the street, found the marker where the jar had been buried, dug it up, and found it contained eleven pieces of paper which he turned over to the police and which were identified as eleven "bindles" containing narcotics.

The defendant did not take the stand and offered no evidence other than some photographs of the premises which were offered to discredit the testimony of the witness Woodward as to what he saw from his window. Evidence was offered by the plaintiff to show that if the legal owner had made any investigation prior to the sale of the car it would have discovered that the purchaser was not a man of good moral character, reputation or responsibility. The legal owner conceded this and made no defense to the forfeiture.

[1] On this evidence the trial court properly found that the automobile had been used to transport narcotics and the forfeiture was the inevitable result. The only plausible attack on the judgment is that the trial court had to infer from the fact that narcotics were found in the jar that the owner of the car put them there and that he had them in his possession while driving the car. The usual argument against basing an inference on an inference is made, but the premises are wrong. There was direct evidence that the driver of the car walked directly from the car to the sign board and there took the papers from his pocket and placed them in the jar. The only inference necessary to support the judgment is that the driver was operating the car with the owner's consent.

[2, 3] The controlling principles in a case made on this state of facts are well stated in People v. One 1937 Buick Coupe, 89 Cal.App.2d 556, 201 P.2d 402, 404, from which we quote: "Under the statute, the only grounds upon which the owner may defend against a proposed forfeiture are that the vehicle was not in fact used to transport narcotics or that narcotics were not unlawfully possessed by an occupant of the vehicle. Health & Safety Code, § 11619. An additional defense, read into the statute by the courts to save its constitutionality under the due process clauses of the state and federal constitutions, is that the owner did not consent to the taking of his vehicle. People v. One 1941 Ford 8 Stake Truck, 26 Cal.2d 503, 159 P.2d 641; People v. One 1941 Chrysler Tudor, 71 Cal.App.2d 312, 162 P.2d 653. The question of lack of consent is a matter of defense which must be pleaded and proved, and in the absence of any evidence on the issue of consent the interest of the owner must be forfeited. People v. One 1939 La Salle 8 Sedan, 45 Cal.App.2d 709, 713, 115 P.2d 39; People v. One 1937 Plymouth 6, 37 Cal.App 2d 65, 98 P.2d 750."

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

91 Cal.App.2d 19

NORTHWEST CASUALTY CO. v. LEGG et al.

Civ. 3756.

District Court of Appeal, Fourth District, California.

March 30, 1949.

1. Insurance ⚷665(4)

Evidence established that a passenger automobile involved in accident was furnished for the regular use of a member of the household of insured under an automobile liability policy covering a pick-up truck and excluding from coverage any automobile furnished for regular use to the insured or a member of his household.

2. Insurance ⚷665(4)

Evidence sustained finding that wife of insured was equitable owner of passenger automobile involved in an accident under liability policy covering a pick-up truck and excluding coverage for any automobile furnished for regular use to the named insured or a member of his household, where the automobile had been given to the wife of insured but the registration in the name of her mother had not been changed.

3. Automobiles ⚷136

Vehicle Code provision respecting requirements of motor vehicle liability policy was intended to authorize liability policies covering insured in operation of all automobiles not owned by him, or limiting the coverage to certain automobiles not owned by him, and provision does not require that a policy covering an insured in use of vehicles owned by him or registered by him in his name, and also covering certain automobiles not owned by him, must cover him in the operation of all automobiles not owned or registered by him. Vehicle Code § 415(a) (1), (b) (1–4).

4. Automobiles ⚷136

Subdivision (b) 2 of the Vehicle Code respecting requirements for motor vehicle liability policies, which uses the word, "all" in referring to vehicles owned by insured and in the same sentence uses the word "any" in referring to a "vehicle" not owned by insured, cannot be construed so as to make the word "any" mean every and all, but as used therein, means any one, or more of the vehicles which are designated in the policy as required by subdivision (a)1, to which coverage was intended to be granted, in view of the section when construed as a whole. Vehicle Code, § 415(a) (1), (b) (1).

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Any".

5. Insurance ⚷435.2

A liability policy covering a pickup truck owned by a partnership and containing provision covering use of other automobiles, did not cover a passenger automobile equitably owned by partner's wife, and driven by a member of the partnership at time of accident where member was not in the partnership business at time of accident.

6. Insurance ⚷435.2

A liability policy covering a pickup truck owned by a partnership and extending coverage to use of other automobiles was not ambiguous as respects coverage of a passenger automobile driven by a member of the partnership involved in an accident so as to require a construction in favor of insured.

7. Declaratory judgment ⚷317

In action by insurer for declaratory relief to determine whether liability policy covering a pickup truck insured defendants from possible liability to another defendant arising out of an accident involving a passenger automobile complaint stated facts sufficient to state a cause of action for declaratory relief.

◆

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action for declaratory relief respecting interpretation of an insurance policy by the Northwest Casualty Company a corporation against H. C. Legg and O. H. Lightsey, doing business as Kern Neon Company, and others. From the judgment the defendants appeal.

Affirmed.

West, Vizzard, Howden & Baker and Dorris, Fleharty & Phillips, all of Bakersfield, for appellants.

Mack & Bianco, of Backersfield, for respondent.

BARNARD, Presiding Justice.

On July 29, 1946, the plaintiff issued to "H. C. Legg and O. H. Lightsey dba Kern Neon Company" a standard form liability policy covering bodily injury and property damage caused by accident arising out of the ownership or use of a 1941 International Pickup owned by the partnership. The policy covered a period of one year and its insurance provisions were made applicable to the use of other automobiles under certain specified conditions.

On September 15, 1946, H. C. Legg, while driving a 1936 Chevrolet automobile, collided with the defendant Beatrice Grindstaff, causing personal injuries. The accident occurred while Mr. Legg was taking his wife out to dinner. This Chevrolet was registered in the name of the defendant Eleanor Lowe Johnston, who is the mother of Mrs. Legg.

A controversy having arisen between the parties with respect to the interpretation of the insurance policy above mentioned and as to whether it covered this accident, the plaintiff brought this action for declaratory relief, praying that the court take jurisdiction and determine whether this policy insured the defendants, or any of them, for any possible liability to the defendant Grindstaff.

The controversy here is with respect to that portion of the policy covering the use of other automobiles. So far as material here, this portion reads as follows:

"V. Use of Other Automobiles:

"Such insurance as is afforded by this policy for bodily injury liability and for property damage liability with respect to the automobile classified as 'pleasure and business' applies (1) to the named Insured, if an individual and the owner of such automobile or if husband and wife either or both of whom own such automobile, and (2) to the spouse of such individual if a resident of the same household, the employer of such named Insured or spouse, the parent or guardian of such named Insured or spouse, if a minor, and a partnership in which such named Insured or spouse is a partner, as insured, with respect to the use of any other automobile by or in behalf of such named Insured or spouse. This insuring agreement does not apply:

"(a) To any automobile owned in full or in part by, registered in the name of, hired as part of a frequent use of hired automobiles by, or furnished for regular use to, the named Insured or a member of his household * * *".

After a trial, the court found that at the time of the accident this Chevrolet was registered to Mrs. Johnston, who was then living with a son in Oakland; that the Chevrolet was then and for several months had been furnished to Mr. and Mrs. Legg for their regular use, and had been regularly used by them; that Mrs. Legg was a member of the household of H. C. Legg and was the equitable owner of the Chevrolet; and that Mr. and Mrs. Legg were using the Chevrolet at the time of the accident pursuant to an arrangement between themselves and Mrs. Johnston for its regular use by them. The court concluded that this policy did not insure any of the defendants against liability as a result of this accident, and that such risk was expressly excluded under the exception provided by Paragraph V(a) as above quoted. Judgment was entered accordingly and defendants have appealed.

[1] It is contended that the finding that the Chevrolet was furnished to Mr. and Mrs. Legg for their regular use, is not supported by the evidence. The evidence discloses the following facts. Mrs. Johnston, to whom the Chevrolet was registered, lived with Mr. and Mrs. Legg at Taft. She was rendered a helpless invalid by a stroke in January, 1945, and was never able to drive the car thereafter. Mrs. Legg used the car on occasions after January, 1945, to run errands for her mother. Mrs. Legg sold her own car in September, 1945, "and from that time on, as necessity demanded, I used Mother's car." She then used the Chevrolet for any use that she wanted, and had the use of it whether it was for her mother, for herself, for her family, or for

business. She had the keys and used it whenever she wanted to and for all purposes and occasions. On May 1, 1946, Mrs. Johnston was taken to Oakland to stay with a son for the summer. The Chevrolet was left at the family home in Taft, and was then in disrepair. In June, 1946, the Leggs moved to Bakersfield, taking the Chevrolet with them. In August, 1946, they had the Chevrolet repaired. Mrs. Legg then continued to use the car and, with her permission, Mr. Legg also used it at times. Mrs. Legg had control of the car and used it whenever she wanted to. The only reasonable inference from the evidence is that Mr. Legg was given the same privilege and that he used it whenever he desired. Mrs. Legg testified that about January or February of 1946, her mother gave the car to her "for my use." Shortly after the accident Mrs. Legg signed a statement in which she said that the Chevrolet was given to her by her mother in January or February, 1946, and that she was sending in the certificate of ownership for transfer to her name. Mr. Legg, on September 16, 1946, signed a statement in which he said: "This Chevrolet was not being used by my family or myself until about six weeks ago when I took it to the Automotive Service in Bakersfield and spent about $200.00 in having a mechanically overhauled. Actually this car was given to my wife by her mother but the registration was never changed; it is so registered to Mrs. Johnston. As we had use for the car, we had it mechanically repaired and have been using it during the last month or six weeks. There is no specific insurance on this car."

This evidence very clearly shows that this car was furnished for the regular use of Mrs. Legg, who is a member of Mr. Legg's household, and, with the only reasonable inferences therefrom, adequately supports the finding here questioned. Pacific Auto. Insurance Co. v. Lewis, 56 Cal. App.2d 597, 132 P.2d 846. In discussing a similar question the court, in Rodenkirk v. State Farm, etc., Insurance Co., 325 Ill. App. 421, 60 N.E.2d 269, 274, an Illinois case, said: "The exclusion from coverage of other cars owned by the insured as well as cars owned by the members of his household, and the exclusion of cars furnished for regular use to the insured or a member of his household would seem to indicate the intention of the company to protect itself from a situation where an insured could pay for one policy and be covered by the insurance in driving any car that he decided to use whether owned by him or members of his family, or cars that had been furnished for his regular use; in other words, cars under his control that he could use at will and might use often."

[2] It is also contended that the finding that Mrs. Legg was the equitable owner of the Chevrolet is not supported by the evidence. While this finding is immaterial, we think it is sufficiently supported by the evidence that the car had been given to Mrs. Legg but the registration had not been changed. LeGrand v. Russell, 52 Cal.App. 2d 279, 126 P.2d 136; Carpenter v. Devitt, 49 Cal.App.2d 473, 122 P.2d 79.

It is next contended that under the provisions of section 415 of the Vehicle Code this policy was required, as a matter of law, to cover the operation of this Chevrolet by Mr. Legg. Subdivision (a) of that section provides that a "motor vehicle liability policy", as referred to in that code, shall meet three requirements. The first of these reads: "(1) Such policy shall designate by explicit description or by appropriate reference all motor vehicles with respect to which coverage is thereby intended to be granted."

Subdivision (b) sets out four requirements, in the alternative. It reads:

"(b) Such policy shall (1) cover the assured in the use or operation of all vehicles owned by him or registered in his name but not insuring such person when operating any motor vehicle not owned by him, or

"(2) Cover the assured in the use or operation of all vehicles owned by him or registered in his name and insure such person in the operation of any motor vehicle not owned or registered in his name, or

"(3) Cover the assured only in the operation of any motor vehicle not owned by him nor registered in his name, or

"(4) Cover the assured only in the operation of a certain vehicle or vehicles not owned by him nor registered in his name."

It is argued that since the policy here in question covers the assured in the operation both of owned automobiles and at least some not owned it falls within the requirement (b) (2); that the provisions of (b) (2) thus automatically became a part of the policy; and that it follows that this policy insures Mr. Legg in the operation of all automobiles not owned by him or registered in his name, including this Chevrolet. In other words, it is argued that if the policy purports to cover the assured in the operation of any vehicle, in addition to those owned by him or registered to him, it must cover his operation of each and all vehicles not owned by him.

Section 415 is a part of the Financial Responsibility Law. As such, it is directly related to the matter of suspending and reinstating operators' licenses in connection with proving ability to respond in damages for injuries caused to others. Whether or not these provisions are controlling with respect to the contract which an insurer may make with an insured, and their relation to the provisions and requirements contained in the Insurance Code, need not be here decided.

[3] We are unable to agree with the contention that section 415(b) (2) must be interpreted as requiring that a policy covering an assured in the use of vehicles owned by him or registered in his name, and also covering certain automobiles not owned by him, must cover him in the operation of all automobiles not owned or registered by him. While the statute is not too clearly worded, it would appear to have been intended to authorize policies covering the insured in the operation of all automobiles not owned by him, or limiting the coverage to certain automobiles not owned by him. Subdivisions (b)(3) and (b)(4) seem to so provide where cars owned by the assured are not also covered. No good reason appears for making a distinction in this regard, in cases where the policy also covers a car owned by the assured. Moreover, subdivision (b)(1) permits coverage of an owned car, without covering any car not owned by the assured, and (b)(2) permits coverage of an owned car, and also covering "any" car not owned by the assured. It would be unreasonable to think that it was intended, where the policy covers cars owned by the assured, to permit an exclusion of coverage as to all cars not owned by him, but to forbid an exclusion of coverage on only a part of such other cars.

[4] Subdivision (b)(2) uses the word "all" in referring to vehicles owned by the assured and in the same sentence uses the word "any" in referring to a "vehicle", in the singular, not owned by him. The appellants would read this word "any" as intended to mean every and all. Not only does this appear unreasonable in view of the context but we think (b)(2) must be read in connection with (a)(1), which provides that such a policy shall designate the motor vehicles with respect to which coverage is intended to be granted. The word "any" is often used to mean one or more, and does not necessarily mean "all". As used in (b)(2), it seems to have been intended to mean any one or more vehicles which are designated in the policy, as required by (a)(1), to which coverage was intended to be granted. Any other interpretation of (b)(2) would seem unreasonable when section 415 is viewed as a whole, and especially in the light of long continued common usage and experience. The policy here in question clearly excepted the use of this Chevrolet from its coverage, under the circumstances which here appear, and it must be held that there is nothing in section 415 which, as a matter of law, enlarged or extended the coverage as stated and limited in the policy, and agreed upon by the parties as the basis for the premium charged.

[5, 6] It is further contended that this policy should be interpreted as covering this accident since Mr. Legg was at the time driving the car on business of the copartners, and since Paragraph V of the policy refers to a partnership in which the insured is the partner. Also, that the policy is ambiguous as to whether coverage was furnished to the copartners under the facts of this case, that such ambiguity should have been construed in favor of the appellants, and that, in any event, the other partner, O. H. Lightsey, was entitled to judgment in his favor. There is ample evidence that Mr. Legg was not on partnership business at the time of the accident. Moreover,

Lightsey was not driving the car and was not covered unless Legg was covered. The wording of the policy clearly excluded coverage on this Chevrolet, under the circumstances here appearing, and there is no ambiguity in the policy in this respect regardless of what may be said concerning the language of the statute. In our opinion the court's interpretation of the statute, and of the policy, was a reasonable one.

[7] Finally, it is contended that the complaint herein failed to state facts constituting a cause of action for declaratory relief. The facts already stated are a sufficient answer to this contention, which is without merit. Columbia Pictures Corp. v. DeToth, 26 Cal.2d 753, 161 P.2d 217, 126 A.L.R. 747; Maguire v. Hibernia Sav. & Loan Soc., 23 Cal.2d 719, 146 P.2d 673, 151 A.L.R. 1062; Wolas v. Crescent Commercial Corp., 86 Cal.App.2d 740, 195 P.2d 471.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

90 Cal.App.2d 793

BROWN v. VOLZ.

Civ. 16493.

District Court of Appeal, Second District, Division 3, California.

March 23, 1949.

Hearing Denied May 19, 1949.

1. Appeal and error 🔑103

An appeal does not lie from an order denying defendant's motion to amend her answer. Code Civ.Proc. § 963.

2. Trusts 🔑96

Where sole purpose of defendant in signing note and trust deed was to loan her credit in order to make transaction acceptable to vendors of property and she received no consideration and suffered no detriment, defendant was an "accommodation maker," and where her name was added to the joint tenancy deed under erroneous belief that it was necessary to secure her against any liability she might have incurred, defendant held record title as joint tenant with the other joint tenant in "trust". Civ.Code, §§ 1577, 1578, 1605, 2224; Code Civ.Proc. §§ 580a, 580d.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Accommodation Maker".

3. Bills and notes 🔑122

An "accommodation party" is one who signs an instrument as maker, drawer, acceptor or indorser, without receiving value therefor and for purpose of lending his name to some other person. Civ.Code, § 3110.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Accommodation Party".

4. Evidence 🔑423(6)

Parol evidence is admissible to show that maker of a note is in fact an accommodation maker, in those cases in which there was no consideration passing. Civ. Code, §§ 1605, 3110.

5. Bills and notes 🔑122

The fact that an accommodation party has taken security for loan of his credit does not prevent him from being an accommodation party, for in order to constitute a valid consideration, accommodation party must receive something other than mere chance of not losing if he is called on to pay the instrument.

6. Trusts 🔑96

Where deed was made to plaintiff and to defendant as joint tenants under a mistake of fact and law and defendant had no present interest in property, court properly determined that defendant held record title to property as a joint tenant with plaintiff as an involuntary trustee for plaintiff. Civ. Code, § 2224.

◆

Appeal from Superior Court, Los Angeles County; Paul Nourse, Judge.

Action by Minnie Brown against Jeanette Volz to quiet title. From a judgment for plaintiff and from an order denying defendant's motion to amend answer, defendant appeals.

Judgment affirmed and appeal from order dismissed.

Melville R. Adams, of Pasadena, for appellant.

Edward P. Hart, of Los Angeles, for respondent.

VALLÉE, Justice.

[1] Defendant appeals from a judgment quieting title in plaintiff to a parcel of real property situated in Pasadena, and from an "order denying defendant's motion to amend her answer." Since no appeal lies from the latter order, Code Civ.Proc. sec. 963, it is dismissed.

In October of 1942, plaintiff purchased a residence in Pasadena from a Mr. and Mrs. James Frush for $5,250. She made a down payment of $2,050. The balance, $3,200, was evidenced by a promissory note, dated October 7, 1942, signed by plaintiff and defendant and secured by a deed of trust upon the property executed by plaintiff and defendant as trustors. A deed to the real property was executed by the sellers and named plaintiff and defendant "as joint tenants."

The circumstances surrounding the activity of defendant in the transaction stems from a life-long friendship between herself and her mother with plaintiff. Plaintiff is a widow, 74 years of age, and a retired school teacher, having a retirement income of "about" $97 per month. She and defendant's mother had been school mates and close friends for many years and she had known defendant practically all her life. Defendant and her mother resided in Mt. Vernon Tract in East Pasadena. Plaintiff desired to live near them and attempted to purchase a residence in the same tract. The deal fell through, whether due to a delay in selling her Glendale property or because a loan company would not accept her signature alone on a note, is not clear. In any event, the property owned by Mr. and Mrs. Frush was found for plaintiff by Miss Peterson, a real estate saleswoman, and Mrs. Gott, a real estate broker. It was located almost across the street from the home of defendant and her mother. There was a loan commitment on it which required a co-signer with plaintiff because of her age and small income. At first Mr. and Mrs. Frush wanted cash, but subsequently decided to carry the papers themselves. Mrs. Gott, the broker, testified "* * * we contacted the Frushes and talked to them about taking the deal, and we suggested if it was safe for the loan company to make the deal with a co-signer on it it would be safe for them to take the same deal. * * * There was no effort to make the Frushes take the place without the co-signer." Plaintiff purchased the property. Plaintiff and defendant signed the note and deed of trust. The deed read to them as joint tenants. Plaintiff went into, and ever since has been in sole possession of the property, has made the monthly payments of $27.20 due on the note, and has collected and retained all rentals from roomers. Defendant has never made any contribution either toward the purchase price of the property or its upkeep. In the latter part of 1946, plaintiff wanted to make a will. On January 1, 1947, she wrote defendant, explained that her name "as copartner on the mortgage deed kinda complicates matters" and requested defendant to sign over a quitclaim deed, leaving plaintiff "as sole owner." Defendant refused to do anything about the matter and on July 15, 1947, plaintiff brought this action to quiet title and revoke an oral trust.

The court, among other things, found: the note was executed to evidence the balance of the purchase price and the deed of trust was given to secure this balance; defendant was named as a "grantee" and "as a joint tenant with the plaintiff solely because the plaintiff and the defendant believed * * * defendant would incur a personal obligation to pay the amount of said note if it was not paid by the plaintiff, * * * and in order that the defendant might be protected and be secured against her liability upon said note * * * it was necessary for her to be named as grantee in said deed of trust"; the plaintiff and defendant "were operating under a mutual mistake of law and fact, and that in truth the defendant incurred no liability or responsibility upon said promissory note, or under the terms of said deed of trust, and that the sole remedy of the payee of said promissory note or of any holder thereof would be to foreclose said deed of trust, and that they would not be entitled to any deficiency judgment against the defendant Volz, unless she consented to be sued upon said note without foreclosure of said deed of trust"; "that it was not the intent of the plaintiff and the defendant that the defendant have any right, title or interest in said property, other than by way of security for her personal obligations upon said promissory note and under said deed of trust, and * * * as the defendant has no obligation or any liability upon said note or deed of trust * * * she is not and has not been at any time entitled to any interest in said real property or to the possession thereof"; defendant was "an accommodation maker upon said promissory note without consideration, and that she has no liability whatsoever upon said note"; it was "not the intention of the plaintiff to make a gift to the defendant of any interest or right in or to the real property in question, and that the plaintiff did not make a gift of any interest or right in said property to said defendant." From these facts the court concluded that plaintiff was the owner of the property, that defendant had no "right, title or interest" therein, that she "at all times held a record title in said property as a joint tenant with the plaintiff, in trust for the plaintiff," and that plaintiff was entitled to a decree quieting title against defendant.

The sole question presented is whether the evidence supports the findings.

Mrs. Gott, the real estate broker consummating the deal, testified: "After we got the thing ironed out with the Frushes, Mrs. Brown asked us to go with her over to the Volzes and talk to them. * * * Now, I heard it stated here that the joint tenancy deed was given in return for her signing the note. That is not true. Mrs. Volz [defendant] asked quite a lot about liability and so forth * * * about what it meant to go on paper, and I said of course the object of a co-signer on a note was to make the seller feel safe if payments were not made by one party, because then the other party could do it, and I did state quite clearly there would be no deficiency judgment if she did not make the payments. * * * I did not point out to Mrs. Volz in the discussion of any risk she might run. I said that the object of signing as a co-signer was while she didn't have to make the payments the object behind it was that the co-signer could make the payments. * * * Well, you have no idea how close that relationship was there. It was just like a mother and daughter trying to get together to help on the matter of her getting that place. And I said to Mrs. Volz being in the joint tenancy deed supposed Mrs. Brown got ill, I didn't think Mrs. Volz would be willing to see her lose the home because of the close relationship there, and suppose she had to make the payments over a period of time, by being in the joint tenancy deed she would be protected so she could put in a claim for anything she advanced. * * * So the joint tenancy deed was for the purpose of protecting Mrs. Volz in case she did make payments. * * *

"The Court: What was your statement to Mrs. Brown and Mrs. Volz as to the nature of her signing, that she was to be a co-maker or what? A. Well, I signed her on a note. I explained to her that the loan company or anyone wouldn't want to make a loan of that size on that priced property to an elderly lady with that limited income without having a younger person sign the note with her. I think that was the words I used, 'Sign the note with her'."

The plaintiff testified:

"Q. * * * when did you first learn that through a joint tenancy the survivor took the whole property? A. Well, I don't know when that came to my attention, but I will go back and say this, when Jeanette went on there there was nothing serious to me about it. It was only a matter of a friendly deed is all, that she would do it in order to help me get a home. * * *

"Q. * * * Did Jeanette Volz or anyone else prior to the execution of these instructions at the bank, tell you Jeanette Volz would have one-half interest to the property if you signed such instructions? A. Well, I believe so, but it didn't mean anything to me, only that Jeanette was doing a kind act to me.

"The Court: What was the kind act that she was doing? A. Putting her name on that paper so I would be in a position to buy a home. You heard it stated, you know, that I was along in years and didn't have sufficient financial backing, and anyone would think it was a safer bet if they had somebody else on. * * *

"The Court: * * * did you have any intention of making a gift of anything to Miss Volz at the time you took the deed in the two names? Did you intend to give her an interest in the property at that time? A. No, it never occurred to me, nothing like that."

Miss Peterson, the real estate saleswoman, in answer to a question by the Court as to whether it was explained to defendant "that she was doing this as an accommodation", replied, "It was understood it was an accommodation, and that was all. There was no promises of any kind. It was a friendly, almost a mother and daughter relation." She further testified:

"Q. Do you know the customs of loan companies and lenders as to accommodation parties? A. Yes, I know more about them now, though, than I did at that time.

"Q. It is not necessary for an accommodation signer to be on the deed as a joint tenant, is that not correct. A. That is something I didn't understand at that time.

"The Court: That is true, however. A. I believe it is.

"The Court: You have found that out, have you? A. I have found that out, yes.

"Q. But you believed that to be true. A. I believed it to be true at that time."

Mrs. Gott further testified:

"Q. Do you know what the custom of building and loan companies is as to accommodations? A. Well, the building and loan companies requires a younger person to sign on the trust deed and note, both.

"Q. They require a separate guarantee by the younger person, do they not? A. Well, no, it is right along on the trust deed and the note.

"Q. Do they require that they become one of the purchasers, too? A. No, it is not necessary for a person who signs a note and a trust deed to appear in the deed as a joint tenant.

"Q. Then why was it you asked that to be done here? A. Well, I don't recall I did the asking. It was a general conversation that Miss Volz might have to make some payments on it, and it is understood by the parties that in case she did have to make payments and there was a transfer of moneys she could put in a claim for any moneys that she might have paid in the event there was a transfer.

"Q. Was that said by you? A. I don't remember who said what, but Miss Volz asked a lot of questions. Naturally, she wanted to know all about it, and I tried to look into every angle and make it safe for everybody concerned. * * *

"Q. In your conversation with Miss Volz did you say to her that the purpose of putting her name on this joint tenancy deed was to protect her in the future should she be required to make some payments, and, in that event, would protect her on any payment that she might have made? A. I believe so. That was the whole gist of it."

Defendant testified that it was understood at all times that she was not to have any "present" interest in the property; "It was always my impression that she [plaintiff] was to have it and live in it, and at her death it would be mine. Q. But until her death you would have no interest in it? A. That is right."

[2] Under the facts, it is clear that the sole purpose and intent of the defendant in signing the promissory note and trust deed was the loan of her name and credit to make the transaction acceptable to the sellers. She wanted to help put the deal over, not by paying any portion of the purchase price of the property, or any expenses incurred or to be incurred therewith, or by making the monthly payments on the note, all of which were to be paid by plaintiff, but by merely lending her name and credit to that of plaintiff. For this act alone she received no consideration whatsoever. Civil Code, section 1605, defines "consideration" as follows: "Any benefit confer-

red, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor * * *." No detriment was suffered by defendant. The note represented the balance due on the purchase price of the property. It was secured by a deed of trust on the property. In the event of a default in the payment of any installment due, the sole remedy of the holder would be to foreclose the deed of trust. No deficiency judgment could be rendered against defendant after a sale under the purchase money deed of trust. Code Civ.Proc. secs. 580a, 580d; see, Stockton Savings & Loan Bank v. Massanet, 18 Cal.2d 200, 202, 206, 114 P.2d 592.

[3-5] As between the parties, the status of defendant on the note was that of an accommodation maker. An accommodation party is one who signs an instrument as maker, drawer, acceptor or indorser, without receiving value therefor and for the purpose of lending his name to some other person. Civ.Code, sec. 3110. Parol evidence is admissible to show that the maker of a note is, in fact, an accommodation maker, Seth v. Lew Hing, 125 Cal. App. 729, 736, 14 P.2d 537, 15 P.2d 190; and the evidence is limited to those cases in which there was no consideration passing, for otherwise the maker could not be an accommodation maker under the statute. A loan of credit is the universal test of the character of accommodation paper. Gardiner v. Holcomb, 82 Cal.App. 342, 353, 255 P. 523. The fact that an accommodation party has taken security for the loan of his credit does not prevent him from being an accommodation party, "for in order to constitute a valid consideration, the accommodation party must receive something else than the mere chance of not losing if he be called on to pay the instrument." 11 C.J.S., Bills and Notes, § 742, subd. c., page 298.

The only reason defendant's name was added on the joint tenancy deed with that of plaintiff was to secure her against any liability the parties thought she might incur by signing the promissory note and deed of trust. No "present" interest was given to defendant by the transfer. Plaintiff did not intend that she should have any interest in the property during her lifetime, other than by way of security, and defendant testified that she did not expect any. That this was the understanding between the parties is also evidenced by their conduct. Plaintiff made the down payment on the property, paid all fees and expenses, made all payments due under the note, collected all rentals, and has retained sole and exclusive possession. Defendant has never contributed any payments on the property nor has she in anywise exercised or attempted to exercise any dominion over it.

It is likewise evident that all the parties misapprehended both the facts and the law. There was no necessity for placing defendant's name on the deed from the sellers, and it is clear that loan companies did not customarily require that such action be taken. Where the parties have misapprehended both the facts and the law, equity gives relief. Civ.Code, secs. 1577, 1578; Rued v. Cooper, 119 Cal. 463, 51 P. 704; Hannah v. Steinman, 159 Cal. 142, 112 P. 1094; Spear v. Farwell, 5 Cal.App.2d 111, 42 P.2d 391. In the last cited case, evidence was held properly admitted showing that a joint tenancy contract with respect to a bank account was entered into under a mistake of law. The court said, 5 Cal.App.2d at page 113, 42 P.2d at page 392: "Our Civil Code defines a mistake of law as 'a misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law.' Civ.Code, § 1578. The evidence in this case shows a contract entered into by each of the parties under the same misapprehension as to the law. They were entitled to be relieved from the effects of such a contract."

[6] The court properly concluded that the defendant held record title to the property as a joint tenant with the plaintiff "in trust" for the plaintiff, for "one who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit

of the person who would otherwise have had it." Civ.Code, sec. 2224.

The correctness of the ruling of the court in not permitting defendant to amend her answer to set up the statute of frauds and a gift need not be noticed for in view of the foregoing the amendment was immaterial.

Judgment affirmed.

SHINN, P. J., and WOOD, J., concur.

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90 Cal.App.2d 785

ELLENBERGER v. WARREN, Governor, et al.

No. 14046.

District Court of Appeal, First District, Division 1, California.
March 23, 1949.

Rehearing Denied April 22, 1949.

1. Mandamus 🔑154(7)

In mandamus proceeding, allegations of petition that defendant Governor, while district attorney, failed to advise widow and to investigate her charges of conspiracy to defraud her of pension, and that while Governor he failed to compel district attorney's office to bring to justice those allegedly guilty of conspiracy or to investigate the conspiracy himself, failed to state any cause of action against the Governor.

2. Mandamus 🔑154(7)

In mandamus proceeding, allegations that former district attorney and district attorney failed to obtain a pension for widow and prosecute those who allegedly conspired against her, and to change county records to show that death of police officer resulted from industrial injury, failed to state a cause of action against them or against county.

3. Mandamus 🔑154(7)

In mandamus proceeding, allegations that former grand jury foremen did not give widow a full hearing before the grand jury with respect to alleged conspiracy to deprive her of pension failed to state a cause of action against them.

4. Conspiracy 🔑18
Fraud 🔑43

In mandamus proceeding by widow of police officer to compel payment of pension to her and to recover damages for alleged fraud and negligence in depriving her of pension, allegations that physician performed a spinal puncture on officer and discovered or should have discovered a meningitis condition, which she failed to report, and that she conspired with doctors to protect themselves by wrongful medical practice, and that she improperly performed an autopsy, and made false autopsy reports, failed to state a cause of action for fraud and conspiracy.

5. Judgment 🔑713(3)

Judgment denying relief to widow of police officer in mandamus proceeding to compel Board of Trustees of Police Relief and Pension Fund of city to grant her a pension was res judicata with respect to city and its officers in subsequent mandamus proceeding by widow to compel payment of pension and to recover damages for alleged fraud and negligence in depriving her of pension.

6. Mandamus 🔑154(7)

In mandamus proceeding by widow of police officer to compel payment of pension to her and to recover damages for alleged fraud and negligence in depriving her of pension, allegations that city manager refused proper investigation of records pertaining to officer and that he and member of Board of Trustees of Pension Fund failed to file true records concerning cause of officer's death, that captain of inspectors denied requests for investigations and enforcement made by widow and refused to produce certain police records, and that attorneys concealed truth at pension board hearings, alleged no actionable cause against any of such persons.

7. Appeal and error 🔑419(1)

Notice of appeal was not defective because it stated that judgment was of record in Liber 326, at page 970, whereas judgment was entered in Liber 326, at page 971, since variance was immaterial.

8. Appeal and error ⚿102

Order sustaining demurrers to petition was not appealable.

9. Attorney and client ⚿129(2)

In mandamus proceeding by widow of police officer to compel payment of pension to her and to recover damages for alleged fraud and negligence in depriving her of pension, allegations that attorneys who represented widow before pension board had failed to protect widow's interests and had obstructed justice stated no cause of action against attorneys.

10. Limitation of actions ⚿100(1)

Alleged cause of action of widow of police officer for damages for alleged fraud of defendants in depriving her of pension was barred by either three or four year limitation statutes, where petition was filed on June 17, 1948, and widow alleged that she discovered the alleged fraud on March 29, 1944, and petition showed that all facts were known to her on such date. Code Civ.Proc. §§ 338, subd. 4, 343.

◆

Appeal from Superior Court, Alameda County; James R. Agee, Judge.

Mandamus proceeding by Annie Ellenberger against Governor Earl Warren, Chief Executive Officer of the State of California, and others, to compel defendants to pay petitioner a pension and general damages, and to have records corrected to show true cause of the death of petitioner's husband. From a judgment for the defendants, the petitioner appeals.

Judgment affirmed.

Annie Ellenberger, of Hayward, in pro. per.

Fred N. Howser, Atty. Gen., Leonard M. Friedman, Deputy Atty. Gen., and J. F. Coakley, Dist. Atty., R. Robert Hunter, Asst. Dist. Atty., John W. Collier, City Atty., Archer Bowden, Asst. City Atty., and J. Paul St. Sure, all of Oakland, Edward Moore, of Red Bluff, Robert L. Lamb and Robert A. Haughwout, both of San Francisco, and Richard H. Klippert, of Oakland, for respondents.

BRAY, Justice.

Appeal by petitioner from a judgment in favor of all defendants after order sustaining their demurrers to petitioner's petition without leave to amend. The petition was filed and the appeal brought by petitioner in propria persona.

On June 17, 1948, petitioner filed in the trial court a "Petition for Writ of Mandate, Petition to Clear the Records, Conspiracy to Violate Civil Rights, Damages," against Governor Earl Warren and a large group of defendants. (Their names will be given later when we consider the allegations concerning them.) All defendants demurred to the petition, both generally and by setting up various sections of the statutes of limitation. The court sustained these demurrers without leave to amend. The action arises out of the extended efforts of petitioner, the widow of a former police officer of the city of Oakland, to obtain a pension of half of her deceased husband's salary. He was injured on January 6, 1932, and died July 28, 1939. In October, 1940, the Board of Trustees of the Police Relief and Pension Fund denied petitioner's claim for a widow's pension, based on their finding that her husband's injury was not incurred in the line of duty. In April, 1942, petitioner petitioned for a writ of mandate to compel the board to grant her a pension. This petition was denied by the superior court and its action affirmed by this court in June of 1943. Ellenberger v. City of Oakland, 59 Cal.App.2d 337, 139 P.2d 67. In November, 1946, this court denied a "motion to set aside the judgment on the grounds of error, fraud or mistake." Ellenberger v. City of Oakland, 76 Cal.App.2d 828, 174 P.2d 461, 462, hearing by Supreme Court denied. A comparison of those cases with ours shows that every main contention made here was considered there.

The 67 page petition is inexpertly drawn, charges fraud in general terms, and in many respects is vague and indefinite, both as to the legal grounds upon which it is brought and the remedy sought against some of the defendants. We have diligently considered all of the contentions made by petitioner, as we have been able to understand them, and find that no cause of action has been stated against any defendant, and that had any cause of action existed, it would be barred by the statutes of limitation. Some of the charges made apply to an individual defendant alone, while other charges apply to a group. The prayer of the petition asks for a writ of mandate directed to all defendants commanding them to pay petitioner "her pension" from July 28, 1939, on, and $100,000 general damages for "the harm, fraudulent deceit, infringement, negligence and the lack of law enforcement to the protection of plaintiff and family from January 6, 1932, to the present date." In addition, petitioner asks that the death records of the city of Oakland be corrected to show the alleged true cause of the husband's death.

Generally, the petition attempts to allege a conspiracy among the defendant officials of Alameda County and the city of Oakland, and the other defendants, to deprive petitioner of the pension which she claims should have been paid her from 1939 on, and their refusal to "correct" the records as petitioner requests. It alleges in great detail the circumstances of her husband's fall while on duty in 1932 as a police officer; the history of his illness from then on, until his death in 1939; his claimed neglect by the doctors who treated him, including the doctors who are defendants in this case, and also by the city of Oakland and some of its officials; the alleged violation of his civil rights; claimed changes in certain medical reports made during that period; claimed conflicting, false and fraudulent reports of the medical men; proceedings before the Oakland City Council to obtain disability allowances during her husband's lifetime; his claimed fraudulent removal from his home in Hayward to Providence Hospital for a brain operation which was never performed; the claimed mutilation of his body after death; the refusal of the legal departments of Oakland and Alameda County and the police department of Oakland to investigate petitioner's charges; a proceeding brought by petitioner in the Industrial Accident Commission for a death benefit and its claimed refusal to allow witnesses to testify for her and its alleged denial of her claim; proceedings before the Oakland pension board, where she was represented by attorneys selected for her by defendant Moorehead, secretary of the Heath Club, which attorneys she claimed conspired to obstruct justice and did not properly represent her; the proceedings in the superior court and in this court before mentioned, where petitioner claims she was illegally refused justice; petitioner's appearance in June, 1944, before the Alameda County grand jury which refused to hear her witnesses, and another appearance in 1947 where again her witnesses were refused admittance to the hearing; the fact that although defendant Simpson, former foreman of the grand jury, claimed the case had been presented to the grand jury, there is no record of it in the county clerk's office, "and the hearings seem to be dishonest;" "That because the County of Alameda and the City of Oakland have employed officials and medical experts who have failed in their duty and conspired to violate the civil rights of plaintiff's family, plaintiff has suffered the loss and comfort of her husband, the widow's pension if the case was industrial, and suffered damage by anxiety, embarrassment and humiliation, that would not have occurred if the laws had been enforced by the defendants to protect the plaintiff from the illegal acts of officials and medical experts herein named. That the failure of the said Heath Club Secretary William Moorehead and Attorney Wade Snook to protect her legal interests before the statute of limitations had expired obstructed justice. * * * That your petitioner has demanded correction of the records that are now in conflict and requested records that would show the right of the City of Oakland to seize George Ellenberger, claim responsibility for an industrial injury said City claims occurred on January 6, 1932, but which they now claim was not industrial and are supported in this by the Courts."

We will now pass to the charges made against particular defendants in addition to the general charges above set forth.

Governor Earl Warren.

[1] It is difficult to determine just what cause of action is attempted to be alleged

against defendant Warren. He is charged with having been a coworker while district attorney of Alameda County with his successor district attorneys, defendants Hoyt and Coakley, with having in 1937 granted permission for the alleged fraudulent removal of her husband from his home, with having as district attorney and later as attorney general failed to advise petitioner and to investigate her charges of conspiracy to defraud, and as Governor failing to compel the Alameda County district attorney's office to bring to justice those guilty of conspiracy or to investigate the conspiracy himself, and "has seen fit to aid and abet the wrongful acts of District Attorney Ralph Hoyt by appointing him to a Judgeship while Ralph Hoyt was being investigated by the Alameda County Grand Jury for his failure to do his duty. That Attorney Charles Wade Snook was also under investigation by the Grand Jury just prior to his appointment as a Judge of the Superior Court of Alameda County by Governor Earl Warren. Both men had been involved in this case. That because of the wrongful use of political power plaintiff has suffered damages," and together with all defendants, Warren had "infringed upon her civil rights." It is also charged that Governor Warren "covered up the fraud by reorganizing the State of California Industrial Accident Commission." It is obvious that petitioner has alleged no duty which this court could compel the Governor to perform, nor is there any way in which the Governor could pay, or require any of the defendants to pay, a pension to petitioner.

Alameda County and Officers.

In addition to the county of Alameda, petitioner joined as defendants the following officers of that county—Alameda County Board of Supervisors, Mark Emerson, M. D., County Coroner, John Reeves, M. D., Frank Coakley, District Attorney, H. L. Simpson, former foreman of the grand jury, Preston Snook, former foreman of the grand jury, Ralph Hoyt, former District Attorney.

The pension to which petitioner claims she is entitled, if payable at all, would not be payable by the county of Alameda or any of the officers thereof. The specific charges against defendants Hoyt and Coakley seem to be for failure to obtain the pension for her, to prosecute those who she claims conspired against her, and to bring about a change in the Alameda County records so as to show that her husband's death resulted from an industrial injury.

[2, 3] Defendants Simpson and Preston Snook as former foremen of the grand jury are charged with not giving her a full hearing before the grand jury and with failure of the grand jury to grant the relief which she expects. Defendant Emerson as coroner apparently is charged with improperly stating the cause of death of petitioner's husband at the inquest held in 1939. The mere statement of the charges made against the county of Alameda and the above named defendants shows that no cause of action is stated.

Gertrude Moore.

[4] An amended complaint was filed against defendant Gertrude Moore. It alleged, in addition to repeating practically all the allegations of the original complaint, that defendant Moore performed a spinal puncture on petitioner's husband in 1932. It is difficult to determine just what petitioner is attempting to allege, but apparently she means to charge that defendant Moore, by this spinal puncture, discovered or should have discovered a meningitis condition, which she failed to report; that defendant Moore conspired with the other doctors to "protect themselves by wrongful medical practice and procedure;" that after the husband's death, his body was mutilated by defendant Moore and the latter took specimens of certain of his organs "not to establish the true cause of death but [in] a desire for the scientific facts that had been of interest to" Dr. Moore and another doctor; that defendant Moore made false pathological and autopsy reports. These acts occurred in 1939. As to the attempted general charges of fraud and conspiracy, no cause of action thereon is stated against defendant Moore.

Defendants City of Oakland and Its Officers.

[5] Included in the general conspiracy charges are the city of Oakland, John Has-

sler, City Manager, Robert Tracy, Chief of Police, John Collier, City Attorney, and the following former members of the Board of Trustees of the Police Relief and Pension Fund: Dr. Wm. McCracken, John E. Slavich, M. D., Harold C. Holmes, Jr., and N. M. Ashley, M. D. Not only is any claim for a pension barred by the statutes of limitation, but the matter has been completely litigated in the two cases of Ellenberger v. City of Oakland, supra, and the decisions in those cases are res judicata.

In addition to the general charges, it is alleged that defendant John Hassler, City Manager, "refused proper investigation of the records pertaining to said George Ellenberger," petitioner's husband, and that while defendant Hassler has been notified that there are seven conflicting records of death, he has taken no action to establish the true records, and has failed to expose those who petitioner claims have violated the law. While defendant Ashley is charged as a member of the Board of Trustees of the Police Relief and Pension Fund, he is also charged as Health Officer with failure to file true records concerning the cause of death of Ellenberger. It is alleged that defendant Tracy, when he was Captain of Inspectors, denied requests for investigations and law enforcement made by petitioner, and as Chief of Police he refused to produce a certain police record; that he knew or should have known of the false records and that the pension board has violated their public trust; that defendants McCracken, Holmes and the then assistant City Attorney, Collier, aided petitioner's own attorney to conceal the truth at the pension board hearings; that assistant City Attorney Collier made a statement to the trial court in the first case of Ellenberger v. City of Oakland which was false.

[6] It is obvious that no actionable cause is alleged against any of the defendants in this group.

Notice of Appeal.

[7, 8] The defendants in this category contend that the notice of appeal is defective. It reads that the appeal is "from the judgment and order sustaining demurrers without leave to amend, made and entered * * * on the 1st day of September, 1948. Said judgment sustaining demurrers is now of record in Liber 326, at page 970, Records of the County Clerk of Alameda County, California." Admittedly the judgment for these defendants is entered in Liber 326, at page 971. As the proper date of making and entry is set forth, we deem this variance immaterial. Likewise the fact that petitioner is attempting to appeal from the order sustaining demurrers (from which there is no appeal) as well as from the judgment, is immaterial.

William Moorehead, Secretary of the Heath Club, and

Charles Wade Snook.

[9] It is alleged that defendant Moorehead employed an attorney to represent petitioner before the pension board; that after six months this attorney refused to present petitioner's case and Attorney Wade Snook was paid by the Heath Club to represent her, but he conspired to obstruct justice, did not properly represent her, and failed to expose the fraud which petitioner claims prevented the pension board from granting her a pension; that later, he declined to represent her in court, as did the Heath Club; that the failure of both defendants Moorehead and Snook to protect petitioner's interests had obstructed justice. Again, no cause of action is stated against these defendants.

[10] If any cause of action for damages for fraud were set up against any of the defendants, and none is, such cause would be barred by section 338, subdivision 4, of the Code of Civil Procedure (or at the latest by section 343, Code of Civil Procedure (4 years), which limits actions for relief on that ground to 3 years from the discovery of the fraud, which discovery petitioner alleges she made on March 29, 1944, more than 4 years prior to filing this action.

In her opening brief petitioner mentions the date "Dec. 17, 1947," as the date of the "accrual" of her cause of action, and the date upon which the statute of limitations would commence to run. Just what this date refers to cannot be determined, as no such date appears in the petition. At argument, petitioner stated this was a clerical error and should have read "1944." It may be, however, that petitioner on December 17, 1947, asked some of the defendants to "protect her civil rights" arising from the death of her husband when "no proper action was taken." But as her petition shows, all of the facts were known to her on March 29, 1944. Moreover, prior to that date she had been importuning the defendants to protect her civil rights and they had refused. At the latest, that date would start the statutes of limitation running.

Petitioner, at oral argument, seemed to be under the erroneous impression that regardless of the date of the occurrence or of its discovery, the statutes of limitation would not begin to run as long as she was contacting various public officials to get them to do what she contends is their duty.

It is apparent that, at best, this petition attempts to set up matters which were completely litigated in the preceding cases, and which are res judicata. The trial court properly sustained the demurrers without leave to amend.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concur.

91 Cal.App. 4

POTTER et al. v. EMPRESS THEATRE CO. et al.

BRADY v. EMPRESS THEATRE CO. et al.

Civ. 7535, 7536.

District Court of Appeal, Third District, California.

March 30, 1949.

Hearing Denied May 26, 1949.

1. Municipal corporations 🔑819(1)

Evidence authorized recovery from theater companies, owner of building which was being remodeled, and construction company for injuries to and death of pedestrians on sidewalk when overhanging theater marquee fell because of loss of support after partial demolition of walls in remodeling.

2. Appeal and error 🔑989

Where question of fact was submitted to jury and was answered by verdict in favor of plaintiffs, the only matter for determination of reviewing court was whether there was sufficient evidence to support that conclusion.

3. Negligence 🔑34, 35

Possessor of land is liable for bodily harm to others outside the land caused by structure or other artificial condition thereon which possessor realizes, or should realize, involves unreasonable risk of harm, if condition is created by possessor or by third person without possessor's consent or acquiescence but reasonable care is not taken to make the condition safer after possessor knows or should know of it.

4. Death 🔑99(4)

$40,000 for death of 42-year-old housewife, who also earned about $3,250 annually and assisted husband in business, was not excessive. Code Civ.Proc. § 377.

5. Damages 🔑132(2)

$30,000 to 46-year-old truck driver, who had been earning $50 a week, for injuries causing possibly permanent nervous difficulties, loss of hearing and sense of smell, and disability of arm, was not excessive.

◆

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Separate actions, consolidated for trial, by Joseph Brady, and by Raymond Potter and others, against Empress Theatre Company and others, for personal injuries and for death, respectively, resulting from fall of marquee overhanging sidewalk. From a judgment for plaintiffs and an order denying defendants' motion for judgment notwithstanding verdict, defendants appeal.

Affirmed.

Gerald M. Desmond, Jerome M. McLaughlin, Johnson, Ware & Davies and William A. Sitton, all of Sacramento, for appellants.

Albert E. Sheets and Carl Kuchman, both of Sacramento, for respondents.

ADAMS, Presiding Justice.

This is an appeal from a judgment in two cases which were filed separately, but consolidated for trial. The one action was brought by Joseph Brady for personal injuries sustained by him when the marquee overhanging the public sidewalk in front of the Hippodrome Theater on K Street between 10th and 11th Streets in Sacramento fell upon him. The other action was brought by J. D. Wood, Mrs. J. D. Wood, his wife, and Raymond Potter, as heirs of Shirley Potter who was killed in the same accident. Defendants named in both actions were the Empress Theatre Company, a corporation, the Sacramento Hippodrome Theatre Company, Inc., a corporation, West Coast Theatres, Inc. of Northern California, a corporation, Fox West Coast Theatres Corporation, a corporation, Physicians Building Company, a corporation, and Sidney Osborn Mackey, William Alden Campbell and John Liddicoat, copartners doing business as Campbell Construction Company. Nonsuits were granted as to defendant West Coast Theatres Inc. of Northern California, but verdicts for plaintiffs were returned against the other defendants all of whom have appealed.

The evidence shows, without serious dispute, that on June 17, 1912, the Physicians Building Company owned lots 8 and 7 situated on the north side of K Street, lot 8 being situated on the northeast corner of K Street and 10th Street, and lot 7 adjoining lot 8, on the east side thereof. On that date the Physicians Building Company leased lot 7 to defendant Empress Theatre Company. Said lease was thereafter extended, same still being in effect on September 14, 1946, the date of the accident. Empress Theatre Company had, in the meantime, subleased to various sub-lessees who had improved lot 7 so that, on September 14, 1946, it was occupied by three structures fronting on K Street, consisting of an unoccupied store on the west formerly occupied by the Sutter Candy Store, on the east side by a corset shop, and between the two, the tunnel entrance to the Hippodrome Theater, above which was a tower. Lot 8 was occupied by what was known as the Physicians Building, belonging to defendant Physicians Building Company, a six-story brick building, the east wall of which constituted the west wall of the Sutter Candy Store.

The marquee, which extended across the front of the three structures on lot 7 and out over the sidewalk, was constructed some twenty-five or thirty years before the accident, by tenants under the Empress Theatre Company, with its consent. It was 48 feet long, 10 feet wide, was variously estimated to weigh from 5400 to 6500 pounds, and was about 12 feet above the sidewalk. Above its jointure with one-story candy store building was a brick wall some 5 feet, 4 inches in height which was set upon a lintel composed of two 10 inch eyebeams bound together, the west end of this lintel being supported by a U-shaped steel strap hanger which passed under the eyebeams. The arms of the U-shaped strap hanger extended upward, and the ends thereof, bent at a 90° angle, were encased in the east wall of the Physicians Building where they extended over a concrete spandrel beam in that building, which beam was situated at the top of the first story thereof, the bent ends of the strap hanger being held in place by the weight of the brick wall of the Physicians Building, which extended five stories above them. The outer edge of the marquee was supported by four chains, equally spaced. The one on the west end was attached at one end to the outer corner of the marquee, and at the other it was fastened to the wall of the Physicians Building by means of steel straps attached to the wall by a bolt passing through it, and an expansion bolt which passed partially through the wall. The other three chains were attached to the outer edge of the marquee and to the wall back of it.

On February 15, 1946, the Physicians Building Company, owner of the Physicians Building, desiring to remodel same to make it into a store building, entered into a contract with defendant Campbell Construction Company to tear out the offices therein. This demolition work was started in February, 1946, but on June 27th the plans were changed, and the construction company was authorized to demolish the exterior brick walls down to a spandrel beam located at approximately the top of the first or ground floor, and to replace the brick walls above that level with reinforced concrete.

Demolition of these brick walls was completed on August 12, 1946, and the bricks removed down to the spandrel beam upon which they had rested, and below the point where the chain supporting the west end of the marquee was attached. This chain had been thrown down upon the top of the marquee which was thus deprived of the support which it had derived therefrom. Also, the ends of the U-shaped strap hanger where they had extended over the spandrel beam had not only been deprived of the weight of the brick wall which had held them in place, but one of such ends had been left entirely in the air by reason of the chipping off of the portion of the beam upon which it had rested.

During the 32 days which elapsed between the conclusion of the demolition work and the date of the accident the eyebeams sustaining the wall above the portion thereof in front of the candy store had rotated slightly, and the west end of the marquee had sagged to some extent. The result was that on September 14th a portion of the brick wall above the west end of the marquee, weighing about 5000 pounds, fell outward upon the marquee, the three chains which then furnished its sole support were broken, and the outer edge of the marquee fell like a trap door upon Mr. Brady and Mrs. Potter, pedestrians on the sidewalk beneath it.

On this appeal all of the theater companies join in one brief; and they concede that if the judgment is affirmed it shall be affirmed as to all of them, a stipulation to the same effect having been entered into in the trial court. They contend, however, that they are not liable, and that the responsibility should rest upon the construction company. The latter company has joined the Physicians Building Company in one brief, but no real defense is therein made in behalf of the construction company.

[1] We think that their liability is amply shown by the evidence, and no further consideration need be given to their appeal.

As for the liability of the Physicians Building Company, as owner of lot 8 and the building under reconstruction, it is argued that it is not charged as owner of the lot 7, and that as for the work done by the construction company on lot 8, the latter was an independent contractor, and that there is no evidence that the Physicians Building Company was in any way careless or negligent in its selection of the construction company, or that the latter was in any degree incompetent to perform the work for which it was employed under its contract. They quote from 39 C.J. 1324 [57 C.J.S., Master and Servant, § 584], to the effect that as a general rule a contractee is not liable for the acts or omissions of a contractor or his servants, and that the general rule deducible from the decisions and the one now universally recognized is that, where the relation of an independent contract exists, and due diligence has been exercised in selecting a competent contractor, and the thing contracted to be done is not in itself a nuisance, nor will necessarily result in a nuisance if proper precautionary measures are used, and an injury to a third person results, not from the fact that the work is done, but from the wrongful or negligent manner of doing it by a contractor or his servants, the contractee is not liable therefor. They urge that there is no evidence that the Physicians Building Company ever had actual knowledge of the manner in which the west end of the marquee was supported; or that the theater companies had been given the right to so support it by affixing its supports to the wall of the Physicians Building; or that the Physicians Building Company ever assumed the duty of affording support to the end of the marquee; or that any demand was ever made by the theater companies upon the Physicians Building Company to support the end of the marquee, or that, after the demolition work had been done, that company replace the supports removed by the construction company. They also assert that the negligence of the construction company cannot be imputed to the Physicians Building Company since the construction company was an independent contractor.

Respondents reply that regardless of the status of the construction company as an independent contractor, the owner should be held liable for its own negligence in maintaining its premises in a condition of disrepair which was a hazard to persons using the public sidewalk, and that such owner is answerable in damages if it knew of the condition of disrepair, or, in the exercise of reasonable care and prudence it should have known of it in time to take measures against it.

We note that the trial court instructed the jury as follows:

"If in the course of the demolition or construction work upon Lot 8 a condition was created on Lot 8 which made the marquee unsafe for pedestrians upon the public sidewalk, and the defendant Physicians Building Corporation, through its officers, or agents, knew of this condition or by the exercise of ordinary care under the circumstances should have known of it, then it was the duty of defendant Physicians Building Company as the owner and in possession of Lot 8 to take such precautions for the safety of pedestrians upon the public sidewalk as an ordinarily prudent person would do under the circumstances."

Also:

"Notwithstanding the relationship of independent contractor which existed between the defendant Campbell Construction Company and the defendant Physicians Building Company, if the defendant Physicians Building Company ordered or directed the defendant Campbell Construction Company to do any act which the defendant Physicians Building Company knew, or by the exercise of ordinary care under the circumstances should have known, involved an unreasonable risk of harm to pedestrians upon the public sidewalk, and thereafter defendant Campbell Construction Company carried out such order or direction, and as a proximate result thereof the plaintiff Joseph Brady was injured and Mrs. Shirley Potter, the deceased, was killed, then in that event the defendant Physicians Building Company and the defendant Campbell Construction Company are equally liable for the damages, if any, proximately resulting therefrom."

No exception was taken to those instructions, nor, on this appeal are any of the instructions assailed as erroneous.

[2] Under the foregoing instructions and the evidence the jury were justified in holding the owner of the Physicians Building liable if they found that it knew, or by the exercise of ordinary care under the circumstances should have known, of the condition created by the construction company which resulted in the accident. Thus a question of fact was submitted to the jury for its determination, and by the verdict it answered it in favor of plaintiffs. The only matter then left for the determination of this court is whether there is sufficient evidence to support that conclusion. We cannot say that it does not find support. The record shows that the owner employed an architect, Harry J. Devine, to exercise supervision over the work of the construction company, and, by the contract with that company, Devine was to prepare the plans and specifications for the remodeled building, the construction company was to be guided by and follow the instructions of the architect, and the latter was at liberty at any time to order any extra work or make any changes, and the entire work was subject to inspection and approval by the owner. This architect was not called as a witness, and the only testimony in behalf of the owner was that of its secretary, A. I. Diepenbrock, who observed the progress of the work only as he walked by from time to time.

George E. Goodall, a qualified structural engineer, testified that he examined the marquee shortly after it fell, and thereafter. He described the marquee and the manner in which it was constructed and sustained, the conditions after the brick walls of the Physicians Building had been removed, and he also testified that from a picture taken after such removal, and three days before the accident, he could definitely tell that the brick parapet above the candy store was about to fall because of the removal of support of the U-shaped strap hanger, which had caused it to tip forward. He stated that during the 32 days preceding the fall of the marquee the results which followed the removal of the wall of the Physicians Building would have been plainly visible to anyone who had looked; and that four timber shores would have completely prevented the collapse of the marquee. It may, then, have been concluded by the jury that the architect employed by the owner of the building must have, or, at least, should have seen the inevitable result of the removal of the support of the west end of the marquee and the support of eyebeams which supported the brick wall above the front of the candy store.

Respondents also urge that the Physicians Building Company is chargeable with negligence because its contract with the construction company contained no provision requiring precautions, citing sections 413 and 416 of Restatement of the Law of Torts, pp. 1118, 1130, to the effect that one who employs an independent contractor to do work which he should recognize as necessarily creating conditions containing an unreasonable risk of harm to others unless special precautions are taken, is subject to liability if he fails to provide in his contract that the contractor shall take such precautions, or fails to exercise reasonable care to provide in some other manner for the taking of such precautions. (Referring to Comment, on page 1119, for a comparable situation.)

While the evidence is not strong upon the liability of the Physicians Building Company, we cannot say that there was no evidence, nor any inferences to be drawn from evidence, to uphold the verdict of the jury. That company and the theater companies made motions for judgments notwithstanding the verdicts, which motions the trial court denied, this evidencing its opinion that there was evidence sufficient to sustain the conclusions of the jury.

As for the liability of the theater companies, they make no complaint about the instructions given, one of which was:

"Where a part of a building is leased the lease carries with it, as an incident thereto, everything then in use for the part of the building leased, and thereafter the tenant in possession and control of the part of the building and what passed to him as an incident of the lease has a duty to exercise ordinary care to keep the same in safe condition for pedestrians upon the adjacent public sidewalk.

"The duty to use ordinary care to maintain the marquee in a safe condition for pedestrians upon the public sidewalk was an affirmative duty. It required the party or parties defendant, upon whom it rested if any to inspect the marquee and its supports, to ascertain their condition as often as an ordinarily prudent person would do under the circumstances, and to make such repairs or take such precautions as an ordinarily prudent person would do under the circumstances to keep the marquee in a safe condition for pedestrians upon the public sidewalk."

The evidence is ample to justify the implication of the jury's verdict that the theater companies did not use ordinary care to maintain the marquee in a safe condition, and that they knew, or in the exercise of reasonable care should have known, that the support for the marquee had been impaired as had the support of the brick wall above the candy store; yet they did nothing at any time to protect the structures which they, themselves, had erected and were charged with maintaining. They are chargeable with knowledge as to how the U-shaped strap hangers and the westerly chain were affixed to the Physicians Building, and must have known of the removal of the wall holding the strap hangers in place, and that such removal would release them; and during the 32 days that elapsed after they were released and before the accident, these appellants apparently made no effort to ascertain the conditions created, or to remedy them. Section 364 of the Restatement of the Law of Torts is applicable. There it is stated:

[3] "A possessor of land is subject to liability for bodily harm caused to others outside the land by a structure or other artificial condition thereon, which the possessor realizes or should realize as involving an unreasonable risk of such harm, if

"(a) the possessor has created the condition, or

* * * * * *

"(c) the condition is created by a third person without the possessor's consent or acquiescence, but reasonable care is not taken to make the condition safe after the possessor knows or should know of it."

Mr. Lyons, president and general manager of Empress Theatre Company, testified that he made inspections of the premises ten or twelve times a year; and his testimony shows that he knew of the demolition work being done on the Physicians Building, and he knew that the marquee was anchored in the wall of that building, but never inspected it. Mr. Wasserman, manager of several theaters, including the Hippodrome, admitted that he had observed the demolition of the Physicians Building from the start; that he had never inspected the marquee to ascertain its safety. Mr. Enwald, manager of the Hippodrome at the time of the accident, stated his only outside inspection had been as to lights, but admitted that several times he had been on top of the marquee to hang a banner which was flown from near the top of the tower, its lower ends being attached to the chains which supported the marquee. He knew of the demolition of the Physicians Building and should have observed that the west end chain was down and lying on the marquee after it had been thrown there by the construction company; and had he looked up he would have seen the ends of the strap hanger deprived of their support. Obviously, then, the theater companies, if they did not actually know of the dangerous condition that obtained for the 32 days prior to the accident, are chargeable with constructive knowledge, and with failure to exercise reasonable care.

The construction company, as appellant, urges finally that the awards of damages are excessive. The record shows that the jury returned a verdict awarding $50,000 to plaintiffs Potter et al., and $50,000 to plaintiff Brady. However, on motions for a new trial, the former was reduced to $40,000 and the latter to $30,000, and plaintiffs accepted the reductions.

Regarding the award as applicable to Mr. and Mrs. Wood, the parents of decedent, appellants say that there was no evidence that they were dependent upon their daughter, or ever had been or ever would be; and that the probabilities are that Mr. Potter, the surviving husband, will remarry; that under section 377 of the Code of Civil Procedure those plaintiffs are entitled to recover only for the *pecuniary* loss sustained by them, which could not amount to $40,000.

Respondents reply by pointing out the present devalued condition of the dollar, citing Kircher v. Atchison, T. & S. F. Ry. Co., 32 Cal. 2d 176, 187, 195 P.2d 427, in which a verdict for personal injuries amounting to $60,000 was sustained; and Brown v. Boehm, 78 Cal.App.2d 595, 603, 178 P.2d 49, in which an award of $25,000 to the surviving widow and five adult children of a decedent was affirmed. Those cases also hold that the allowance of damages is primarily a factual matter, and even where an award may seem large to a reviewing court, it will not interfere unless the allowance is so grossly disproportionate to a sum reasonably warranted by the facts as to shock the sense of justice and raise a presumption that it was the result of passion and prejudice. Also, it is pointed out in the latter case that the remedy for excessive verdicts is practically committed to the judge who presides at the trial, and numerous decisions to that effect are cited. Also see Holder v. Key System, 88 Cal.App.2d 925, 200 P.2d 98 (hearing in Supreme Court denied), and Buswell v. City and County of San Francisco, 89 Cal.App.2d 123, 200 P.2d 115, (hearing in Supreme Court denied).

[4] The evidence shows that Mrs. Potter, who was about 42 years old, was highly accomplished, earned about $3250 each year by her various activities, and besides doing her own housework, actively assisted her husband, aged 43 years, in his business affairs, kept his books, and helped him to design houses which he was building. They had been married 18 years. Apparently the relation between decedent and plaintiffs was a close and affectionate one.

[5] As for the award to respondent Brady, while the evidence was conflicting as to whether his injuries were of a permanent nature, there can be no question that they were severe; and there was medical testimony that because of injury to his brain there was "a good possibility" that convulsions and epilepsy might develop later. Compare Cordiner v. Los Angeles Traction Co., 5 Cal.App. 400, 91 P. 436; Oliveira v. Warren, 24 Cal.App.2d 712, 715, 76 P.2d

113; Ostertag v. Bethlehem, etc., Corp., 65 Cal.App.2d 795, 807, 151 P.2d 647, and Bauman v. San Francisco, 42 Cal.App.2d 144, 163–165, 108 P.2d 989. Brady was 46 years old, earned $50 net a week, and had a wife and one child of his own, while his wife had three children from a former marriage. There is testimony that his health had been good before the accident and he had been able to do heavy work as a truck driver employed by the Pacific Transfer Company, which work he is now unable to perform. He has grinding pains in his head, staggers when walking, cannot concentrate, has lost his hearing in his right ear and his sense of smell, and his left arm (he is left-handed) is practically useless.

As for both awards, reduced as they were by the able trial judge who tried the cases, we are not convinced that they are excessive in view of the evidence, particularly since the trial judge who saw the witnesses and heard their testimony has concluded what they should be. We cannot say that they are so grossly disproportionate to sums reasonably warranted by the facts as to shock the sense of justice and raise a presumption that they are the result of passion and prejudice.

The judgment for the reduced amounts are affirmed, as is the order denying the motion of the theater companies for judgment notwithstanding the verdict.

PEEK and THOMPSON, JJ., concur.

WEST KEY NUMBER SYSTEM

91 Cal.App.2d 101

FREDERICK v. FOX.

Civ. No. 3761.

District Court of Appeal, Fourth District, California.

April 4, 1949.

1. Specific performance 🔑121(9, 11)

In action for specific performance of a contract to convey a lot, evidence was insufficient to support a finding for defendant that original purchasers had orally agreed to erect a building and operate a cleaning establishment thereon and had breached such agreement, and was insufficient to support finding that plaintiff, who purchased from original purchasers, had knowledge of such oral agreement.

2. Specific performance 🔑64
Vendor and purchaser 🔑83

Regardless of any oral agreement, existing between vendor and original purchaser at time of issuance of first receipt for down payment, on price of a lot, concerning erection of a building on lot, such agreement was replaced by subsequent unqualified written agreement for a deed upon specific terms, which was issued to enable original purchasers to make a transfer of their equity, and grantees of original purchasers were entitled to specific performance of such agreement for deed according to its terms.

3. Evidence 🔑448

Where parties entered into a written contract to convey a particular lot upon specific and unambiguous terms, oral evidence was not admissible to change terms of contract.

◆

Appeal from Superior Court, Kern County; Warren L. Stockton, Judge.

Action by Helene N. Frederick against Joe Fox for specific performance of a contract to sell a lot. Judgment for defendant and plaintiff appeals.

Reversed.

Frederick E. Hoar, of Bakersfield, for appellant.

William Crum, of Hollywood, for respondent.

BARNARD, Presiding Justice.

The defendant subdivided a tract of land near a naval base and not far from the eastern boundary of Kern County. In the fall of 1944, he was selling lots in this subdivision although a map had not yet been accepted or filed and much of the street and other required work had not been done. On October 1, 1944, he sold a lot to Wm. W. Johnson, giving him receipt No. 8502, which reads:

"Oct 1st 1944 8502
Received from Wm. W. Johnson
* * * Twenty five * * * Dollars
1st pmt on lease on Lot 1 Blk
H. Kern Sub Div. 1234
How Paid Balance due
$25/00 check 75/00 Joe Fox"

A month later, he gave Johnson a new receipt, numbered 8535, which reads:

"Replacing 8502
Oct 1 1944 8535
Received from Wm. W. Johnson
* * * Twenty five * * * Dollars
1st pmt on Lot No. 12 Blk H.
to be deeded upon map acceptance
How paid Balance due
$25/00 cash 75/00 Joe Fox"

Lot 1 and Lot 12 in Block H are adjoining, Lot 1 being to the north of Lot 12. A map was accepted and filed in January, 1945. The Johnsons moved two cabins onto Lot 12 early in January and for some eight months lived there with their five children. In September, 1945, Mrs. Johnson, who handled the business for her husband, informed the defendant that they were leaving and requested a paper to show that they had a right to transfer their equity in the property. The defendant signed and gave her a paper, which reads:

"I will transfer Lot Equities upon endorsement of receipt of lot payments.
"Joe Fox
"9/7/45"

On the same day Johnson sold the two cabins which were on Lot 12 to the plaintiff and, when they were paid for, endorsed receipt No. 8535, transferring his equity to Mrs. Frederick. Mrs. Frederick moved in and was still living on the property at the time of the trial. The defendant, who lived seven blocks from Lot 12, did not infrom either Johnson or Mrs. Frederick that a map had been accepted and filed, and did not tender a deed. Mrs. Frederick made several unsuccessful efforts to find the defendant at home and when she finally found him in May, 1946, he refused to recognize that she had any interest in the lot. It was first stated that he intended building on the lot himself. Later, he said that the Johnsons had agreed to erect a $2,500 building on the lot and operate a cleaning works and that this agreement had not been kept. About six months later, the defendant brought an action in ejectment in the justice's court. Thereafter, the plaintiff brought this action for specific performance of the agreement to convey Lot 12, offering to pay the balance of $75.

Mrs. Johnson testified that the defendant showed her several lots, including Lots 1 and 12 in Block H, all priced at $100 each; that she told him they had these two cabins and he offered to loan her equipment with which to move them; that she picked Lot 1 because it would be cooler there in the desert, as it faced north; that she paid him $25 and he gave her receipt No. 8502, which she understood was a receipt for the down payment on the purchase price of that lot; that about a month later, she passed Lot 1 and saw that a house was being built on it; that she went to see the defendant and he told her that he had a prior commitment on Lot 1 but would give her Lot 12, which was adjoining; that he then gave her receipt No. 8535 and marked it "Replacing 8502"; that at time she offered him the balance of $75 and requested a deed to Lot 12; that he explained that he could not give a deed because the subdivision was in process of remapping, and put on the receipt " to be deeded upon map acceptance"; that they then moved the cabins onto the property and lived there; and that in September, 1945, she asked the defendant for something in writing to show to Mrs. Frederick that he would accept the transfer of their equity in this lot, and the defendant gave her the writing dated 9/7/45.

The defendant testified that at their first interview Mrs. Johnson told him that on account of her children she just had to have a place to live; that he told her that to get a lot she would have to build on it; that he further told her they needed a laundry or cleaning business in the new town; and that she agreed to build a building costing at least $2,500 and to operate a laundry or cleaning establishment, if he would sell her the lot. He further testified that he then leased the lot to her for $100 a year, "until she showed some evidence of building," and gave her receipt No. 8502;

that a month later Mrs. Johnson told him "she couldn't finance herself with a lease, she would have to have a contract to purchase"; that he told her he couldn't give her a deed until the map was approved, but would give her a contract to purchase if she wanted to use it to finance her building; that he then gave her receipt No. 8535; that in September, 1945, Mrs. Johnson told him they were leaving but had a party who would go through with the deal, and requested a paper to show their right to transfer their equity in the property; that he then gave her the paper dated 9/7/45; and that he knew nothing further in connection with the lot until Mrs. Frederick approached him in May, 1946. He also testified that Lots 1 and 12, as mentioned in the two receipts, referred to the same lot, and that the lot picked out by Mrs. Johnson was renumbered as Lot 12 in the official map when it was filed. It is significant, in this connection, that early in the trial the defendant produced his carbon copy of receipt numbered 8502, which was represented to be a true copy of the original, although it described the lot as Lot 12 in Block H. Mrs. Johnson insisted that her original receipt read Lot 1 in Block H. She later found and produced the original, which was for Lot 1 in Block H. The defendant's explanation of why he altered his copy of this receipt is far from satisfactory. Most of defendant's testimony was received over the objection that it tended to vary the terms of a written contract.

The court found, among other things, that on October 1, 1944, the parties entered into an agreement whereby the defendant leased the property to Johnson for one year for $100, "upon the express understanding" that Johnson would erect a building costing $2,500 in which he would establish and maintain a Dry Cleaning Establishment; that Johnson paid $25 and this agreement was evidenced by receipt No. 8502; that receipt No. 8535 was later given upon the representation that Johnson was unable to finance such a building unless he could show a contract to buy the property rather than a lease; that the paper dated 9/7/45 was given because the Johnsons told the defendant that they were unable to carry out the agreement to build a cleaning establishment, and so they could transfer their equity to some person who would carry out that agreement; that the plaintiff acquired her interest in the property, if any, with full knowledge of the agreement that a cleaning establishment was to be built; and that the plaintiff has refused to carry out this agreement to build such a building. Judgment was entered for the defendant and this appeal followed.

[1] While there is oral evidence to support the finding of an agreement to erect a $2,500 building and operate a cleaning establishment, that finding is not controlling here. Incidentally, it may be observed that such a finding here places an undue strain on the credulity of any one reading the cold record. It hardly seems reasonable that a person looking for a cheap home would agree to erect a $2,500 business building, and pay a rental of $100, in order to get a one-year lease on such a lot. The respondent knew that the Johnsons were looking for a lot upon which to move two shacks so that they could live close to their work at the naval base, he knew they were unable to finance such a building, and according to his own testimony he did not even ask whether they knew how to run a cleaning establishment. He made no objection to the moving of the cabins upon the lot, for living purposes, and he even offered his assistance to that end. While he testified that he was anxious to get a cleaning establishment there as it was needed in the town, he also testified that no limit whatever was specified as to when the building should be erected or the business established. He paid no attention to the matter for nearly two years, and the claimed oral agreement to build such a building was the second excuse offered for failing to complete the transaction. The respondent's action throughout, his insistence that only one lot was ever involved, his reliance on an altered copy of the first receipt, and his belated explanation of why he altered it, are so suggestive that his manner of testifying must have been very convincing to have overcome the adverse effect of his own testimony

Assuming that such an agreement to build a business building existed at the start there is absolutely no evidence in the record which even tends to indicate that this appellant had ever heard of or knew anything about such an agreement. The court's finding that she had full knowledge of this agreement is entirely without support in the evidence.

[2, 3] Further assuming that such an agreement existed at the start, and that oral testimony with respect thereto was admissible insofar as receipt No. 8502 is concerned, a different situation appears in connection with receipt No. 8535. That was not only a receipt, but it constitutes an agreement to convey this lot. There is no ambiguity in its language. The terms are fully stated, $25 paid in cash and a balance of $75. It is specifically stated that the lot is to be deeded upon the acceptance of the map, and this fixes the time for the payment of the balance due. Nothing was said therein about any agreement to build a building, and oral evidence was not admissible to change the terms of the contract as set forth in the instrument. If there ever was an oral agreement for the erection of a building, it was replaced by the subsequent unqualified written agreement for a deed upon specific terms.

Not only was this true with respect to the Johnsons, the original purchasers, but it applies with even greater force to this appellant who was led to purchase the equity in the lot, together with the cabins thereon, by the paper dated 9/7/45 which was admittedly issued by the respondent for the very purpose of enabling the Johnsons to make this transfer, and without in any way referring to or calling the new buyer's attention to any additional oral agreement supposedly entered into as a part of the consideration for the purchase of the lot. Not only was the finding of knowledge on the part of the appellant unsupported, but the main and controlling findings in the case are based entirely upon oral evidence which was inadmissible, and which could not be accepted as varying the terms of the written contract and adding thereto an important element which completely changed that contract. Moreover, it appears without conflict that the appellant was misled into buying the equity without knowledge of any oral agreement. Under well established rules the judgment should be reversed, and it would serve no useful purpose to discuss and analyze the various cases cited by the parties in this connection.

The court made no finding that the contract was not just and reasonable, or that the consideration was inadequate. As clearly appears, the decision was based upon the existence of an additional oral agreement to erect a $2,500 business building, and a breach of that agreement. While some evidence was produced with respect to the value of the lot, it was unsatisfactory in nature. While the court found that this lot "was" worth $500, this finding is both indefinite as to time and inconsistent with another finding that the lot is now worth $500, since the evidence clearly discloses that the value of the lot had greatly increased. This entire matter may be fully presented, and considered on its merits, in the event of a retrial.

The judgment is reversed.

GRIFFIN and MUSSELL, JJ., concur.

33 Cal.2d 711

PEOPLE v. KEHOE.

Cr. 4921.

Supreme Court of California, in Bank.
March 31, 1949.

1. Criminal law ⚷199

The doctrine of included offenses is a part of the constitutional guaranty against "double jeopardy". Pen.Code, § 1023; Const. art. 1, § 13.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Double Jeopardy".

2. Criminal law ⚷200(3)

Vehicle Code section penalizing the act of driving or temporarily using an automobile without consent of owner, if done in his absence with intent to temporarily or permanently deprive him of title and possession, and Penal Code section declaring theft of an automobile, which requires an intent to deprive owner of its value and to appropriate the property to the benefit of the person taking it, a crime in so far as they relate to a single act of taking an automobile without the owner's permission, may subject the offender to but one punishment. Pen.Code, § 487; Vehicle Code, § 503.

3. Criminal law ⚷199

Where theft of automobile was completed in one city and defendant was arrested one week later while driving the automobile in another city many hundred miles away, defendant was properly charged in information for unlawfully taking a motor vehicle without the owner's consent and for grand theft, and where he was found guilty of the latter offense the lesser offense was merged therein, and the trial court erroneously entered a judgment finding the defendant guilty of both offenses. Pen.Code, §§ 487, 654; Vehicle Code, § 503.

◆

Appeal from Superior Court, Humboldt County; Delos A. Mace, Judge.

James Kehoe, also known as James J. Kehoe, was convicted of grand theft and driving an automobile without permission of the owner, and he appeals.

Reversed with directions in part and affirmed in part.

Prior opinion 193 P.2d 493.

Raymond McClure, of North Sacramento, for appellant.

Fred N. Howser, Atty. Gen., and Doris H. Maier, Deputy Atty. Gen., for respondent.

EDMONDS, Justice.

James J. Kehoe was convicted by a jury of the crimes of grand theft and driving an automobile without the permission of the owner. The sentence imposed for each of these offenses was imprisonment for the term prescribed by law. His appeal from the judgment, and from the order denying his motion for a new trial, presents for decision only the question of the sufficiency of the evidence to support the conviction for both of the crimes.

The first count in the information charged Kehoe with grand theft in that he did "wilfully, unlawfully, and feloniously steal, take and carry away one motor vehicle * * *." Pen.Code, sec. 487. By a second count it was alleged that Kehoe did "on or about" the same day, "wilfully, unlawfully and feloniously drive and take a motor vehicle * * * not his own * * * without the consent of the owner thereof, and in the absence of the owners * * *." Veh.Code sec. 503. Each crime, according to the information was committed in Humboldt County.

Kehoe entered pleas of not guilty and, upon trial, the prosecution offered evidence showing that Dale E. Kortie left an automobile on a street in Eureka. Kortie had recently purchased the car from George R. Nelson, who retained the certificate of ownership as security for the payment of part of the purchase price. Both Kortie and Nelson denied ever having seen Kehoe or having given him permission to drive the automobile. The people established Kehoe's presence in Eureka at the time the car was taken by his registration at a local hotel and proof that he pawned a camera and watch there on the same day. His own story, as related at the preliminary hearing and admitted into evidence on the trial, although it strongly conflicted with many of his earlier explanations, was that he had been drinking in a bar in Eureka with a man whom he identified as "Chuck". When they were "both two sheets to the wind", "Chuck" asked him where he was going. Kehoe said he was on his way to Los Angeles and "Chuck" then offered him the use of his car for the trip. While Kehoe packed his belongings, "Chuck" left him and returned in about 15 minutes with the automobile. Kehoe got in the car and "Chuck" drove him to the outskirts of the town, where "Chuck" left him to continue on alone. But Kehoe did not produce "Chuck" as a witness nor was he able to identify him or otherwise substantiate his story.

One week after the automobile was taken, police in Salinas, about 400 miles from Eureka, arrested Kehoe while he was driving the car. There is no definite evidence as to his whereabouts during the interim, but the record includes testimony that, at a time not specified, he had left his watch at a service station in Healdsburg as security for some gasoline. It was also shown that Kehoe traveled through Oakland, where he pawned some personal property, but again, there is no evidence to establish the time he was there or how long he remained.

Kehoe states three grounds as the basis for his attack upon the judgment entered pursuant to the verdicts finding him guilty of each of the offenses charged against him. He asserts: (1) that the evidence does not sustain the verdicts on both counts; (2) that the court erred in its instructions stating that he might be convicted on both counts, and (3) that the judgment should be reversed rather than modified. In substance, Kehoe's position is that the evidence, insofar as it is material to the charges in the information, shows but one criminal act, and that conviction upon both counts constitutes imposition of double punishment, prohibited by section 654 of the Penal Code. The attorney general has framed the issue in terms of "included offenses", and argues that, under the authorities, section 503 of the Vehicle Code is not an offense included within the crime of grand theft as defined by section 487 of the Penal Code.

[1] The doctrine of included offenses is a part of the constitutional guarantee against double jeopardy. Cal.Const. Art. I, sec. 13. Section 1023 of the Penal Code implements that guarantee by providing that a prior conviction is a bar to subsequent prosecution for the same offense "or for an offense necessarily included therein." In determining whether this section is applicable to a specific situation, it is necessary first to determine whether a given crime, by definition, necessarily and at all times is included within another one. See discussion in People v. Greer, 30 Cal. 2d 589, 595, 184 P.2d 512. But although a given crime is not "necessarily included" within another one for the purpose of the double jeopardy statute, under certain circumstances the conviction of both crimes cannot be justified. The Penal Code recognizes this principle in section 654, which declares: "An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one * * *." This section is not concerned with the question of whether the particular crime, in the abstract, necessarily and always is included within another one, but rather, it is directed to the question of whether two statutes punish one specific act of the defendant. Accordingly, the question here presented for decision is whether, under the facts shown in the record now being reviewed, Kehoe may be punished both for the violation of section 503 of the Vehicle Code and for the crime of grand theft, of which he was also convicted.

There is a gradual differentiation in substance between the crimes defined in section 499b of the Penal Code (the so-called "joy-ride statute"), section 503 of the Vehicle Code, and section 487 of the Penal Code. The first of these statutes defines as a crime the act of driving or temporarily using an automobile without the consent of the owner. Section 503 makes such conduct an offense if done in the absence of the owner with the intent to temporarily or permanently deprive him of title or possession. Section 487 declares that the theft of an automobile, which requires an intent to deprive the owner permanently of its value and to appropriate the property to the use and benefit of the person taking it, is a crime. Section 499b classifies the crime it defines as a misdemeanor; the other two crimes are made felonies. The violation of section 503 is punishable by imprisonment for from one to five years in the state prison, or by one year of imprisonment in the county jail, or by a fine not exceeding $5,000, or by both such fine and imprisonment. The punishment for theft of an automobile, as defined by section 487, is imprisonment in the state prison for from one to ten years.

[2] Obviously the three statutes are part of a general legislative plan of protection and punishment conceived to prevent the taking or use of an automobile without the owners' consent. Different punishment is fixed to correspond with the intent with which each offense is committed, but the legislation is directed against one evil. Insofar as they relate to a single act of taking an automobile without the permission of the owner, section 503 of the Vehicle Code and section 487 of the Penal Code may subject the offender to but one punishment.

The position of the attorney general does not squarely meet the points relied upon by Kehoe, who is claiming the protection of section 654 of the Penal Code against double punishment for the same act. The state is endeavoring to justify the dual conviction by showing that the offense specified in section 503 of the Vehicle Code is not included within grand theft, and discusses several cases upon that question. In People v. Jeffries, 47 Cal.App.2d 801, 807, 808, 119 P.2d 190, 194 it was said that "both in substance and in form the offenses charged are distinctly different", but this conclusion was not necessary to the opinion. A sounder analysis is found in People v. Stovall, 94 Cal.App. 635, 271 P. 576, approved in People v. Smith, 117 Cal.App. 530, 4 P.2d 268, where the court observed that no issue as to separate or included offenses was raised by the appeal but, on the contrary, there was only a question concerning the sufficiency of the evidence to support the conviction.

Two decisions, aside from People v. Smith, supra, and People v. Jeffries, supra, are cited by the attorney general as authority for the proposition that the violation of section 503 of the Vehicle Code is not an offense included within section 487 of the Penal Code. One of them, In re Connell, 68 Cal.App.2d 360, 156 P.2d 483, concerned the determination that the defendant was an habitual criminal, and the language relied on was, at most, dictum. The other one, People v. Bean, 88 Cal.App.2d 34, 198 P.2d 379, was decided upon facts substantially the same as those of the present case and the contention as to double punishment was rejected after a reference to the doctrine of included offenses and the citation of People v. Jeffries, supra. Insofar as it considers the question of double punishment, the opinion in the Bean case is contrary to the rule here stated and is disapproved.

People v. Cuevas, 18 Cal.App.2d 151, 63 P.2d 311, 312, also cited by the attorney general, was decided upon evidence quite different from that in the present case. There, the defendant was convicted of a violation of section 503 committed more than three years after the theft of the automobile which he was charged with operating illegally. The court rejected the contention that the bar of the statute of limitations as to a prosecution for theft was equally applicable to a charge of the violation of section 503 of the Vehicle Code after noting that "the crime of larceny of the automobile had been fully completed, [and] the subsequent act by defendant in driving the automobile without the consent of its owner was entirely separate and disconnected from the original theft of it."

[3] The record here under review shows a theft completed in Eureka and Kehoe's arrest one week later while driving the automobile in Salinas. Upon this evidence, he might also have been prosecuted in Monterey County for driving an automobile without the owner's permission. People v. Cuevas, supra. The attorney general attempts to justify the dual convictions by stating that "[a]ppellant was not apprehended with the car until he was many hundred miles away from the scene

of the original taking and several days later", and he also refers to "appellant's subsequent acts of utilizing the car as he did". But the information charged that each offense was committed on or about the same day in Humboldt County, and, in the absence of any evidence showing a substantial break between Kehoe's taking and his use of the automobile in that county, only the conviction for one offense may be sustained.

Accordingly, although it was proper to charge Kehoe with both crimes in the information and the record would support his conviction of either of them, it was error for the court to enter a judgment finding him guilty of both offenses. Since he was found guilty of grand theft, the lesser crime of violation of section 503 may be said to have merged into that conviction. Although the sentences were ordered to run concurrently, to "preclude the dual judgments of the trial court from hereafter working any possible disadvantage or detriment to the defendant in the later fixing of his definite term by the [Adult Authority]", People v. Craig, 17 Cal.2d 453, 458, 110 P.2d 403, 405, the judgment, insofar as it finds Kehoe guilty of a violation of section 503 of the Vehicle Code, is reversed with directions to the trial court to dismiss count two of the information. In all other respects, the judgment is affirmed as is also the order denying a new trial.

GIBSON, C. J., and TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

CARTER, Justice.

I concur in the judgment, but it is my opinion that People v. Cuevas, 18 Cal.App. 2d 151, 63 P.2d 311, cited in the majority opinion, is unsound and should be disapproved. It holds, in effect, that each day a car is driven without the owner's consent constitutes a new offense, that is, section 503 of the Vehicle Code creates a continuous offense. That section provides that any person who "drives" or "takes" a vehicle without the consent of the owner is guilty of a violation thereof. That implies that the crime is complete once the car has been driven. Where there is a continuous transaction from the first driving of the vehicle, there should not be a new offense each day the car is driven. To so hold would render such an offender susceptible to a greater penalty than the theft of a car which plainly was not the intent of the legislature. It will be noted that the section provides that either driving or taking is a violation. Certainly there is not a new taking every day the vehicle remains in the possession of the defendant.

33 Cal.2d 694

CALIFORNIA TRUST CO. v. BENNETT.

No. L. A. 20584.

Supreme Court of California, in Bank.

March 31, 1949.

Rehearing Denied April 28, 1949.

1. Joint tenancy 🔑3

Statutory provision that joint tenancy in personalty "may" be created by a written transfer, is mandatory and under it joint tenancies may be created only by a writing. Civ.Code, § 683.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "May".

2. Statutes 🔑227

Permissive words used in statute may be interpreted as being mandatory where necessary to effectuate the legislative intent.

3. Husband and wife 🔑256

The use of common law forms of conveyances should not be permitted to alter the community character of realty contrary to intention of parties.

4. Husband and wife 🔑14(3)

Under statutory provision that joint tenancy in personalty may be created by written transfer, wife could not create a joint tenancy between herself and husband of wife's separate personalty except by written instrument. Civ.Code, § 683.

5. Joint tenancy 🔑3

Safe deposit rental contract providing that upon death of decedent or her husband, survivor should be sole renter of box with exclusive right of access and possession of contents, did not change decedent's separate personalty in box to a joint tenancy. Civ.Code, § 683.

6. Frauds, statute of ⚷106(1), 158(3)

Where a statute requires a writing for the creation of an interest in property, the writing must contain words indicating an intent to transfer the interest, and in absence of words which could be interpreted to show such intent, no parol evidence will be admitted.

7. Joint tenancy ⚷3

Where safe deposit rental contract providing that upon death of decedent or her husband, survivor should be sole renter of box with exclusive right of access and possession of contents, contained no words indicating an intent of decedent that her separate personalty placed in box should be held by decedent and her husband as joint tenants, and under statute joint tenancies in personalty could be created only by a writing, parol evidence was inadmissible to show intention to create a joint tenancy. Civ.Code, § 683.

CARTER and SCHAUER, JJ., dissenting.

◆

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by California Trust Company, a Corporation, as executor of the will of Charlotte Bennett, deceased, against John Bennett, for money had and received. From a judgment for defendant, plaintiff appeals.

Judgment reversed.

For prior opinion see 189 P.2d 531.

Lindstrom & Bartlett and William C. Bartlett, all of Los Angeles, for appellant.

Marshall & Farnham, Walhfred Jacobson and O. E. Farnham, all of Long Beach, for respondent.

GIBSON, Chief Justice.

The executor of the will of Charlotte Bennett, deceased, appeals from a judgment awarding to defendant, the husband of decedent, the sum of $7950 which was originally her separate property. The money was in a safe deposit box at the time of her death, and the principal question presented on appeal is whether the record supports the trial court's conclusion that defendant and his wife held the contents of the box in joint tenancy.

The box was rented from a bank by decedent in August, 1945, about six months before her death. At that time she told the bank clerk that she wanted her husband to have access to the box and that she wanted him to have its contents if she should die. The clerk then gave her a signature card entitled "Co-Renters Agreement (Survivor To Have Exclusive Right of Access)" which provided as follows: "The undersigned hereby rent the above numbered safe deposit box. * * * We jointly and severally agree with you and with each other that: 1. Right of access to said box shall he had and surrender of the same be made by either of us without consent of or notice to the other. 2. We will immediately notify the Bank of the death of any person who at the time of his death had the right or privilege of access to said safe deposit box and will not seek access to said box at any time after the death of such person until it has been examined and released in accordance with all inheritance and estate tax laws and regulations then in effect. * * * 4. Upon the death of either of us, the survivor is and shall for every purpose be the sole renter of said box, with the exclusive right of access thereto and possession of the contents thereof. We hereby, jointly and severally, agree to save you, your successors and assigns, harmless from and against any and all demands, liabilities, loss, damages, or expense of whatsoever kind or nature, including attorneys' fees, which you shall at any time sustain or incur by reason or in consequence of your relying or acting upon any of the agreements, declarations, conditions, and regulations contained herein or printed on the reverse of the aforesaid rental receipt. This agreement shall be binding upon the heirs, legatees, devisees, administrators, executors, successors and assigns of each of the undersigned. * * *'-

Defendant testified that when decedent brought the card home for him to sign she told him that if anything happened to her she wished him to have the contents of the box. Decedent's sister testified that decedent placed $8000 "in her own box in the name of" defendant husband.

Plaintiff executor contends that the judgment must be reversed, arguing (1) that section 683 of the Civil Code requires a writing for the creation of a joint tenancy interest in personal property, (2) that the rental card is insufficient standing alone to satisfy this statutory requirement, and (3) that the decedent's declarations and the circumstances surrounding the execution of the rental card are not admissible to explain and amplify its terms.

The general statutory provisions relating to the creation of a joint tenancy are contained in section 683 of the Civil Code which reads: "A joint interest is one owned by two or more persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or *by transfer * * * from a husband and wife when holding title as community property or otherwise to themselves or to themselves and others when expressly declared in the transfer to be a joint tenancy * * *. A joint tenancy in personal property may be created by a written transfer, instrument or agreement. Provisions of this section shall not restrict the creation of a joint tenancy in a bank deposit as provided for in the Bank Act*."[1] The italicized portion was added in 1935.[2]

Prior to the 1935 amendment, joint tenancies in personal property could be created by both oral and written agreements. Wheeland v. Rodgers, 20 Cal.2d 218, 221, 124 P.2d 816; In re Estate of Gaines, 15 Cal.2d 255, 260, 100 P.2d 1055; In re Estate of Harris, 9 Cal.2d 649, 654, 72 P.2d 873; In re Estate of Harris, 169 Cal. 725, 726, 147 P. 967. The first question, therefore, is the effect of the addition in 1935 of the sentence: "A joint tenancy * * * may be created by a written transfer, instrument or agreement."

[1, 2] In our opinion this provision is mandatory, and under it joint tenancies may be created only by a writing. Any other construction would render the sentence meaningless. If it were construed as merely permissive in nature, the amendment would constitute but an idle act on the part of the Legislature, ineffective except as a partial declaration of the preexisting law which had always permitted the creation of joint tenancies by a writing. The fact that the word "may" was used is not conclusive, since it is well settled that permissive words may be interpreted as mandatory where such construction is necessary to effectuate the legislative intent. See Uhl v. Badaracco, 199 Cal. 270, 282, 248 P. 917; Driscoll v. East-West Dairymen's Ass'n, 52 Cal.App.2d 468, 472, 126 P.2d 467; Goodman v. Board of Education, 48 Cal.App.2d 731, 737, 120 P.2d 665; 3 Sutherland, Statutory Construction [3rd Ed. 1943] p. 81; Crawford, Statutory Construction [1940] p. 521.

Defendant relies on several cases decided since the 1935 amendment which have stated, without discussion of the change, that joint tenancies in personal property may be created orally. See Wheeland v. Rodgers, 20 Cal.2d 218, 221, 124 P.2d 816; In re Estate of Harris, 9 Cal.2d 649, 72 P.2d 873; White v. Bank of America, 53 Cal.App.2d 831, 834, 128 P.2d 600. In the Wheeland and Harris cases the transactions involved took place prior to the date of the amendment, and the White case concerned written instruments. These cases, therefore, are of no assistance to us in determining the proper interpretation to be given the amendment.

[3, 4] Defendant contends, nevertheless, that even though section 683 as amended requires a writing, there is an exception

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[1] No contention is made that the Bank Act referred to in section 683 is applicable here. (See 1 Deering's Gen.Laws, Act 652, § 15a.)

[2] Section 683 of the Civil Code, prior to the amendment of 1935, read: "A joint interest is one owned by several persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants."

where the transfer is between husband and wife. Reliance is placed upon Tomaier v. Tomaier, 23 Cal.2d 754, 146 P.2d 905, which held that, where a husband and wife acquired property through deeds purporting to create a joint tenancy, evidence was admissible to show that the property was acquired with community funds with the intention that it was to remain part of the community. This decision carried out the well established policy that the use of common law forms of conveyances should not be permitted to alter the community character of real property contrary to the intention of the parties. There is no claim that the property involved here was ever community property, or that it was the intention of the parties to convert it into community property, and, therefore, the reasoning in the Tomaier decision has no application to the facts of this case. Moreover, the statute specifically mentions transfers between husband and wife but does not exempt them from its provisions. Accordingly, we see no basis in the present case for making an exception to the statutory requirement that there be a writing to create a joint tenancy in personalty.

[5] Defendant does not contend that the rental card standing alone is sufficient to establish a joint tenancy in the contents of the safe deposit box, and it is clear that it is not. It has been held that a rental agreement practically identical to the one here involved did not affect title to the contents of the box. Security-First Nat. Bank, of Los Angeles v. Stack, 32 Cal.App.2d 586, 90 P.2d 337; see In re Estate of Dean, 68 Cal.App.2d 86, 90 et seq., 155 P.2d 901, 905. In the Dean case the card signed by the renters was entitled "Joint Tenants (One signature required—Right of survivorship)", but its provisions were similar to those in the present case. The court held that parol evidence was admissible to show the intention of the parties, stating that "the caption and the body of the writing are inconsistent with each other." In the present case, however, there is no inconsistency between the body of the card and its caption, which reads: "Co-Renters Agreement (Survivor To Have Exclusive Right Of Access.)" With respect to the body of the card in the Dean case, which was substantially the same as that of the card involved here, the court said: "* * * no express declaration was made in the body of the writing that the title to the property was to be held jointly or in any manner, or that the survivor should be the owner of the property. There is a declaration, however, in the body of the writing that the survivor shall be the sole renter of the box 'with the exclusive right of access thereto and possession of the contents thereof.' Appellant's contention that said last mentioned provision shows the intention to establish ownership cannot be sustained. * * * Neither the word 'title' nor the word 'ownership' is used in that provision or used at all on the card. Said provision is a part of a paragraph of the writing which relates to absolving the bank from liability for the acts of the survivor in removing property from the box * * *. It appears * * that the provision * * * was not intended to be, and was not, a declaration as to title or ownership of the contents of the box. * * *" 68 Cal.App.2d at pages 91, 92, 155 P.2d at page 904.

[6, 7] It is asserted, nevertheless, that decedent's declarations and the circumstances surrounding the renting of the safe deposit box may be used to interpret the rental card, and that, when interpreted with this evidence, the card is sufficient to satisfy the statutory requirement of a writing. It is well settled that were a statute requires the formality of a writing for the creation of an interest in property, it must contain words indicating an intent to transfer such interest, and in the absence of words which could be interpreted to show such intent, no parol evidence will be admitted. See Code Civ.Proc. §§ 1856, 1860; Cordano v. Wright, 159 Cal. 610, 618, 115 P. 227, Ann.Cas.1912C, 1044; McGarrigle v. Roman Catholic Orphan Asylum, 145 Cal. 694, 696, 79 P. 447, 1 L.R.A.,N.S., 315, 104 Am.St.Rep. 84; Litten v. Warren, 11 Cal.App.2d 635, 637, 54 P.2d 39; 9 Wigmore on Evidence [3rd Ed. 1040] § 2453. In the present case, the rental card is clear and, as we have seen, it does not purport to affect the title to the contents of the box, but relates only to rights of possession and access. See In re Estate of Dean, 68 Cal.App.2d 86, 91, 155 P.2d 901; Security-First

Nat. Bank of Los Angeles v. Stack, 32 Cal. App.2d 586, 591, 90 P.2d 337. Accordingly, the parol evidence could not be used to amplify the terms of the rental card so as to create a joint tenancy.

The conclusion we have reached makes it unnecessary to discuss the other claims of error with reference to refusal to admit evidence.

The judgment is reversed.

SHENK, TRAYNOR, and SPENCE, JJ., concur.

EDMONDS, J., did not participate herein.

CARTER, Justice.

I dissent.

Assuming that the creation of a joint tenancy in personal property must be in writing, I believe that the safe deposit box rental agreement creates an ambiguity as to whether a joint tenancy in the contents (money) of the box was created which permits the use of parol evidence to explain it. It will be recalled that the rental agreement was headed *"Co-Renters Agreement (Survivor To Have Exclusive Right Of Access)."* (Emphasis added.) The use of the word "survivor" is the common expression used to create joint tenancies. Hence we have some indication that there was an intent to create a joint tenancy. The agreement goes on to provide that the parties each agree with the other that each has right of access to the box *without consent or notice to the other.* That is to say, each, to the complete exclusion of the other, may have access to the box, and implicit therein, it is reasonable to assume that he may remove the contents and appropriate same to his own use. In addition, it is provided that "Upon the death of either of us, the *survivor* is and shall for every purpose be the sole renter of said box, with the *exclusive right* of access thereto and *possession of the contents* thereof. * * *" (Emphasis added.) Plainly the survivor has exclusive right of possession. That "exclusive" right would bar the estate of the deceased tenant or a representative thereof from possession. In this connection, it should be noted that the rental agreement *expressly provides* that it "shall be binding upon the *heirs,* legatees, devisees, *administrators, executors,* successors and assigns of each of the undersigned." (Emphasis added). That being the case, the right of the exclusive possession in the survivor is binding upon all *successors* of the deceased. *Therefore, no one could ever gain any right to possession without consent of the survivor.* If no one but the survivor could have possession or any *right* to possession, how could any other person effectively become the owner of the contents? The interest in the property would be split with the heirs holding the bare legal title and the survivor having the right to perpetual exclusive possession. Furthermore, it is to be noted that the survivor is to have the exclusive right of possession "for every purpose", indicating that he has it for the purpose of use and enjoyment to the extent of consumption if he desires.

We must consider the foregoing factors in light of various rules of law. It is presumed "That things which a person possesses are owned by him". (Code of Civil Proc., sec. 1963[11]). Thus it is clear that giving the right to "possession" may mean that title was intended to be transferred. A situation somewhat analogous is presented in Woodford's Ex'rs v. Woodford, 44 N.J.Eq. 79, 14 A. 273, 274, where the testator devised the right of possession of property to his wife. The court held that ownership was intended to go to the wife, stating: "It is true that, when he comes to state what he understands to be a widow's right in her husband's personal estate, he describes it as a right of possession, but it is quite evident that he uses the word 'possession' in the sense of ownership. He meant a possession without limitation as to time. He does not say that her right to possession shall be limited in duration to her life, nor does he say that the share of his personal estate, which he directs shall go into her possession, shall, on her death, go to some other person. There is no gift over."

All of the foregoing factors point to a reasonable probability that it was intended by the agreement to create a joint tenancy in the contents of the box—to make a gift of the contents—pass title to them. I am not overlooking the arguments that the agreement was merely intended as one for rental and was primarily to protect the bank; (it is to be noted, however, that the agreement expressly states that it is between the joint holders of the box inter se as well as with the bank); that right of possession does not necessarily mean ownership; and that only mere custody was intended. But those things merely illustrate *the inherent ambiguity of the phrasing in the agreement.* The words may, or may not, mean that ownership is to be transferred. From them alone you cannot be sure. Manifestly, therefore, parol evidence was admissible to explain their meaning.

There is ample parol evidence to show that the decedent intended the rental agreement to create a joint tenancy. To illustrate, the bank clerk testified that when the decedent made arrangements for the joint box: "I asked her [decedent] if she would want the survivor to have the contents of the box, if she should pass away, and she said that is what she wanted." Defendant testified: "When she [decedent] asked me to sign that card she said if anything happened to her she wished me to have the contents of the box but named no contents or nothing referring to what was in it or should be in it. She naturally had to tell me something when she asked me to sit down and sign a paper."

In my opinion, this evidence, coupled with the "Co-Renters Agreement", was ample to sustain the finding of the trial court that decedent intended the contents of the box to be held in joint tenancy with defendant, and that he became the owner of such contents by virtue of the right of survivorship arising out of such agreement.

The cases relied upon by the majority opinion should not be controlling. In Security-First Nat. Bank of Los Angeles v. Stack, 32 Cal.App.2d 586, 90 P.2d 337, the court gave no consideration and made no mention of a clause such as exists in the instant case making the promises binding upon the executors, heirs and assigns of the parties. Moreover, the rental agreement there was completely wiped out as a joint tenancy arrangement by the execution by the husband and wife of a written agreement expressly terminating all joint tenancy relations *after* the rental agreement was made. In re Estate of Dean, 68 Cal. App.2d 86, 155 P.2d 901, rather than supporting the majority opinion, is to the contrary. The issue there involved was whether the contents of a safe deposit box was held in joint tenancy. There was a rental agreement similar to that involved in the instant case and, while stating that the agreement did not expressly declare that a joint tenancy was created, also holds that: "Considering the caption and the body of the writing together and *as a whole,* as appellant asserts should be done in order to ascertain the 'true intention in the minds of the parties,' it appears that it was not expressly declared on the signature card that the property in the box was to be held in joint tenancy; and it appears further that *the writing was uncertain and ambiguous as to whether it was the intention of the parties to create a joint tenancy in the ownership of the contents of the box or to become co-renters with the right of joint access to the box and to possession of the contents.* * * * In the present case the signature card, 'standing alone,' was not sufficient to create a joint tenancy, but was uncertain and ambiguous. * * * It appears, contrary to appellant's contention, that the court received parol evidence, and received documentary evidence in addition to the signature card of January 19th, for the purpose of considering it in determining the intention of the decedent in signing the card. The card being uncertain and ambiguous, such evidence was received properly. The evidence was sufficient to support the findings of the court." (Emphasis added.) The majority opinion gives no reason why parol evidence was held to be properly admitted in the Dean case but not in the case at bar.

I would, therefore, affirm the judgment.

SCHAUER, J., concurs.

Rehearing denied; CARTER and SCHAUER, JJ., dissenting; EDMONDS, J., not participating.

33 Cal.2d 638

In re BURNISON'S ESTATE.

BURNISON v. KATZ et al.

S. F. 17620.

Supreme Court of California, in Bank.
March 22, 1949.

1. Wills ⚷1

The right to make testamentary disposition of property rests wholly upon the legislative will, and is derived entirely from statutes, and the legislature may withhold the right altogether, or impose any conditions or limitations upon it which it chooses.

2. Descent and distribution ⚷5

The distribution of a decedent's personal estate is governed by the law of his domicile. Civ.Code, § 946.

3. Statutes ⚷188

In construing a statute, words are to be taken in their ordinary sense and normal signification.

4. United States ⚷55

The word "state" within statute permitting a testamentary disposition to be made to the "state" does not include the United States of America. Probate Code, § 27.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "State".

5. United States ⚷55

Under statute permitting enumerated corporations to take under a will, and excluding all other corporations unless expressly authorized by statute, United States could not take under will in absence of federal statute purporting to authorize United States to acquire property by will. Probate Code, § 27.

6. United States ⚷55

The state is not required by constitution to allow the United States to take under a will. Probate Code, § 27.

7. United States ⚷55

Statute exempting property transferred to United States from state inheritance tax, does not entitle United States to take under will under statute permitting enumerated corporations to take under will, and excluding all other corporations, unless expressly authorized by statute. Probate Code, § 27; Revenue and Taxation Code, § 13841.

8. Taxation ⚷872
Wills ⚷10

In making laws relating to who could take under a will, and relating to inheritance tax exemptions, legislature was not bound to shape the enactment to fit any particular pattern or limit its right to impose such conditions as legislature deemed appropriate in the distinct fields. Revenue and Taxation Code, § 13841; Probate Code, § 27.

9. Escheat ⚷3

The residue of a veteran's pension fund may be transferred to the United States under the federal escheat laws.

10. United States ⚷55

Property may be transferred to the United States in pursuance of a contract whereby a veteran, prerequisite to entry into a national soldiers home, agreed that all his personal property should pass to the board of managers of the home under certain circumstances upon death of veteran.

TRAYNOR, J., dissenting.

◆

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Proceeding in the matter of the estate of Gust Burnison, also called Gustav Burnison, deceased. From an order denying distribution of decedent's estate to his heirs, and sustaining the objections of the United States of America, Joe Burnison appeals, opposed by Phil C. Katz, as Public Administrator of the City and County of San Francisco, and the United States of America.

Order reversed.

Prior opinion, 196 P.2d 822.

Harry N. Grover and Everett H. Roan, both of San Francisco, for appellant.

Robert E. Hatch, of San Francisco, and J. Harold Decker and J. Frank Martin, Jr., both of Los Angeles, amici curiae on behalf of appellant.

Abraham J. Harris, Acting Sol. Gen., and George T. Washington, Asst. Sol. Gen., both of Washington, D. C., Frank J. Hennessy, U. S. Atty., and Robert B. McMillan, Asst. U. S. Atty., both of San Francisco, and Clyde C. Downing, Asst. U. S. Atty., of Los Angeles, and John T. Fowler, of Washington, D. C., Atty., Department of Justice, for respondents.

SPENCE, Justice.

This is an appeal from an order denying distribution of the decedent's estate to his heirs—three brothers, a sister, and thirteen nieces and nephews—and sustaining the objections of the United States of America, the sole beneficiary under the terms of the will. The entire estate—consisting of personal property appraised at $22,668.70—was left to "The United States government U.S.A." Appellant maintains that the "United States of America is not authorized by statute or otherwise to take under a will executed in the State of California by a resident" thereof, that the testamentary "bequest" is therefore "void," and that all of the estate should be distributed to the "heirs at law of deceased under and pursuant to the laws of succession of" this state. His position is well taken under the prevailing statutory law applicable in determination of the issue involved.

[1] At the outset it should be said that the authorities without exception hold that "the right to make testamentary disposition of property is not an inherent right or a right of citizenship, nor is it even a right granted by the constitution. It rests wholly upon the legislative will, and is derived entirely from the statutes." In re Walker, 110 Cal. 387, 390, 42 P. 815, 1082, 30 L.R.A. 460, 52 Am.St.Rep. 104; see, also, Estate of Carpenter, 172 Cal. 268, 269, 156 P. 464, L.R.A 1916E, 498; Estate of Wilkinson, 113 Cal.App. 645, 646, 298 P. 1037. The legislature may withhold the right altogether, or impose any conditions or limitations upon it which it chooses. Estate of Durlewanger, 41 Cal.App.2d 750, 752, 107 P.2d 477; Estate of Bauer, 51 Cal.App.2d 636, 637, 124 P.2d 630. As a necessary postulate of this proposition, it follows that the legislature has the exclusive power to designate those whom the testator may make the objects of his bounty. In re Wilmerding, 117 Cal. 281, 284, 49 P. 181.

[2] Equally well settled is the general rule that the distribution of a decedent's personal estate is governed by the law of his domicile. Estate of Sloan, 7 Cal.App. 2d 319, 333, 334, 46 P.2d 1007. It was early recognized in decisions of this state—as Estate of Apple, 66 Cal. 432, 436, 437, 6 P. 7; Whitney v. Dodge, 105 Cal. 192, 197, 198, 38 P. 636; Estate of Lathrop, 165 Cal. 243, 247, 131 P. 752,—and it is likewise declared by section 946 of the Civil Code.

In the light of these established principles, the language of section 27 of the Probate Code, prescribing "Who may take by will", must be construed as determinative of the validity of the bequest here in question. That section reads as follows: "A testamentary disposition may be made to the state, to counties, to municipal corporations, to natural persons capable by law of taking the property, to unincorporated religious, benevolent or fraternal societies or associations or lodges or branches thereof, and to corporations formed for religious, scientific, literary, or solely educational or hospital or sanatorium purposes, or primarily for the public preservation of forests and natural scenery, or to maintain public libraries, museums or art galleries, or for similar public purposes. No other corporation can take under a will, unless expressly authorized by statute."

[3] The Government cites the opening language of the statute, in its designation of "the state" as a proper recipient of a "testamentary disposition," as embracing the United States. But in construing a statute, words are to be taken in their ordinary sense and normal signification, 23 Cal.Jur. sec. 109, p. 730; Taylor v. Lundblade, 43 Cal.App.2d 638, 641, 111 P.2d 344; Gayer v. Whelan, 59 Cal.App.2d 255, 262, 138 P.2d 763, and the Government's suggested extension of the meaning of "the state" runs counter to this settled rule. Although it must be recognized that historians and other writers frequently use the literary or rhetorical expression and refer to the na-

tion as "the state," the draftsmen of legislation as a rule employ language notable for its precise and definitive character rather than for its elegance. So it would appear that if the legislature had intended to include the United States within the purview of the statute, " 'the ordinary dignities of speech would have led' to its mention by name." United States v. Cooper Corporation, 312 U.S. 600, 606, 61 S.Ct. 742, 744, 85 L.Ed. 1071, citing Davis v. Pringle, 268 U.S. 315, 318, 45 S.Ct. 549, 69 L.Ed. 974. Also the collocation of the successively authorized recipients of a "testamentary disposition" should be taken into consideration in construing the meaning of the terms of the statute. 23 Cal.Jur. sec. 110, p. 732; People v. One 1940 Chrysler Coupe, 48 Cal. App.2d 546, 549, 120 P.2d 117. Here the collection of "the state" is with "counties" and "municipal corporations," and obvious incongruity if the Government's contention were accepted.

Moreover, the statute uses the *definite* article in its mention of "the state," ostensibly to signify California and to distinguish its purport from the *indefinite* reference of "a state," which latter term might reasonably be construed to mean any established government on earth. So pertinent is the legislative history of section 27 of the Probate Code. As first enacted in 1872 as section 1275 of the Civil Code, it was provided that "no corporation" could take from a California testator "unless expressly authorized by statute" so to do. In 1873 the section was amended so that corporations "formed for scientific, literary, or solely educational purposes" might take under such a will. Amendments to the Codes, 1873-74, p. 275. In 1881 a separate statute was enacted authorizing the "several counties, cities and counties, cities and towns of this state to accept * * * any gift, bequest and devise * * *." Stats. 1881, p. 2. In 1903 section 1275 was amended to permit corporations formed for "hospital purposes" also to take under a will. Stats. 1903, p. 258. In 1905 the section was further amended to permit "counties" and "municipal corporations" to take under a California will, subject to the provisions of section 1313, the antecedent of section 41 of the Probate Code concerning "restrictions" upon charitable bequests and devises, Stats. 1905, p. 605, and the code commissioner's note shows that "The amendment in substance incorporates into the section the provisions of the act of 1881, page 2, authorizing the several counties, cities and counties, cities and towns of the state, to recover property by gift, bequest and devise." See legislative history subjoined to section 1275. Manifestly, therefore, when "counties" and "municipal corporations" were so engrafted into section 1275, they carried the same geographical meaning of territorial components of this state as the "act of 1881" had expressly given them, and which they had signified for twenty-four years. Then in 1931, when, upon adoption of the Probate Code, the legislature added to the list of entities privileged to take under a California will "the state" in connection with "counties" and "municipal corporations," it could not have meant any state other than California.

The case of United States v. Fox, 94 U.S. 315, 24 L.Ed. 192, is closely in point. There the testator, a resident of the state of New York, "devised and bequeathed" all his property "to the government of the United States." The statute of New York, Decedent Estate Law, Consol. Laws, c. 13, § 12, provided that a devise of lands might be made "to every person capable by law of holding real estate; but no devise to a corporation shall be valid, unless such corporation be expressly authorized by its charter, or by statute, to take by devise." The sole question presented for consideration was "the validity of a devise to the United States of real estate situated in the State of New York." The Supreme Court of the United States declared (as the state court had, 52 N.Y. 530, 534, 11 Am.Rep. 751), that "this question" was "to be determined by the laws of [New York]." 94 U.S. 320, 24 L.Ed. 192. Then the court, speaking through Mr. Justice Field, stated, 94 U.S. at page 321, 24 L.Ed. 192, as follows: "The term 'person' as here used applies to natural persons, and also to artificial persons, —bodies politic, deriving their existence and powers from legislation,—but cannot be so extended as to include within its meaning the Federal government. It would require an express definition to that effect to give it a sense thus extended. * * * A devise to the United States of real property situated in that State [New York] is, therefore, void."

It is true that the New York law imposed limitations affecting only devises of "real estate" while the present case concerns the validity of a bequest of personalty under a statute regulating alike the power of testamentary disposition as to real and personal property. But such difference in statutory scope does not militate against the applicable force here of the reasoning in the Fox case, based as it is on the right of a state to prescribe who can, and who cannot, take by the will of one of its residents. So significant is the case of United States v. Perkins, 163 U.S. 625, 16 S.Ct. 1073, 1074, 41 L.Ed. 287, wherein the "single question" presented was "whether *personal* property bequeathed by will to the United States [was] subject to an inheritance tax under the laws of New York." (Emphasis added.) Recognizing the right to make a testamentary disposition as "purely a creature of statute, and within legislative control", 163 U.S. at page 627, 16 S.Ct. at page 1074, 41 L.Ed. 287, and that when a state "grants" such right, it may annex "any conditions which it supposes to be required by its interests or policy", 163 U.S. at pages 629, 630, 16 S.Ct. at page 1075, 41 L.Ed. 287, the court, following citation of the Fox case, supra, sustained the propriety of the tax—in "diminution" of the amount the United States would receive under the will—as it was "only upon [such] condition that the legislature assent[ed] to [the] bequest". 163 U.S. at page 630, 16 S.Ct. at page 1075, 41 L.Ed. 287. And as recently as 1942 the Supreme Court of the United States in Irving Trust Co. v. Day, 314 U.S 556, 62 S.Ct. 398, 86 L.Ed. 1734, wherein was sustained the validity of a section of the "New York Decedent Estate Law" concerning the right of a surviving spouse to elect to take against the provisions of a will, cited both the Fox and Perkins cases, supra, among others, in support of its broad statement, 314 U.S. at page 562, 62 S.Ct. at page 401, 82 L.Ed. 1734, as follows: "Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and *the dead hand rules succession only by sufferance.* Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction." (Emphasis added.) See, also, Allen v. Markham, 9 Cir., 156 F.2d 653, 659; Clark v. Allen, 331 U.S. 503, 517, 67 S.Ct. 1431, 91 L.Ed. 1633, 170 A.L.R. 953.

[4] The Government's contention that if section 27 of the Probate Code should be construed as invalidating the bequest in question, "serious constitutional questions would arise" involving an "unlawful discrimination against the United States" is effectively answered by the Irving Trust Co. case as above quoted. Likewise the attack upon the pertinency of the basic reasoning in the Fox case, supra, and the claim that assuming "the Fox case cannot be distinguished, it must be regarded as overruled" are without force in view of its citation as recently as 1942 by the Supreme Court as noted.

[5, 6] Nor does the reference in the last sentence of section 27 of the Probate Code to the testamentary capacity of a "corporation * * * expressly authorized by statute" aid the Government in its attempt to uphold the validity of the bequest in question. Whether or not the word "corporation" in such "legislative environment" would include the United States as a "governmental body", see State of Ohio v. Helvering, 292 U.S. 360, 370, 54 S.Ct. 725, 78 L.Ed. 1307; State of Georgia v. Evans, 316 U.S. 160, 161, 62 S.Ct. 972, 86 L.Ed. 1346, the further requirement of the section is concededly unsatisfied in the Government's admission that though "various Federal statutes enacted from time to time have authorized particular agencies of the Government to acquire property by will and to apply it to stated uses * * * no Federal statute of general application has purported to authorize the United States to so acquire property." It is true that the capacity of the United States to "receive a voluntary devise or bequest" has been regarded as an "inherent attribute of sovereignty" and so sustained as an implied power of the federal government, but such principle has no force where there is an

"express statute" of the state wherein "the testator had his domicil" effecting "a restriction as to who may be devisees or legatees." Dickson v. United States, 125 Mass. 311, 315, 28 Am.Rep. 230. In short, the entire matter of the right of testamentary disposition appears to be one within the control of the state having jurisdiction of the property in question, and there is no constitutional requirement that the state allow the United States to take "under a will." United States v. Fox, supra, 94 U.S. 315, 24 L.Ed. 192; United States v. Perkins, supra, 163 U.S. 625, 16 S.Ct. 1073, 41 L.Ed. 287; Irving Trust Co. v. Day, supra, 314 U.S. 556, 62 S.Ct. 398, 86 L.Ed. 1734.

[7-10] Nor does it strengthen the Government's position to refer to section 13841 of the Revenue and Taxation Code, which exempts "property transferred to * * * the United States" from the California inheritance tax. There is no necessary connection between a statute regulating succession to property and one setting forth tax exemptions, and in making laws relating to these two subjects, over which it had plenary authority, the legislature was not bound to shape its respective enactments to fit any particular pattern or limit its right to impose such conditions as it deemed appropriate in the distinct fields. In re Wilmerding, supra, 117 Cal. 281, 286, 287, 49 P. 181. There may be, for example, a transfer of property—the residue of a veteran's pension fund—to the United States under the federal escheat laws, Estate of Lindquist, 25 Cal.2d 697, 705, 154 P.2d 879, certiorari denied 325 U.S. 869, 65 S.Ct. 1408, 89 L.Ed. 1988; Estate of Walker, 25 Cal.2d 719, 720, 154 P.2d 891, certiorari denied 325 U.S. 869, 65 S.Ct. 1408, 89 L.Ed. 1989, or in pursuance of a contract whereby a veteran, prerequisite to entry into a national soldiers' home, agreed that all his personal property should pass to the board of managers of such home under certain circumstances, United States v. Stevens, 302 U.S. 623, 58 S.Ct. 388, 82 L.Ed. 484; Mauck v. United States, 9 Cir., 94 F.2d 745. But such situations do not furnish any parallel considerations negativing the force of section 27 of the Probate Code as determinative of rights of testamentary disposition of property "within [the] dominion" of this state. United States v. Perkins, supra, 163 U.S. 625, 629, 16 S.Ct. 1073, 41 L.Ed. 287.

The Government finally relies on the Estate of Hendrix, 77 Cal.App.2d 647, 176 P.2d 398, to sustain the bequest in question, but an analysis of that case shows it to involve quite dissimilar considerations. There the bequest was made to the "United States Veterans Administration * * * for the purpose of rendering to disabled veterans of the world war * * * such aid, comfort, [and] assistance * * * as may to them be most helpful and profitable, determinable by said [organization]." 77 Cal.App.2d at page 649, 176 P.2d at page 399. As the successor of "a corporation, 'The National Home for Disabled Volunteer Soldiers,'" 77 Cal.App.2d at page 652, 176 P.2d at page 401, the "Veterans' Administration" is authorized, through its "Board of Managers," to "receive donations of money or property [which would] embrace gifts by means of will, as well as by transfers during the lifetime of the donors." 77 Cal.App.2d at page 653, 176 P.2d at page 401. Upon classifying the Veterans' Administration as a "governmental agency," though unincorporated, and in discussing its testamentary capacity to accept the bequest in question under the laws of California, Prob.Code, sec. 27, the court declared that "the bequest to the agency was, in effect, a bequest to the parent, United States of America", 77 Cal.App.2d at page 651, 176 P.2d at page 401, that "The United States Government is a corporation", 77 Cal.App.2d at page 652, 176 P.2d at page 401, that "the [agency] is authorized by statute to take property by will", 77 Cal.App.2d at page 652, 176 P.2d at page 401, and that therefore the United States Government, functioning through one of its component parts in a designated field of operation, is a "corporation * * expressly authorized by statute" to "take [property] under a will" within the purport of section 27 of the Probate Code. 77 Cal.App.2d page 653, 176 P.2d 398, 401. But the validity of the bequest there involved need not rest on that ground, for, as the court indicated in its reference to the analagous considerations prevailing in the Estate of Yule, 57 Cal.App.2d 652, 135 P.2d

386, the terms of the will, as reasonably construed, provided for "a gift for charitable purposes to a legally constituted institution" 57 Cal.App.2d at page 654, 135 P.2d at page 388, and whether or not such recipient was "incorporated" or "unincorporated" was not a material factor affecting its capacity to take the "donation" as so restricted. Accordingly, the bequest to the United States Veterans' Administration was properly deemed valid in the light of the liberal provisions of the statute evidencing the legislative purpose to favor "gifts for charitable purposes" in pursuance of "the intent of the donor", Estate of Yule, supra, 57 Cal.App.2d at page 654, 135 P.2d at page 388, and the further discussion in the Hendrix case relative to the propriety of holding the "United States of America" to be a "corporation authorized to take by will pursuant to Section 27 of the Probate Code", 77 Cal.App.2d at page 650, 176 P.2d 400, was unnecessary to the decision, and certainly will not be regarded as furnishing ground for sustaining a bequest to the "United States Government," without qualification as to administration or purpose. From these underlying considerations—both factual and legal—distinguishing the essential focal point of decision, it is manifest that the Government's reliance upon the Hendrix case in nowise strengthens its position here. In view of the nature of the power of testamentary disposition, the right of the state to determine the limits under which this power shall be exercised, and the express terms of section 27 of the Probate Code prescribing "who may take by will", the bequest here challenged cannot be sustained as meeting the test of the cited statute, and hence is void.

The order subject of this appeal is reversed.

GIBSON, C. J., and SHENK, CARTER, and SCHAUER, JJ., concur.

EDMONDS, J., concurs in the judgment.

TRAYNOR, Justice.

I dissent for the reasons set forth in Estate of Hendrix, 77 Cal.App.2d 647, 651-653, 176 P.2d 398.

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33 Cal.2d 647

In re SANBORN'S ESTATE.
HARRIS et al. v. UNITED STATES.
L. A. 20816.

Supreme Court of California, in Bank.
March 22, 1949.

United States 🔑**55**

Federal statute declaring that United States Treasurer shall effect redemption of direct obligations of United States that are bequeathed to the United States, and statute authorizing Secretary of Treasury to sell lands acquired by United States by devise, do not entitle United States to take under will under California statute permitting enumerated corporations to take under a will, and excluding all other corporations unless expressly authorized by statute. Probate Code, § 27; 31 U.S.C.A. § 757e; 40 U.S.C.A. § 304.

TRAYNOR, J., dissenting.

◆

Appeal from Superior Court, Los Angeles County; Harold B. Jeffery, Judge.

Proceeding in the matter of the estate of Emily P. Sanborn, deceased. From portion of decree of final distribution entered in favor of the United States of America, Annie L. Harris, petitioner, and Charles F. Gayetty and others, heirs at law of deceased, appeal, opposed by the United States of America.

Appealed from portion of decree reversed.

J. Harold Decker and J. Frank Martin, Jr., both of Los Angeles, for appellants.

Abraham J. Harris, Acting Sol. Gen., and George T. Washington, Asst. Sol. Gen., both of Washington, D. C., James M. Carter, U. S. Atty., and Cylde C. Downing and Robert A. McMillan, Asst. U. S. Attys., all of Los Angeles, and John T. Fowler, Atty., Department of Justice, of Washington, D. C., for respondent.

SPENCE, Justice.

Testatrix, a resident of Los Angeles, devised and bequeathed to the "United States of America" all her real property in this state and her Government bonds. The will contains no residuary clause so that in the event of the failure of such devise and bequest, such property would descend to the decedent's heirs at law under the laws of succession. In the probate proceedings, the court ordered distribution of the mentioned property in pursuance of the terms of the will. From the portions of the decree of final distribution accordingly entered in favor of the "United States of America," the heirs bring this appeal.

The only question here presented is whether the challenged testamentary disposition to the "United States of America" is valid under the laws of this state. The parties advance the same opposing contentions in relation to the construction of section 27 of the Probate Code, prescribing "who may take by will," as were considered and resolved in a like situation prevailing in the Estate of Burnison, Cal.Sup., 204 P.2d 330. The only additional point here made relates to the pertinency of the Government's reference to two specific federal statutes as establishing the "authority of the United States to take by will." One is the Act of April 3, 1945, 59 Stats. 48, c. 51, sec. 4, 31 U.S.C.A. § 757e, declaring that "the Treasurer of the United States * * * shall effect redemption" of "any direct obligation of the United States" (such as Government bonds) that "is bequeathed by will to the United States"; and the other is the Act of March 3, 1903, 32 Stats. 1112, c. 1007, sec. 1, 40 U.S.C.A. § 304, authorizing "the Secretary of the Treasury * * * to sell such lands as have been or may be acquired by the United States by devise." However, such Congressional enactments, by their provision for the Government's disposition of such testamentary gifts, can be regarded as no more than implied recognition of the power of the United States to take property by will, but only where such act would be in accordance with the law of the state governing the right to make the testamentary disposition in question. Certainly such federal statutes cannot validate a "devise" or "bequest" of property in this state made by a California resident contrary to our statutory law. In re Estate of Burnison, supra. Accordingly, the objections of the heirs to the claims of the "United States of America" under the terms of the decedent's will must be sustained.

The portions of the decree here subject of appeal are reversed.

GIBSON, C. J., and SHENK, CARTER, and SCHAUER, JJ., concur.

EDMONDS, J., concurs in the judgment.

TRAYNOR, J., dissents.

FRISTOE v. DRAPEAU et al.

Civ. 16528.

District Court of Appeal, Second District,
Division 3, California.
March 30, 1949.

Hearing Granted May 26, 1949.*

1. Easements 🔑61(9)

In action for decree that plaintiff is owner over and for easement over property of defendants for ingress to and egress from plaintiff's lands, and for an injunction restraining defendants from interfering with the easement, evidence supported findings for plaintiff.

2. Easements 🔑15

The doctrine of implied easements includes existing servitudes sometimes referred to as "quasi easements".

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Quasi Easements".

3. Easements 🔑16

Where during unity of title, an apparently permanent and obvious servitude is imposed on one part of an estate in favor of another part, which servitude at time of severance is in use and is reasonably necessary, for the fair enjoyment of the other part of the estate, upon severance of the ownership, a grant of right to continue such use arises by implication of law, sometimes called the rule of "visible easements".

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* Subsequent opinion 215 P.2d 729.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Visible Easements".

4. Easements 🔑16

The rule of "visible easements" is grounded upon the principle that all privileges as are obviously incident and reasonably necessary to the fair enjoyment of the property granted substantially in the condition in which it is enjoyed by the grantor, are included in the grant.

5. Easements 🔑15

The doctrine of implied easements is not restricted to ways of necessity.

6. Easements 🔑15

An "implied easement" is distinguished from the specific principle under which a way of necessity arises since the rule of implied easements presupposes the existence of an obvious servitude or quasi easement.

7. Easements 🔑15

Owner of an entire tract of land, or of two or more adjoining parcels may employ a part of the land so as to create a seeming servitude or quasi easement in favor of another portion to which the use becomes appurtenant.

8. Easements 🔑24

If the quasi dominant tenement is conveyed without express reference in the deed, the quasi easement is held to be impliedly granted, by invoking the inference, that the parties contracted with reference to the conditions of the property at the time of the sale, that the grantor intended to convey a right to use the quasi easement and that the grantee reasonably expected to take and hold such right.

9. Easements 🔑15

In applying the rule of quasi easements the courts look to the nature, arrangement and use of the land, the relation of its parts to each other and the degree of necessity for giving such construction to the grant, as will give effect as to what may be inferred to have been the reasonable intention of the parties.

10. Easements 🔑54

Parties having contracted with a view to the condition of the property as it actually existed at time of the sale, neither party has a right thereafter without consent of the other to change to the detriment of the other, a condition which openly exists.

11. Easements 🔑16

Elements necessary to create "quasi easement" by implication upon severance of unity of ownership in an estate, are a separation of title, which implies unity of ownership at some former time as a foundation of the right, necessity that before separation takes place, the use which gives rise to the easements shall be so long continued and obvious so as to show that it was meant to be permanent, and the easement must be necessary to the beneficial enjoyment of the land granted.

12. Easements 🔑15

As respects a quasi easement, the requisite of necessity to the beneficial enjoyment of the land is not an absolute or strict necessity, a reasonable necessity being sufficient.

13. Easements 🔑18(1)

If an owner who has used an apparent roadway over one parcel of his land, for benefit of another part conveys the part so benefited, a right to use the roadway passes by conveyance by implication it being reasonably necessary for the use and enjoyment of the property granted.

14. Easements 🔑24

A transfer of realty passes all easements attached thereto and creates in favor thereof an easement to use other realty of person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred for the benefit thereof at the time when the transfer was agreed upon or completed. Civ.Code, § 1104.

15. Easements 🔑22

Where owner of tenements sells one of them or owner of an entire estate sells a portion of it, purchaser takes tenement or portion sold, with all benefits and burdens that appear at the time of the sale to belong to it as between it and the property and the vendor retains.

16. Easements 🔑36(3)

Where the entire lot over which plaintiff claimed an easement for a roadway was owned by a common grantor there was a separation of title, the roadway was constructed as a permanent road, and before the separation took place, the use of the roadway which gave rise to the easement continued for 20 years and was open, visible and obvious and was reasonably necessary to the beneficial enjoyment to the land granted, evidence established an implied easement in plaintiff by implication to use of the roadway. Civ.Code, §§ 662, 801, 1084, 1104.

17. Easements 🔑3(1), 24

An "easement appurtenant" inheres in the land, concerns the premises, pertains to its enjoyment, and passes with the transfer of the title to the land. Civ.Code, § 1084.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Easement Appurtenant".

18. Easements 🔑44(1)

Where plaintiff was entitled to a quasi easement for a roadway over property of defendants for ingress to and egress from plaintiff's lands court should have restricted the use that plaintiff might make of the quasi easement to that existing at the time of the severance of the quasi dominant tenement from the quasi servient tenement.

19. Easements 🔑40

The rights of a person having an easement in the lands of another are measured and defined by the purpose and the character of that easement.

20. Easements 🔑43

An easement implied from an existing use is subject to the conditions and burdens imposed upon it at the time of severance.

21. Easements 🔑43

A quasi easement is restricted to the servitude that exists when the owner effects a severance, and the owner of an easement cannot change the character of a servitude or materially increase the burden upon the servient estate.

22. Easements 🔑41

A person who does not secure a natural grant for all purposes is not entitled to be put in a better position than to be able to enjoy that which he had at the time the grant was made, and such rule applies to easements acquired by prescription.

23. Easements 🔑51

A right of way for a particular purpose cannot be enlarged and used for any other purpose.

24. Easements 🔑22, 24

Where plaintiff's predecessor saw when she bought her lot, merely a roadway used by her grantor solely for care and maintenance of an orchard on the property, and harvesting of crops therefrom, she was charged with notice of the true origin and history of the easement and neither she nor plaintiff had any rights inconsistent with that origin and history.

25. Easements 🔑61(12)

Where decree established that plaintiff was owner of an easement over property of defendants for an ingress to and egress from plaintiff's lands and it was found that a gate or other barricade should be maintained to the entrance to the roadway, plaintiff was entitled to have the provision therefor contained in the judgment. Civ. Code, § 1104.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action for a decree that plaintiff is owner over an easement over property of defendants, and for an injunction by Margaretta B. Fristoe against Jack Drapeau and another. From a judgment for plaintiff and from an order denying their motion for a new trial, defendants appeal.

Appeal from order dismissed. Judgment modified and affirmed.

Charles F. Gerard, of Ventura, for appellants.

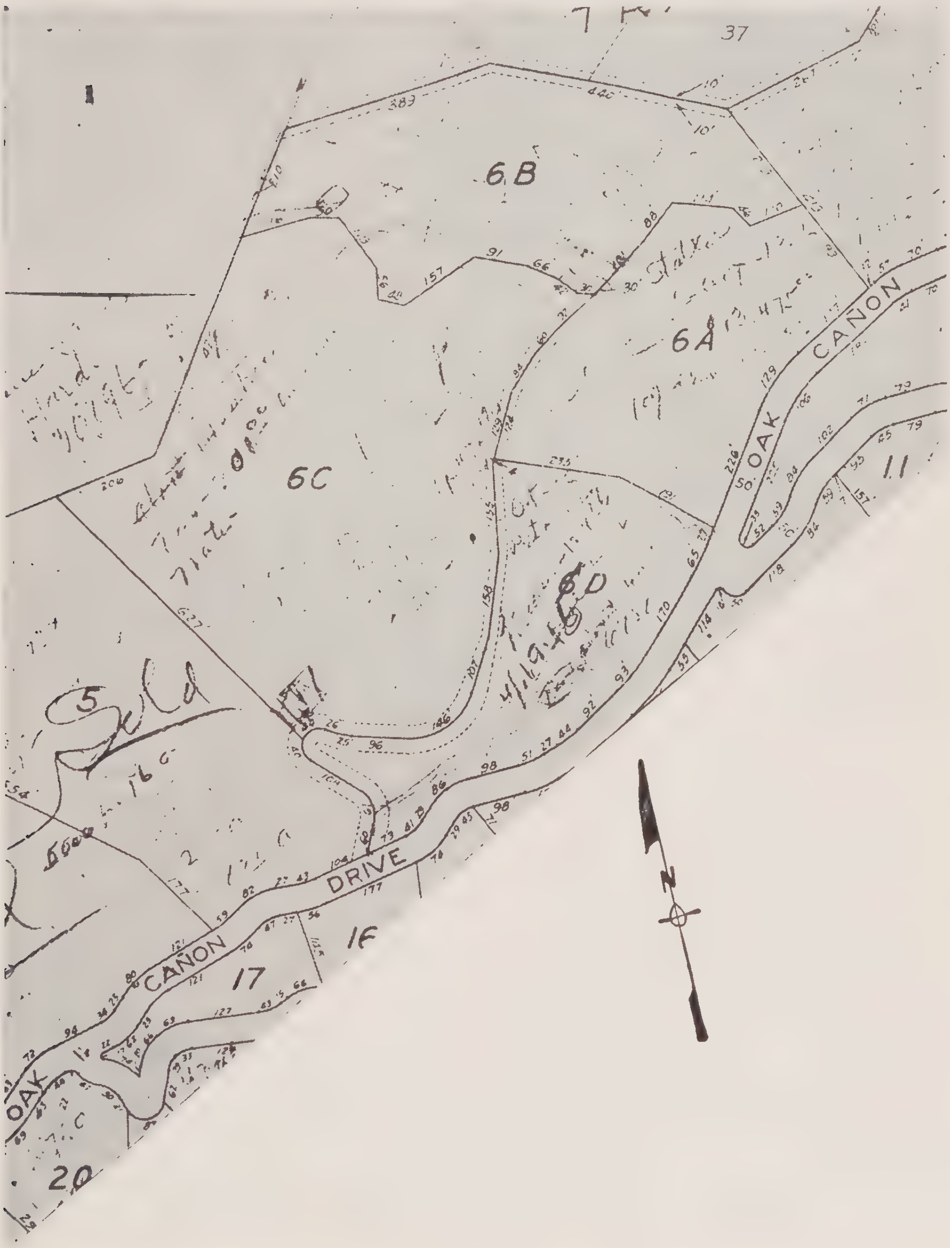
Sprague & Sparks, of Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by defendants from a judgment for plaintiff in an action to have it decreed that plaintiff is the owner of an easement over property of the defendants for ingress to and egress from plaintiff's lands and for an injunction enjoining defendants from obstructing and interfering with the easement. Defendants also appeal from the nonappealable order denying their motion for a new trial.

The accompanying sketch will lend to better understanding of the facts:

The property shown on the sketch was subdivided by Whittier Extension Company. Plaintiff is the owner of Lot 6a. Defendants are the owners of Lot 6c. A roadway of which the easement, as decreed, is a part, is shown by the dotted lines between Lots 6a and 6d on one side and Lot 6c on the other side. A county road, Oak Cañon Drive, runs along and is contiguous to the entire south boundary of plaintiff's



property. She has used this road since acquiring the property for access to her house and garage and to remove fruit from the southerly portion of her land.

The complaint is in two counts. The first alleges facts as the basis of a prescriptive title. The second alleges facts as the basis of a grant of an implied easement. The court found: the existence of the roadway; that a portion thereof lies on appellants' property and a portion on respondent's property; it is for the benefit and convenience of the property of the parties; each party is entitled to use the roadway as means of ingress to and egress from their respective properties; a gate or other barricade should be maintained at the entrance to the roadway; the parties should have keys or other means of entry through the gate; appellants' right, title and interest in the roadway and the property through which it runs is subject to its use by respondent; due to the hilly nature of the terrain and the steepness of respondent's property, there is no other available means of ingress to or egress from the groves located thereon; from 1914 to 1930 Whittier Extension Company was the owner of all of Lot 6; during that ownership it built and improved the land (the portion between the dotted lines) as a permanent roadway, including cement retaining walls on both sides along various parts thereof; the roadway was constructed and situated so as to serve all of Lot 6 and any parcel thereof lying contiguous thereto; the roadway leads to a public thoroughfare, Oak Cañon Drive; on March 26, 1930, Whittier Extension Company conveyed Lot 6a to Cristine Drum; the conveyance reserved a portion of the existing roadway for road purposes and reserved the right to dedicate the roadway to public use; the part of the roadway reserved has no connection to the public thoroughfare other than over the balance of the roadway; the roadway has been utilized by Whittier Extension Company and its grantees for more than 25 years as a roadway; the use of that portion of the roadway, which is not a part of plaintiff's property, is reasonably necessary for the beneficial enjoyment of said property. The court concluded that the roadway shall be kept open and is to be used by respondent and appellants as a means of egress into and over their respective parcels of property. The judgment decreed that both appellants and respondent shall have the equal right to the use of the roadway as a means of ingress to and over their respective properties.

The properties involved were originally owned by Whittier Extension Company and called Lot 6. About 1916 a roadway was constructed on Lot 6 between the dotted lines shown on the sketch with a turnabout at the north end. It was a permanent road with a gravel surface and had retaining walls along its sides in most of its course. About that time Lot 6 was, and still is, planted to lemons and avocadoes. Lot 6 was divided into Lots 6a, 6b, 6c and 6d. When Lot 6 was divided into four lots, the division of the lots was made so that the roadway was either a part of or adjoined each lot. Before Lot 6 was divided, the roadway was used by Whittier Extension Company for ingress to and egress from all parts of the lot for the pruning of trees, fertilization, irrigation, harvesting of crops, spraying, inspection and other work incidental to growing lemons and avocadoes.

In March, 1930, Whittier Extension Company conveyed Lot 6a to Cristine Drum. The deed reserved to the grantor the right to use as a roadway that portion of the previously constructed road lying within the grant and reserved the right to dedicate the roadway to the public for road purposes. The deed did not grant Cristine Drum any right to use that part of the roadway on Lots 6c and 6d. Respondent acquired Lot 6a by mesne conveyances from Cristine Drum. Appellants acquired Lot 6c in May, 1946, from Whittier Extension Company. The deed did not contain any reservation or mention of the roadway. Throughout the years a gate was maintained at the entrance to the roadway. At times it was torn down by trespassers, replaced until sometime in 1943, when because of lack of materials it could not be replaced. Appellants replaced it in 1946. On occasions through the years it was locked.

From Oak Cañon Drive the terrain slopes upward on all of the lots at a very steep pitch. To grow lemons and avocadoes the land was terraced along contours. There is evidence that it is practically impossible to get implements and materials necessary to the care and maintenance of the orchard on Lot 6a and to get fruit down to Oak Cañon Drive except by the roadway. From the time Lot 6a was acquired by Cristine Drum in 1930, the owners of that lot continued to use the roadway for the same purpose as it had been used by Whittier Extension Company. Respondent has so used it since 1940.

[1] Appellants' principal contention is that the evidence does not support the findings. The claim is not tenable. The effect of the findings is that an easement was created by an implied grant. The entire lot—6—was owned by a common grantor. There was a separation of title. The roadway was constructed as a permanent road. Before the separation took place, the use (over Lot 6c) which gave rise to the easement had continued for 20 years. The use was open, visible and obvious. The easement was and is reasonably necessary to the beneficial enjoyment of the land granted. These facts are sufficient to support the findings and satisfy the requirements necessary to create an easement by implied grant.

[2-6] The doctrine of implied easements includes existing servitudes, sometimes referred to as "quasi-easements." It is well established that where, during unity of title, an apparently permanent and obvious servitude is imposed on one part of an estate in favor of another part, which servitude, at the time of a severance, is in use and is reasonably necessary for the fair enjoyment of the other part of the estate, then upon a severance of the ownership, a grant of the right to continue such use arises by implication of law. 17 Am.Jur. 945, sec. 33, and cases cited; 1 Thompson on Real Property, Perm.Ed., 636, sec. 392; Jones on Easements 104, sec. 129; annotation 26 L.R.A.,N.S., 316, 346; 136 Am.St. Rep. 693; 155 A.L.R. 543. This rule is ofttimes called the rule of visible easements. Annotation 155 A.L.R. 543. The rule is grounded upon the principle that all privileges as are obviously incident and reasonably necessary to the fair enjoyment of the property granted substantially in the condition in which it is enjoyed by the grantor are included in the grant. Philadelphia Steel Abrasive Co. v. Louis Gedicke Sons, 343 Pa. 524, 23 A.2d 490, 138 A.L.R. 776, 778; Talbert v. Mason, 136 Iowa 373, 113 N.W. 918, 920, 14 L.R.A., N.S., 878, 125 Am.St.Rep. 259; Gorton-Pew Fisheries Co. v. Tolman, 210 Mass. 402, 97 N.E. 54, 55, 38 L.R.A.,N.S., 882; Goodall v. Godfrey, 53 Vt. 219, 222, 38 Am. Rep. 671. The doctrine of implied easements is not restricted to ways of necessity. Venegas v. Luby, 49 N.M. 381, 164 P.2d 584, 587; Sievers v. Flynn, 305 Ky. 325, 204 S.W.2d 364; Freiden v. Western Bank & Trust Co., 72 Ohio App. 471, 50 N.E.2d 369; Clement v. Fishler, 28 Ohio App. 392, 162 N.E. 706, 707; Barrick v. Gillette, Tex. Civ.App., 187 S.W.2d 683, 687. An implied easement is to be distinguished from the specific principle under which a way of necessity arises. This because the rule of implied easements presupposes the existence of an obvious servitude or quasi-easement. Venegas v. Luby, supra.

[7-10] The owner of an entire tract of land or of two or more adjoining parcels may employ a part of the land so as to create a seeming servitude, or a quasi-easement, in favor of another portion to which the use becomes appurtenant. If the quasi-dominant tenement is conveyed without express reference in the deed the quasi-easement is held to be impliedly granted by invoking the inference that the parties contracted with reference to the conditions of the property at the time of sale, that the grantor intended to convey a right to use the quasi-easement, and that the grantee reasonably expected to take and hold such right. Venegas v. Luby, supra, 49 N.M. 381, 164 P.2d 584, 586; Rischall v. Bauchmann, 132 Conn. 637, 46 A.2d 898, 901, 165 A.L.R. 559; Ferrell v. Durham Bank & Trust Co., 221 N.C. 432, 20 S.E.2d 329, 331;

28 C.J.S., Easements § 31, page 687; annotation: 8 A.L.R. 1368; 16 A.L.R. 1074; 32 A.L.R. 1347; 34 A.L.R. 233; 41 A.L.R. 1442; 56 A.L.R. 1138; 58 A.L.R. 824; 74 A.L.R. 1250; 100 A.L.R. 1321; 155 A.L.R 543; 164 A.L.R. 1001; 165 A.L.R. 567. In applying the rule, the courts look to the nature, arrangement, and use of the land, the relation of its parts to each other and the degree of necessity for giving such construction to the grant as will give effect to what may be inferred to have been the reasonable intention of the parties. The parties having contracted with a view to the condition of the property as it actually existed at the time of sale neither party has a right thereafter, without the consent of the other, to change, to the detriment of the other, a condition which openly and visibly exists. Powers v. Heffernan, 233 Ill. 597, 84 N.E. 661, 16 L.R.A.,N.S., 523, 122 Am.St.Rep. 199; Irvine v. McCreary, 108 Ky. 495, 56 S.W. 966, 49 L.R.A. 417; Bowling v. Burton, 101 N.C. 176, 7 S.E. 701, 2 L.R.A. 285; 28 C.J.S. Easements § 30, page 686.

[11-13] There are three elements necessary to create a quasi-easement by implication upon the severance of the unity of ownership in an estate. 1. A separation of title which implies unity of ownership at some former time as the foundation of the right. 2. Necessity that before separation takes place, the use which gives rise to the easement shall have been so long continued and obvious as to show that it was meant to be permanent. The servitude must be apparent, permanent, and of such character that it may be inferred that the owner desired its preservation as a servitude. 3. The easement must be necessary to the beneficial enjoyment of the land granted. Carmon v. Dick, 170 N.C. 305, 87 S.E. 224, 225; 3 Tiffany Real Property, secs. 781, 784-786; 1 Thompson on Real Property 661, sec. 405; 17 Am.Jur. 948, sec. 34, 951, sec. 41, 954, sec. 44; 28 C.J.S., Easements § 33, page 691. The requisite of necessity is not an absolute or strict necessity. A reasonable necessity is sufficient. Sievers v. Flynn, 305 Ky. 325, 204 S.W.2d 364, 366; Barrick v. Gillette, Tex.Civ.App., 187 S.W.2d 683, 687; Venegas v. Luby, 49 N.M. 381, 164 P.2d 584, 587; Rischall v. Bauchmann, 132 Conn. 637, 46 A.2d 898, 901; Fischer v. Hendler, 49 Cal.App.2d 319, 322, 121 P.2d 792. The authorities are legion which hold that if an owner who has used an apparent roadway over one parcel of his land for the benefit of another part conveys the part so benefited, a right to use the roadway passes by the conveyance by implication, it being reasonably necessary for the use and enjoyment of the property granted. See cases cited 17 Am.Jur. 955, sec. 44; 3 Tiffany Real Property 255, sec. 781.

[14-17] The doctrine is codified in California. Civil Code section 1104 reads: "A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed." It is long established and fully recognized by a long line of decisions in this state. Cave v. Crafts, 53 Cal. 135, 139; Cross v. Kitts, 69 Cal. 217, 221, 10 P. 409, 58 Am.Rep. 558; Quinlan v. Noble, 75 Cal. 250, 252, 17 P. 69; Smith v. Corbit, 116 Cal. 587, 591, 48 P. 725; Jones v. Sanders, 138 Cal. 405, 411, 71 P. 506; Pendola v. Ramm, 138 Cal. 517, 520, 71 P. 624; Pogue v. Collins, 146 Cal. 435, 439, 80 P. 623; Jersey Farm Co. v. Atlanta Realty Co., 164 Cal. 412, 415, 129 P. 593; Cheda v. Bodkin, 173 Cal. 7, 13, 158 P. 1025; Southern Pac. Co. v. Los Angeles Mill. Co., 177 Cal. 395, 402, 170 P. 829; Vargas v. Maderos, 191 Cal. 1, 2, 214 P. 849; Silveira v. Smith, 198 Cal. 510, 516-519, 246 P. 58; Rodemeyer v. Meger, 30 Cal.App. 514, 516, 158 P. 1047; Kallenburg v. Long, 39 Cal.App. 731, 735, 179 P. 730; Palvutzian v. Terkanian, 47 Cal.App. 47, 52, 190 P. 503; A. Hamburger & Sons, Inc., v. Lemboeck, 20 Cal.App.2d 565, 568, 67 P.2d 380; Rosebrook v. Utz, 45 Cal.App.2d 726, 729, 114 P.2d 715; Fischer v. Hendler, 49 Cal.App.2d 319, 321, 121 P.2d 792; Greene v. Fickert, 49 Cal.App.2d 511, 516, 122 P.2d 93; Rees v. Drinning, 64 Cal.App.

2d 273, 277, 148 P.2d 378; Navarro v. Paulley, 66 Cal.App.2d 827, 829, 153 P.2d 397; cf. Rubio Canon etc. Assoc. v. Everett, 154 Cal. 29, 32, 96 P. 811; Oliver v. Burnett, 10 Cal.App. 403, 406, 102 P. 223; Nay v. Bernard, 40 Cal.App. 364, 368, 180 P. 827. The principle underlying the doctrine was stated in the early case of Cave v. Crafts, supra, 53 Cal. 135, 139, to be: "that where the owner of two tenements sells one of them, or the owner of an entire estate sells a portion of it, the purchaser takes the tenement or portion sold with all the benefits and burdens that appear at the time of sale to belong to it, as between it and the property which the vendor retains." It has been said that the doctrine "has become a rule of real property in this state as forceful as the rule in regard to the rights of lower riparian owners or the mutual obligations of coterminous owners." Kallenburg v. Long, 39 Cal. App. 731, 735, 179 P. 730, 732. All of the elements essential to an easement by implication were established by the evidence. The quasi-easement which arose on the grant of Lot 6a to Cristine Drum passed to respondent. The easement is appurtenant to the land. Civ.Code, secs. 662, 801. An easement appurtenant inheres in the land, concerns the premises, pertains to its enjoyment and passes with the transfer of the title to the land. Civ.Code, sec. 1084; 17 Am.Jur. 933, sec. 12.

The conclusion of the trial court that the respondent has a right of way over the property in question is fully justified.

[18-24] Appellants urge that the court should have restricted the use that respondent may make of the quasi-easement to that existing at the time of the severance of the quasi-dominant tenement from the quasi-servient tenement. The point is well taken. They also urge that having found that a gate or other barricade should be maintained at the entrance to the roadway, the court should have made provision therefor in the judgment. There is no such provision in the judgment. By the express provision of Civil Code, section 1104 the quasi-easement created upon severance is to use the property "in the same manner and to the same extent" as it was then "obviously and permanently used". The rights of a person having an easement in the land of another are measured and defined by the purpose and character of that easement. Percy A. Brown & Co. v. Raub, 357 Pa. 271, 54 A.2d 35, 42; Dyer v. Compere, 41 N.M. 716, 73 P.2d 1356, 1358; 17 Am.Jur. 993, sec. 96; cf. Langazo v. San Joaquin Light & Power Co., 32 Cal. App.2d 678, 686, 90 P.2d 825. An easement implied from an existing use is subject to the conditions and burdens imposed upon it at the time of severance. Tunstall v. Christian, 80 Va. 1, 7, 56 Am.Rep. 581; Frawley v. Forrest, 310 Mass. 446, 38 N.E.2d 631, 138 A.L.R. 999, 1002. A quasi-easement is restricted to the servitude that exists when the owner effects the severance. McKeon v. Brammer, 238 Iowa 1113, 29 N.W.2d 518, 174 A.L.R. 1229, 1234. The owner of an easement cannot change the character of the servitude or materially increase the burden upon the servient estate. Fletcher v. Stapleton, 123 Cal.App. 133, 137, 10 P. 2d 1019; Drake v. Russian River Land Co., 10 Cal.App. 654, 666, 103 P. 167. The basis of this rule is that a person who does not secure an actual grant for all purposes is not entitled to be put in a better position than to be able to enjoy that which he had at the time the grant was made. Ann.Cas. 1914C, 476-478. The same rule applies to easements acquired by prescription. Allen v. San Jose Land & Water Co., 92 Cal. 138, 28 P. 215, 15 L.R.A. 93; Anderson v. Southern Cal. Edison Co., 77 Cal.App. 328, 335, 246 P. 559. A right of way for a particular purpose cannot be enlarged and used for any other purpose. What respondent's predecessor saw when she bought Lot 6a was merely a roadway used by the grantor solely for the care and maintenance of the orchard on the property and the harvesting of crops therefrom. It may not be inferred that she accepted a deed with any greater benefit than that of which her observation gave her notice. She is charged with notice of the true origin and history of the easement and can have no rights inconsistent with that origin and history.

The judgment is modified by adding the following thereto:

The plaintiff's use of that portion of said roadway as lies upon Lot 6c of Tract 9211 is limited and restricted to the care and maintenance of orchards on Lot 6a of Tract 9211 and the harvesting of fruit therefrom.

[25] It is further ordered that the plaintiff and the defendant maintain a gate or other barricade at the Oak Cañon Drive entrance to said roadway.

The appeal from the order denying the motion for a new trial is dismissed. The judgment, as thus modified, is affirmed. The respective parties shall bear their own costs on appeal.

SHINN, P. J., and WOOD, J., concur.

PEOPLE v. CHESSMAN et al.

Cr. 4291.

District Court of Appeal, Second District, Division 2, California.

April 8, 1949.

Hearing Granted May 5, 1949.*

1. Criminal law 🔑1144(13)

On appeal from judgment of conviction, evidence is viewed in light most favorable to the prosecution.

2. Robbery 🔑23(1)

In robbery prosecution, fact that police officers after being notified of robbery had telephoned prosecuting witnesses and said that they had arrested men who had committed the robbery was evidence which trier of fact could consider in determining sufficiency of evidence of identification.

3. Robbery 🔑24(1)

Evidence supported conviction for robbery in the first degree.

4. Kidnapping 🔑5

Evidence supported conviction of kidnapping for purpose of robbery. Pen.Code, § 209.

5. Kidnapping 🔑1

Where person is restrained through fear it is as much a violation of the law of kidnapping as if he were carried away and concealed. Pen.Code, § 209.

6. Kidnapping 🔑1

Under the statute penalizing one who seizes, confines, holds, or detains another to commit extortion or robbery, one who for 15 minutes guarded witnesses who had been forced into back room 25 feet away at point of gun, and who struck victim over the head, and threatened to strike another during time stealing of considerable property occurred was guilty of kidnapping. Pen.Code, § 209.

◆

Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge.

David Knowles, was tried with Caryl Chessman and others, and was convicted of two counts of robbery in the first degree, and two counts of kidnapping for the purpose of robbery, and from each of the judgments and an order denying his motion for a new trial, defendant Knowles appeals.

Judgments and order affirmed.

Rosalind G. Bates, of Los Angeles, for appellants.

Fred N. Howser, Atty. Gen., and Henry A. Dietz, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

After trial before the court without a jury defendant was found guilty of (1) two counts of robbery of the first degree, and (2) two counts of kidnapping for the purpose of robbery. From each of the judgments and the order denying his motion for a new trial he appeals.

[1] The evidence being viewed in the light most favorable to the people (respondent) and pursuant to the rule set forth in People v. Pianezzi, 42 Cal.App.2d 265, 269, 108 P.2d 732, the essential facts are:

At about 6:30 p. m. on January 23, 1948, defendant and Caryl Chessman entered the

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* Subsequent opinion 217 P.2d 1.

Town Clothiers at Redondo Beach, California. Joe Lesher, a clerk in the store, and Melvin Waisler, the owner, were present. Defendant asked Mr. Lesher to show him a topcoat. For 15 minutes defendant examined various coats that were displayed to him. During this time Mr. Waisler was walking about in the store and finally went into his office in the rear of the building. Shortly afterwards he came back into the store and defendant and Chessman displaying guns said: "Come on, this is a stick-up, you put up your hands." Chessman was armed with a .45 caliber pistol and defendant appeared to be armed with a toy cap pistol. They then asked Mr. Lesher what the room was to the right and he told them it was a stock room, whereupon defendant and his companion forced Mr. Lesher and Mr. Waisler to go into the stock room threatening them with their guns.

This room was located about 25 feet from the place where they were when it was announced that this was a holdup. They were forced to go into the stock room when defendant and his companion menaced them with their guns. In the stock room defendant took the .45 revolver from Chessman and gave him the gun he had. Messrs. Waisler and Lesher were ordered to stand in the room with their faces toward the wall and to throw their wallets out. Mr. Lesher tossed his wallet out which contained $38.00 in cash and checks, whereupon he was then taken into the store and forced to open the cash register from which defendant took $227.30. After this Mr. Lesher returned to the stock room where defendant struck Mr. Waisler on the head with the barrel of the gun and at the same time he said to Mr. Lesher: "Keep your head to the front or I will give you the same dose." Defendant and Chessman then left the store and fled in a grey Ford coupe.

[2] The robbery was immediately reported to the police. At about 8 o'clock on the evening of the robbery Officers May and Reardon observed on Vermont Avenue about a half block south of Hollywood Boulevard a Ford automobile answering the description of the one in which defendant and his companion had fled from the scene of the robbery. After pursuing the car for some distance it was stopped. Chessman was driving the car and defendant was in the right front seat. When the car was stopped defendant got out and ran about 30 feet and got up on a parking strip during which time he dropped the .45 automatic pistol with which he had been armed. In the car was found Mr. Lesher's wallet and the toy gun which had been used in the robbery. There was also found a considerable amount of currency and clothing which had been stolen from the store. Messrs. Lesher and Waisler later identified defendants as the men who committed the crimes. The fact that the police officers had telephoned them and said that they had arrested the men who had committed the robbery was evidence which the trier of fact could consider in determining the sufficiency of the evidence of identification.

Defendant relies for reversal of the judgments on two propositions which will be stated and answered hereunder seriatim:

First: *The evidence is insufficient to support the judgments.*

[3, 4] This proposition is untenable. An examination of the record discloses ample testimony and other evidence of each and every material fact set forth above. From such proof the trial court was justified in impliedly finding:

(1) That defendant while armed with a deadly weapon forcibly took from (a) the person and immediate presence of Mr. Waisler money in the amount of $227.30, and (b) Mr. Lesher $38.00. (This finding sustains the judgments of guilty on two counts of robbery of the first degree.)

(2) That defendant at the point of a gun forced Messrs. Waisler and Lesher to go some 25 feet from the place in the store where they were into an adjacent stock room and to remain there for a considerable period of time. (This finding sustains the judgments of guilty of kidnapping.) (People v. Oganesoff, 81 Cal.App.2d 709, 711, 184 P.2d 953; see also

People v. Ash, 88 Cal.App.2d 819, 199 P.2d 711).

The case last cited supports the trial court's conclusion that the complaining witnesses had ample opportunity to identify defendant as one of the perpetrators of the crimes.

People v. Radovich, 122 Cal.App. 176, 178, 9 P.2d 542; People v. North, 81 Cal.App. 113, 117, 252 P. 1063; People v. Deal, 42 Cal.App.2d 33, 35, 108 P.2d 103; People v. Fletcher, 46 Cal.App.2d 126, 128, 115 P.2d 517, relied on by defendant, are not here of value as each of these cases was affirmed and in each of them the identification of defendant was held to be sufficient. Likewise People v. Braun, 14 Cal.2d 1, 92 P.2d 402, is inapplicable for the reason that the court held that the identification of defendant was sufficient, but reversed the case because of the misconduct of the district attorney.

Second: *The legislature did not intend to make any holding or moving of the victims of a robbery from one room to another kidnapping.*

[5] This proposition is likewise untenable. The law is now settled that where a person is restrained through fear it is as much a violation of the law of kidnapping as if he were carried away and concealed. (People v. Salter, 59 Cal.App.2d 59, 67, 137 P.2d 840; see also People v. Tanner, 3 Cal.2d 279, 297 et seq., 44 P.2d 324; People v. Dugger, 5 Cal.2d 337, 339, 54 P.2d 707.)

[6] To sustain a conviction under section 209 of the Penal Code it is not necessary to prove that defendant moved his victim or compelled him to move from one point to another. That section provides that "Every person who seizes, confines * * * holds or detains" another to commit extortion or robbery shall suffer death or life imprisonment.

In the present case the evidence discloses that the complaining witnesses were forced into a back room at the point of a gun; that defendant during the robbery guarded the complaining witnesses and struck one of them over the head with a gun and at the same time threatened to strike the other if he turned his head; that these acts took from 15 to 20 minutes and were accompanied by the stealing of considerable property from the victims. The facts clearly bring the case within the provisions of section 209, Penal Code,* and the convictions are sustained by the authorities above cited.

The judgments and order are and each is affirmed.

MOORE, P. J., and WILSON, J., concur.

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* Section 209 of the Penal Code reads thus: "Every person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or robbery or to exact from relatives or friends of such person any money or valuable thing, or who aids or abets any such act, is guilty of a felony and upon conviction thereof shall suffer death or shall be punished by imprisonment in the State prison for life without possibility of parole, at the discretion of the jury trying the same, in cases in which the person or persons subjected to such kidnaping suffers or suffer bodily harm or shall be punished by imprisonment in the State prison for life with possibility of parole in cases where such person or persons do not suffer bodily harm."

In re ABERT'S ESTATE.

Civ. 7544.

Sac. 5945.

District Court of Appeal, Third District,
California.

March 31, 1949.

Rehearing Denied April 28, 1949.

Hearing Denied May 26, 1949.

1. Wills 🔑384, 386

On appeal from a judgment in a will contest, evidence most favorable to respondent should be accepted as true and that which is unfavorable should be disregarded.

2. Wills 🔑386

In will contest the trier of facts is the sole judge of the credibility of the witnesses and of the weight of the evidence.

3. Wills 🔑163(2)

Where evidence established a confidential relationship existing between proponent of will and his father at time of execution thereof, that proponent was active in procuring the will, and dominated the volition of the testator and that he unduly profited by the instrument, burden shifted to the proponent to show that the will was not the product of his undue influence.

4. Wills 🔑166(2)

Evidence justified denial of probate will in favor of son on ground that there was a confidential relationship between testator and son, activity by the son at the very time of the execution of the will, the securing of an undue proportion of the estate, and the execution of the will by undue influence by the son.

5. Wills 🔑163(2)

When contestant has shown that proponent of a will sustains a confidential relationship towards testator, and actively participates in procuring execution of a will and unduly profits thereby, burden then shifts to proponent to prove that the will was not induced by his undue influence and contestants are not required to prove in addition, that the instrument is an unnatural will.

6. Wills 🔑163(2, 6)

A presumption of undue influence arises where testator is aged and feeble, leaves the bulk of his property to children with whom he lives to exclusion of others for whom he has always manifested affection or where testator actually reposes trust and confidence in the person with whom he lives.

7. Wills 🔑324(3)

Issue of undue influence in procuring execution of a will presents a question of fact for jury under proper instructions.

8. Wills 🔑166(12)

Circumstantial evidence without any direct evidence may be sufficient to support a finding of undue influence in execution of a will.

9. Evidence 🔑589

Where a proponent is the only person who can testify to circumstances attending execution of will, his testimony is not binding on the contestant.

10. Wills 🔑166(1)

Facts indicative of undue influence are unnatural provisions of will, contrary to expressed desire of testator, disposition of property contrary to expressed intention of testator, a confidential relationship of beneficiary of the will who thereby secures undue benefits, age, infirmity or circumstances rendering testator subject to influence or subversion of his free will or consent, and wrongful activity in securing execution of the will.

11. Wills 🔑166(12)

Will contestant is entitled to full force of evidence deduced in support of his charge of undue influence together with all reasonable inferences which may be drawn therefrom.

12. Wills 🔑386

Where there is substantial evidence to support the finding of undue influence in will contest, verdict and judgment rendered in accordance therewith should be affirmed on appeal.

13. Wills 🔑386

In will contest, trier of the facts is the sole judge of credibility and weight of the evidence.

4. Wills ⚿163(2)

Evidence established that son to whom the bulk of testator's estate was left, to exclusion of other children, for whom testator had an equally affectionate regard, was active in procuring the execution of the will, so that burden was thereby shifted to him to show that the will was not the product of his undue influence.

* * *

Appeal from Superior Court, Mendocino County; Donald Geary, Judge.

Proceeding in the matter of the estate of Emanuel Abert, also known as E. Abert, deceased, wherein Ernest Abert and Ernest Abert named as the executor in an alleged will, sought to probate the will of the deceased opposed by Henry J. Abert and others. From a judgment denying probate of the will, the proponent appeals.

Affirmed.

Preston & Falk, of Ukiah, for appellant.

Albert Picard, of San Francisco, for respondents.

THOMPSON, Justice.

Ernest Abert, proponent, has appealed from a judgment rendered pursuant to the verdict of a jury, denying probate of the last will of his father, Emanuel Abert, deceased, on the ground that the will was procured by proponent's undue influence.

The appellant contends that the judgment is not supported by the evidence.

The deceased was a widower eighty-two years of age at the time the contested will was executed on November 13, 1944. He died August 1, 1945, leaving surviving him three adult married sons and four adult married daughters. The will bequeathed to the testator's daughter, Helen Nicolas, the sum of $5,000. The balance of the entire estate, including his Hopland farm of 675 acres of land, except the bonds hereafter mentioned, was devised to his son Ernest, who was also named as sole executor to act without bond. He was also named as sole residuary legatee of all other property. The will declared that the other named children should inherit nothing for the reason that they had already received "from me more than their just proportion" of the estate. Ernest filed the will for probate in Mendocino County. The daughter Helen Nicolas, who was bequeathed the $5,000 legacy, filed a disclaimer of further interest, and did not participate in the contest of will. The remaining two sons and three daughters of the deceased contested the will on three specified grounds: 1. Unsound mind, 2. Lack of due execution of the will, and 3. Undue influence. A nonsuit was granted as to the charge of lack of due execution of the will. Three interrogatories were submitted to the jury, namely: (1) Was the testator of unsound mind? (2) Was the will procured by the undue influence of Ernest Abert? (3) Was it the direct result of the fraud of Ernest Abert? The jury found that the will was the result of the undue influence of Ernest Abert. The other two issues were undetermined by the jury.

A motion for judgment notwithstanding the verdict was denied. A motion for new trial was also denied. The trial judge filed an able opinion, fully and fairly reviewing the evidence, and determined that the proponent sustained a confidential relationship toward the testator, and that the will was procured by the undue influence of Ernest Abert. The decree approved and adopted the verdict of the jury finding that the will was procured by the undue influence of Ernest Abert, and thereupon denied probate of the instrument. From that judgment the proponent, Ernest Abert, has appealed.

The only question on appeal is whether the verdict and judgment determining that the will was procured by the undue influence of Ernest Abert is adequately sustained by the evidence, under the circumstances of this case.

[1-3] We are of the opinion there is substantial evidence to sustain the verdict and judgment denying probate of the will on the ground of undue influence. The evidence is conflicting. We shall not attempt to recite evidence favorable to the proponent. On appeal from a judgment in a will contest, like any other civil action, the evidence most favorable to the re-

spondent should be accepted as true, and that which is unfavorable should be disregarded. Estate of Teel, 25 Cal.2d 520, 527, 154 P.2d 384. The trier of facts is the sole judge of the credibility of witnesses and of the weight of the evidence in a will contest just as he is in any other case. Estate of Teel, supra, 25 Cal.2d at page 526, 154 P.2d 384. The circumstances proved in this case, together with the reasonable inferences to be drawn therefrom, adequately show that a confidential relationship existed between the proponent and his father at the time of the execution of the will; that the proponent was active in procuring the will; that the proponent dominated the volition of the testator, contrary to his desire, with respect to his disposition of his property; and that the proponent unduly profited by the terms of that instrument. The burden therefore shifted to the proponent to show that the will was not the product of his undue influence.

The record contains evidence to show that the testator was a widower and eighty-two years of age at the time of the execution of the will. He was a native of France, who had lived in California fifty years or more, but spoke the English language imperfectly, although several close friends and some of his children, including the proponent, testified that he could read, understand and carry on a conversation in the English language. His wife died in 1924. He left surviving him three sons and four daughters, all of whom were married, and whose ages range from 37 to 51 years. They were all intelligent and fairly well educated. The testator was in normal good health and physical condition. He was industrious and frugal. Until shortly prior to the time he went to live with his youngest son, Ernest, who is the proponent of the will, he was solicitous of the welfare of all of his children, and often expressed his desire and intention to divide his estate equally among them. During that period he was on absolutely friendly terms with all his children. Most of his children and Edward Domergue, Mr. and Mrs. Locatelli, and Mrs. LaFon, old friends of many years' standing, so testified. There appears to be little doubt of that fact. Prior to 1915, he owned and operated a dairy ranch in Imperial Valley, where the entire family lived, and upon which the children worked without fixed compensation until they went with their parents to another ranch. In 1915 the Imperial Valley ranch was traded by the decedent for the Hopland ranch which is involved in this contest. They continued to live harmoniously with their parents and to assist in the operation of the last mentioned ranch, until their marriages.

It appears that the 675 acre Hopland ranch, which contained timber land, grazing land, a vineyard and some sheep and cattle, was taken in the name of the daughter, Lucy Babcock, because of the existence of a judgment against the father. At the request of the father, the ranch was conveyed by Lucy to Ernest J. Abert, the proponent, March 16, 1933, and reconveyed to the father July 23, 1943. It was estimated that the ranch was valued at approximately $60,000, the farm machinery and equipment at $10,000, and the entire estate, independently of the bonds, was worth about $130,000.

The appellant married in 1929, but he and his wife continued to live on the Hopland ranch. In 1936 he bought an automobile from the proceeds of the ranch, which he claimed was due to him for services performed for his father. In 1937 Ernest bought a ranch adjoining his father's Hopland land for $25,000, toward the purchase price of which his father contributed the sum of $12,500. Ernest and his wife then moved to their own farm. Soon thereafter the father went to live with his son Ernest, although he sometimes stayed in his own home. There is evidence that the father from this time became more and more dependent upon his son Ernest in the operation of his Hopland ranch and in various business transactions. The father could not drive an automobile. He relied upon Ernest to take him in the car wherever he wished to go. In 1944, when he was asked by his daughter, Lucy Babcock, of whom he was apparently very fond, why he never came to see her, he replied that he could only go where Ernest took him. In 1943 and 1944 he frequently told his children and friends that he wanted all of his children to share alike in his estate.

In March, 1927, three years after the death of his wife, Judge Held drew a will which was executed by the decedent, in which he devised and bequeathed his entire estate in equal one-seventh shares to his seven children. August 11, 1943, Charles Kasch, an attorney residing at Ukiah, drew a second will which was executed by the decedent, in which he devised and bequeathed his entire estate to his named children, except Ernest Abert, in designated percentages of value. The differences in the proportions devised are explained in the will by stating that the amounts which he had previously advanced to his children were deducted from their portions so that "all may share alike." With respect to Ernest, the will states that the testator had already advanced to him "in excess of his share of my estate," and that he therefore gave to him the sum of only $1. The son Fernand was made executor of the second will, to serve without bond. That will and other documents were left by the decedent in the possession of Mr. Kasch.

January 18, 1944, Ernest telephoned attorney Charles Kasch, stating that his father was dissatisfied and wanted all his papers. That same month, while the testator was living with his son Ernest, they drove together to the office of Mr. Kasch in Ukiah to procure the will which he drew in August, 1943, dividing his estate equally among all his children, and other documents. They were met by appointment at Kasch's office by Fernand, who was present during the discussion which followed. Fernand testified that his father appeared to be annoyed at his presence, that his father then asked him, "What are you doing here?" and then addressed him saying "You have done me enough trouble." When Fernand asked him what trouble he referred to, the testator replied, "I *understand* you stole everything that I have." The testator also said "I understand you have put everything in Charley Kasch's name." Fernand denied that he had taken anything belonging to his father, or that any property had been placed in Kasch's name. They then went together into the office of Charles Kasch and examined the documents in his possession. Fernand testified that after thoroughly examining and reading the documents Mr. Kasch asked his father "Are you satisfied?" to which he replied "Yes." The testator then turned to Ernest and asked him "Are you satisfied with the papers?" to which Ernest then replied "Yes, I am." They then went away, leaving the documents with Mr. Kasch. Soon thereafter, Mr. Kasch received a typewritten request signed by the testator, asking him to deliver all the papers to Judge Preston, which he promptly did.

After the second will and other documents which had been left in the possession of decedent's attorney, Mr. Kasch, had been delivered at the written request of the testator to Judge Preston, the decedent and his son, Ernest, went together to Judge Preston's office, and the latter drew a third will, on February 15, 1944, which was executed by the father, by the terms of which he gave to Ernest all of the property of his estate, including the Hopland ranch, with the exception of one $5,000 legacy, which he gave to his daughter Helen Nicolas. That will stated that the other named children were excluded from the will because each had been previously advanced more than his or her share of the estate. On the last-mentioned date the decedent also executed to his son Ernest a deed to the Hopland ranch, which was recorded a few days later. November 9, 1944, the decedent executed a five-year lease of the "Abert Ranch", together with the farming machinery, equipment and household goods to his son Ernest, in consideration for the payment of one-half of the gross income as rental. That lease was also recorded. November 9, 1944, for a stated consideration of $10, the decedent also executed to his son Ernest a bill of sale to all farm machinery and equipment of every description, together with all personal property, except money, "which I now have or which I may hereafter acquire." That personal property was estimated to be worth $10,000. The bill of sale was likewise recorded. November 13, 1944, Judge Preston also drew the last will which is involved in this contest, which was duly executed by the testator, in which he devised and bequeathed all of his property, including the Hopland ranch, as previously stated, to his son Ernest, except a $5,000 legacy which was given to his daughter Helen Nicolas. All the other children were expressly excluded from the will for the stated reason they had previously received gifts in excess of the value of their just proportion. Ernest was made sole executor of the will to serve without bond.

Judge Preston died in May, 1947, prior to the trial of this case.

In November, 1943, and in January, 1944, about the time the second will and documents were withdrawn from possession of testator's attorney, Charles Kasch, the decedent, in company with the proponent, went to the bank and withdrew $43,700, with which several Government war bonds were purchased in the joint names of himself and four of his children, namely, Lucy Babcock for $11,500, Mary Aldrich for $5,000, Alice Pellisier for $11,500 and Fernand Abert for $11,700. That left cash on deposit in decedent's name in the sum of $13,400. Neither the proponent, Ernest, nor Helen Nicolas was given bonds at that time. But Helen was given a legacy of $5,000 in each of the last two wills, and the proponent had been previously given, in 1937, $12,500 in cash toward the purchase price of his home ranch which he then bought. Later he was given about $1,000 to purchase two lots and weighing scales. It also appears that both Helen and Ernest were given bonds at an earlier date during the first World War. On cross-examination, Ernest admitted that his father gave him bonds at one time of the value of $1,700, and at another time valued at $8,000, in the joint names of himself and father making a total sum of $9,700 in bonds, which more than offset the advances to the other children. At the time of the last-mentioned purchase of United States Bonds, Helen Nicolas was also given war bonds in the sum of $5,000. Ernest said that he conducted that transaction for his father He testified "I only made that transaction for him." It thus appears that the father attempted to equalize the gift of bonds to his children, independently of the devise and bequest of the will in question.

In that same month of January, 1944, Fernand visited his father at the home of Ernest where he was then living. Fernand testified that his father did not recognize him at first. He said "Well, he didn't know me at first." He said his father then "begged me to take him home to his own place." He said that his father was unhappy in Ernest's home, and wanted to go back to his own home to live. But Fernand urged him to remain where he was, telling him that "he could not live alone any more, that he was getting along in years."

On February 15, 1944, when Judge Preston drew the first will, which was executed on that date, Ernest accompanied his father and was present during the preparation and execution of the will, as he was also present when Judge Preston drew the later will executed November 13, 1944, the deed to the Hopland ranch, and the lease and bill of sale of all farm machinery, equipment and household goods. Ernest explained his presence by saying he had to drive the machine and that, while his father "couldn't read or write very much, * * * I helped him out with it, * * * I explained things to him." It appears Ernest was also present with his father when he went to the bank to withdraw his money with which he purchased the bonds previously mentioned.

Prior to the execution of the last two wills, the deed to the Hopland ranch, bill of sale of farming implements, and other documents previously mentioned, while the deceased was returning on July 4, 1943, from a barbecue, in his automobile driven by his hired man, the car ran off the grade, as a result of which the decedent sustained an injury consisting of a concussion or at least severe shock. He was taken to a hospital at Ukiah for treatment, but he was soon removed to the home of his daughter Lucy Babcock in Redwood Valley, where he remained until about August 1st of that year. His daughter Mary Aldrich came from her home and assisted Lucy in taking care of their father. Fernand testified that after that accident his father "would imagine things" and that "He didn't recognize the house at various times. He didn't recognize some of his family." There is persuasive evidence that until after that accident and he had returned to the home of Ernest, he was congenial with all of his children and often expressed his intention of dividing his property equally among them.

[4] The evidence indicates that Ernest kept close watch over his father's business and property affairs for at least a year or two before the last wills were drawn; that he advised and counseled his father regarding all his business transactions, and that a confidential relationship existed between them during that period. The clear inference is that Ernest was active in procuring the large share of his father's estate, contrary to the testator's volition and desire. Considerable ill will existed between Ernest and his brothers and sisters who were excluded from the will. We conclude that the evidence amply shows confidential relationship, activity on the part of proponent at the very time of the execution of the last will, the securing of an undue proportion of the estate, and the execution of the will in question by the undue influence of the proponent.

[5] The rule is firmly established in California that when the contestant has shown that the proponent of a will sustains a confidential relationship toward the testator, and actively participates in procuring the execution of the will, and unduly profits thereby, the burden then shifts to the proponent to prove that the will was not induced by his undue influence. Estate of Lances, 216 Cal. 397, 403, 14 P.2d 768; Estate of Shay, 196 Cal. 355, 363, 237 P. 1079; Estate of Gallo, 61 Cal.App. 163, 175, 214 P. 496; Estate of Ehle, 115 Cal. App. 656, 663, 2 P.2d 398; Estate of Easton, 140 Cal.App. 367, 376, 35 P.2d 614; Estate of Trefren, 86 Cal.App.2d 139, 194 P.2d 574.

The appellant in this case argues that before the burden shifts and the proponent is required to affirmatively prove that the will is not the product of undue influence, the contestants are required to prove, in addition to the foregoing, three elements mentioned, that the instrument is an *unnatural will.* In support of that contention he cites Estate of Teel, supra, 25 Cal.App. at page 528, 154 P.2d 384, and Estate of Yale, 214 Cal. 115, 122, 4 P.2d 153. We think not. In the Teel case, in which the verdict and decree denying probate of a will on the ground of undue influence was affirmed on appeal, the Supreme Court merely said, 25 Cal.App. at page 528, 154 P.2d at page 388, that where it appears, as it did in that case, that, "A fiduciary relationship exists between husband and wife in respect to the issue of undue influence in a will contest, and where such fiduciary relationship is combined with unduly profiting by the will, and its being unnatural, and activity on the part of the proponent in procuring its execution, *we have persuasive evidence of undue influence.*" (Italics added.)

We are persuaded the Supreme Court did not intend by the inclusion of the existence of an *unnatural will* in its recitation of facts in that case to hold that the foregoing rule, so frequently announced in our authorities, was thereby enlarged to also require proof that the will is *unnatural* before the burden shifts so as to require the proponent to affirmatively prove that the will is not the product of his undue influence. All that the court said in the Teel case, in that respect, is that when proof of the four named elements appears there is *persuasive evidence of undue influence.*

Likewise, in the Yale case, supra, in which a nonsuit was granted in a contest to a will after it had been admitted to probate, on the ground of undue influence, among other stated grounds on appeal, the Supreme Court merely held that where the contestants adduced substantial evidence of confidential relationship, undue profit, activity of the proponent in procuring the will, physical and mental condition of the testator rendering him susceptible to such influence, and that the provisions of the will were unnatural, it was error for the trial court to grant a nonsuit on that ground since that issue should have been submitted to the jury for determination. The court further declared that evidence was sufficient to shift the burden to the proponent to show that the will was not the product of undue influence. That case does not change the previously-mentioned rule of evidence.

We are convinced there is ample evidence in this case to show a confidential relationship and undue profit secured by the proponent by the terms of the will. It also satisfactorily appears that the terms of the will, which gave to the proponent practically the whole of the estate valued at approximately $130,000, to the exclusion of five children for each of whom the testator always had a high regard and natural paternal affection was not in accord with his desire and intention, as expressed so frequently to his family and friends until a time shortly before the deed, bill of sale and will were executed in 1944, by often saying he intended his children to share equally in his estate.

[6] In this case the presumption of the existence of undue influence appears to be applicable to the circumstances adduced so as to shift the burden to the proponent to show that the will was not the product of undue influence. The testator was aged and infirm. He was involved in an automobile accident shortly before the execution of the will in question. There is some evidence that the concussion or shock which he sustained affected his mind. He was always affectionate toward all of his children and frequently declared it was his intention to distribute his estate among them share and share alike. Former wills so provided. He was living with the proponent and largely under his care at the time of the execution of the last will. In 2 Page on Wills, p. 631, sec. 825, it is said, under similar circumstances, that:

"* * * A presumption or inference of undue influence is said to arise where testator is aged and feeble, leaves the bulk of his property to the children with whom he lives to the exclusion of others for whom he has always manifested affection, or where testator actually reposes trust and confidence in the person with whom he lives."

The most serious question in this case is whether there is evidence, or reasonable inferences therefrom, that the proponent's activity was the procuring cause of the execution of the will contrary to the testator's volition and desire.

In the dissenting opinion of Mr. Justice Edmonds in the Teel case he correctly said [25 Cal.2d 520, 154 P.2d 391]: "It has been held that active participation in procuring the execution of a will cannot be inferred from the mere fact that the beneficiary accompanied the testator to the office where the will was drawn. [Citing authorities.]"

[7-13] The issue of undue influence in procuring the execution of the will presents a question of fact for the determination of the jury under proper instructions. 2 Page on Wills, p. 251, sec. 661. Circumstantial evidence, without any direct evidence, may be sufficient to support a finding of undue influence. 2 Page on Wills, supra; 26 Cal.Jur. 726, sec. 76. It is said that where the proponent is the only person who can testify to the circumstances attending the execution of the will, his testimony is not binding on the contestant. Estate of Anderson, 185 Cal. 700, 198 P. 407; 26 Cal. Jur. 727, sec. 76. Among the facts which the authorities include as indicative of undue influence are: 1. Unnatural provisions of the will contrary to the expressed desire of the testator; 2. Disposition of the property contrary to the expressed intention of the testator; 3. A confidential relationship of the beneficiary of the will who thereby secures undue benefits, which relationship affords him the opportunity to exercise undue influence; 4. The age, infirmity, or circumstances which render him subject to coercion, influence or subversion of his free will or consent, and, 5. Wrongful activity in procuring the execution of the will. 26 Cal.Jur. 647, sec. 19. Each of the foregoing elements is supported by California authorities. It is impossible to enumerate all the conditions, facts or circumstances which may be deemed to constitute such activity, coupled with the other necessary elements which will render a will invalid on the ground of undue influence. The sufficiency of evidence showing activity or undue influence must necessarily depend upon the particular facts of each case. The contestant is entitled to the full force of the evidence adduced in support of his charge of undue influence, together with all reasonable inferences which may be drawn therefrom. Where there is substantial evidence to support the finding of undue influence, the verdict and the judgment rendered in accordance therewith should be affirmed on

appeal. The trier of the fact is the sole judge of the credibility and weight of evidence in a will contest. Estate of Teel, supra, 25 Cal.App. at page 526, 154 P.2d 384.

[14] We are convinced there is sufficient evidence in this case to adequately show that the proponent was active in procuring the execution of the will in question, that the burden shifted to the proponent to show that the will was not the product of his undue influence, and that he failed to support that burden.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

Hearing denied; TRAYNOR and SCHAUER, JJ., dissenting.

91 Cal.App.2d 185

UNDERHILL v. HOAG et al.

Civ. 16758.

District Court of Appeal, Second District, Division 2, California.

April 8, 1949.

Hearing Denied June 2, 1949.

1. Contracts 🔑28(3), Joint adventures 🔑1.15

Evidence supported finding that defendant did not enter into a joint venture agreement with plaintiff in regard to ownership and improvement of realty owned by defendant upon which plaintiff constructed dwelling house, but rather that dwelling was built by plaintiff under contract calling for price of $13,342.

2. Contracts 🔑355

Refusing to give plaintiff judgment for amount of written contract under which he constructed residence for defendant, together with cost of extras and fees of architect and contractor, after giving credit for moneys received by plaintiff from defendant and loan company was proper in view of findings that plaintiff failed to complete contract and that defendant did not authorize or approve any work to be done by plaintiff in addition to specifications which were a part of written contract.

3. Contracts 🔑355

Refusal to give plaintiff judgment for sum of $1,177.49, which defendant admitted remained unpaid on account of contract under which plaintiff constructed residence for defendant, which sum defendant alleged she was willing to pay plaintiff upon completion of his contract in accordance with terms, was not error, in absence of evidence by plaintiff that he had completed contract in accordance with its terms.

◆

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by H. W. Underhill against Lucile Lillian Hoag and another, to establish a joint venture and to recover the reasonable value of labor and materials furnished named defendant by plaintiff, wherein the named defendant filed a cross complaint. From adverse judgment, the plaintiff appeals.

William Ellis Lady, of Los Angeles, for appellant.

Laurence Phillips, of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of defendant after trial before the court without a jury in an action to establish a joint venture and to recover the reasonable value of labor and material furnished defendant Hoag by plaintiff, plaintiff appeals.

FACTS

On November 26, 1945, defendant purchased a lot in Los Angeles county for the sum of $2,500.00 in cash. On January 6, 1946, plaintiff and defendant entered into a written contract by the terms of which plaintiff agreed to build a dwelling house on defendant's lot for the contract price of $13,342.00. In January, 1946, defendant obtained a loan from the Southern Federal Savings & Loan Association in the sum of $9,000.00. The building was not completed when defendant moved into it on January 2, 1947. The work had been commenced upon it March 26, 1946.

QUESTIONS

First: *Was there substantial evidence to sustain the following findings of the trial court?*

[1] (A) *That it was untrue that during the month of December, 1945, as alleged by plaintiff, he and defendant made an agreement of joint venture in the ownership and improvement of the real property described in the complaint.*

This finding is supported by the direct testimony of defendant in which she denied ever having entered into any joint venture agreement with plaintiff.

(B) *That plaintiff and defendant entered into a written contract whereby plaintiff agreed to construct a residence for defendant for a total consideration of $13,342, and that plaintiff failed to complete the contract.*

This finding was supported by: (1) the written contract which was received in evidence executed by both parties, and testimony that at the time the copy was delivered to defendant she received also a copy of the plans and specifications for the building; and (2) direct testimony of defendant that when she moved into the house it was not completed, and as to the amount of money expended by her to complete the house. In addition there was received in evidence the receipted bills for moneys which defendant had expended for the completion of the work.

(C) *That it is not true that at the special instance and request of defendant and her promise to pay therefor, plaintiff made improvements upon the real property owned by defendant to the reasonable value of $20,259.90, and that all the work, labor, services and materials performed and furnished by plaintiff were furnished in pursuance of a written contract so to do for the total amount of $13,342.00.*

This finding is supported by ample direct testimony of defendant wherein she denied that she had ever discussed with plaintiff any claimed "extras" and stated that she had never authorized or approved any work to be done by plaintiff in addition to the specifications which were a part of their written contract.

(D) *That the contents of plaintiff's affidavit denying the execution of the building contract were untrue; that is, it was not true that the contract of January 6, 1946, was executed with the intent that it should not become a binding contract, that it was a mere matter of form; but that the parties entered into the contract with the intention that it should become a valid and binding agreement between them.*

This finding is amply supported by defendant's testimony and the testimony of witness Royce H. Heath, president and manager of the building and loan company, who testified that he never told either plaintiff or defendant it was necessary to have such a document before they could obtain a loan from his institution.

[2] Second: *Did the trial court err in not giving plaintiff judgment for the amount of the written contract together with the cost of extras, architect's and contractor's fees after giving credit for the moneys received by him from defendant and the loan company?*

This question must be answered in the negative in view of findings (B) and (C), supra.

Third: *Did the trial court commit error in not rendering a judgment for the amount of the written contract plus the "extras" leaving out payment of fees?*

This question must likewise be answered in the negative for the reason set forth in answer to the second question, supra.

[3] Fourth: *Did the trial court err in not giving plaintiff judgment for the sum of $1,177.49, which defendant admitted remained unpaid on account of the contract, which sum she alleged she was willing to pay plaintiff upon completion of his contract in accordance with its terms?*

This question must also be answered in the negative for the reason that it was a condition precedent to plaintiff's right of recovery that he prove that he had completed the contract that he had entered into in accordance with its terms. This the trial court found, supported by substantial evidence, that he had not done. (See finding (B), supra.) Hence plaintiff was not entitled to recover this sum.

The judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.

91 Cal.App.2d 45

PEOPLE v. LYLE.

Cr. 2554.

District Court of Appeal, First District, Division 2, California.
March 31, 1949.

1. Burglary 🔑41(1)

Evidence sustained conviction of second degree burglary.

2. Criminal law 🔑552(1)

Commission of crime may be established entirely by circumstantial evidence.

3. Criminal law 🔑572

Accused had burden of proving alibi to such degree of certainty as would upon consideration of all evidence leave reasonable doubt of guilt in minds of jury.

4. Criminal law 🔑569, 572

Evidence to support defense of alibi and to support claim by accused that he was "framed" by police officers who had attempted to extort money from him, was insufficient to overcome circumstantial evidence establishing guilt of burglary.

◆

Appeal from Superior Court, Alameda County; Edward J. Tyrrell, Judge.

James H. Lyle was convicted of second degree burglary and he appeals.

Affirmed.

James H. Lyle, in pro. per.

Fred N. Howser, Atty. Gen., Clarence A. Linn, Deputy Atty. Gen., and J. F. Coakley,
Dist. Atty., both of Oakland, for respond-
Dist. Atty., and Arthur Sherry, Deputy
ent.

GOODELL, Justice.

Appellant was convicted by a jury of second degree burglary. This appeal was taken from the judgment and from an order denying a new trial. Appellant admitted the two prior convictions alleged in the information, one in 1932 of robbery in the State of Kentucky and another in 1940 of "breaking and entering" in the State of Iowa, with time served on each. At the trial appellant was represented by the public defender but on this appeal he presents his own case.

Some time between 6:10 p. m. on Friday March 12, 1948 and 7:50 a. m. on the 13th, a leather goods store on 7th Street in Oakland was entered through a skylight, and a desk and safe were broken into. About $15 was taken from the desk; the safe contained only papers and records. The safe was over-turned and broken open through the bottom thereof; the dial of the combination lock was missing. The floor was covered with fire clay dust and particles which had been chipped away in breaking into the safe, and papers taken from it were strewn around.

Police investigators arrived promptly and isolated for minute examination the area involved. They photographed the office and the safe. Their examination disclosed on the papers scattered on the floor clearly defined "foot prints" of "Biltrite" rubber heels. Samples of the fire clay insulation were taken for examination and comparison. The locking mechanism of the safe bore marks of a cutting instrument. Inside the safe a small piece of blue cloth was found. Wood bearing chisel marks was taken from the rear door of the premises, by which the burglar apparently attempted to leave.

When appellant was arrested a few hours after the crime he wore overalls and a blue sport shirt, and carried a change of clothing. The overalls revealed a substantial amount of fire clay identical with the samples removed from the safe and found around it.

A pair of appellant's shoes which had been taken to a nearby boot-black on the morning of the 13th was recovered, identified, and found to have "Biltrite" rubber heels, the impression from which exactly fitted the heel prints on the papers strewn on the floor.

The fragment of torn blue cloth found in the safe not only matched the shirt which appellant wore when arrested but fitted a tear in appellant's shirt just above its right cuff. A stain on the fragment of cloth corresponded with one on the torn area of the shirt worn by appellant.

The investigator in reaching into the safe accidentally scratched his arm on the jagged edge of the hole, and this abrasion corresponded in pattern with a scratch on appellant's arm.

Miss R, a woman friend of appellant, lived about a block away from the burglarized premises and the officers went there with appellant and found a paint-stained chisel in a dresser drawer in her room. The paint on the chisel was the same as that on the wood taken from the damaged rear door. An experiment demonstrated that this chisel also exactly fitted the notches in the damaged portion of the safe's locking mechanism. She testified that the chisel was not hers but that on the morning of March 13th appellant while in her room had stood near the dresser where it was found.

The rubber heel and heel print, fire clay, overalls, sport shirt, cloth fragment, chiseled lock, chiseled wood from the rear door and the chisel itself were all before the jury.

On his claimed alibi appellant testified that on the evening of March 12th he was intoxicated; that he had visited friends named the R family in a hotel from about 7 or 7:15 until about 11, and then went to the room of another friend, a Miss C, in the same hotel and slept there until 8 the next morning and later visited the room where the chisel was found. Miss R testified that appellant visited her at 7 o'clock on the evening of March 12th and again at about 11 the next morning. Miss C testified on direct examination that appellant came to her room about 11 or 11:30 p. m. on the 12th and that he was "high"; that when she left shortly thereafter he was lying on the bed and that she did not return until 9:30 a. m. on the 13th. On cross-examination, however, she admitted she could not remember the date or even the day of the week of this occurrence. With the exception of Miss R and Miss C, whose testimony when taken together accounted, at best, for less than one hour of the 14 hour period, there was no corroboration of appellant's alibi testimony. None of the R family, with whom he claimed to have spent the time between 7 and 11 p. m. was called to testify.

As part of his defense appellant claimed that two Oakland police officers had extorted $120 from and later, when they attempted to extort an additional $300, he reported the matter to the District Attorney's office. He claims that because he had done so the officers caused his arrest.

On this point appellant testified at length that some time prior to March 13 (the day of his arrest) the officers in question threatened his arrest unless he paid money to them, pointing out to him that because he was a two-time loser and a Negro it would be an easy matter to secure a conviction on any count with which they cared to charge him. When appellant complained, some weeks before the burglary, an Assistant District Attorney took action. He directed appellant to telephone one of the suspected officers and make an appointment to pay over the money. Appellant was supplied with marked currency, met the officers, drove off in their car, but alighted therefrom without attempting to pass the bills. Representatives of the District Attorney's Office then arrested the officers, but since no money changed hands the officers were not held. The testimony was in conflict as to whether appellant mentioned any sum of money or the word "pay" in his telephone conversation and whether he deliberately disobeyed a direction not to enter the police car or whether he could not avoid violating the instruction to remain on the sidewalk. The accused officers were not witnesses against the appellant though they did testify in their own defense. The Assistant District Attorney also testified.

[1] Appellant claims that the evidence was insufficient to support the verdict. The summary which we have given at considerable length shows that there is no basis whatever for this claim.

[2] The evidence connecting appellant with the offense was almost entirely circumstantial. Expert testimony respecting the physical evidence, appellant's admissions of his ownership of the clothing and shoes, and the testimony of the witness in whose room the chisel was found, all supplemented the circumstantial evidence connecting appellant with the crime. It is seldom that such a connected and convincing set of incriminating circumstances is found in a case. That most of such evidence was circumstantial rendered it no less legally conclusive. "That the commission of a crime may be adequately established entirely by circumstantial evidence is not open to question." People v. Green, 13 Cal.2d 37, 42, 87 P.2d 821, 823; see, also, People v. Koenig, 29 Cal.2d 87, 91, 173 P.2d 1.

[3] As for the alibi evidence, we have already pointed out that appellant's testimony was corroborated only to a negligible extent and one of the corroborating witnesses was not sure, when cross-examined, of the date or even the day of the week respecting which she had testified on her direct examination. The burden was on appellant to prove his alibi "to such a degree of certainty as will, upon a consideration of all the evidence, leave a reasonable doubt of his guilt in the minds of the jury." People v. Alexander, 78 Cal.App.2d 954, 958, 178 P.2d 813, 816; People v. Lewis, 81 Cal.App.2d 119, 124, 183 P.2d 271. That such doubt was not raised is to be implied from the verdict.

[4] With respect to appellant's claim that he was "framed", it should be borne in mind that even if the jury had been convinced that his testimony was true, the effect of the strong chain of circumstantial evidence of the burglary itself, and his connection with it, would not have been destroyed. It should be observed, further, that the trial judge admitted into evidence all the details of this claimed extortion episode without regard to whether that part of the case was collateral or not. Hence the jury had that entire episode before them to the same extent as they had the physical facts and other evidence which bore directly on the specific offense of burglary. There was no restriction or limitation put on the admission of this testimony and it assumed a rather major and dominating place in the proceedings. With all these facts before them, the jury brought in a verdict of guilty.

The record has been carefully considered and we find it free from error.

The judgment and the order denying a new trial are affirmed.

NOURSE, P. J., and DOOLING, J., concur.

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90 Cal.App.2d 865

SNELLING v. CIVIL SERVICE BOARD OF CITY OF OAKLAND et al.

SNELLING v. CITY OF OAKLAND et al.

Civ. 13815, 13895.

District Court of Appeal, First District, Division 2, California.

March 30, 1949.

Hearing Denied May 26, 1949.

1. Appeal and error 🔑781(4)

Where patrolman holding a probationary appointment in Oakland police department was discharged before he had served a full year, and patrolman thereupon filed complaint for injunction, but order denying injunction was not entered until after one year period had expired, appeal presented moot question.

2. Injunction 🔑22

Injunction could not lie after expiration of probationary period to prevent discharge prior to such expiration.

3. Mandamus 🔑77(4)

Where patrolman holding probationary appointment in Oakland police department was discharged before expiration of one year probationary period, mandamus would not lie after expiration of the probationary period to compel reinstatement to position as patrolman.

4. Municipal corporations ⚷218(2)

"Character of appointment" within charter provision that appointment in civil service shall be on probation of a "character" and for a period to be fixed by rules of Civil Service Board, was fixed by rule which provided that probationer was subject to removal by appointing power with approval of Civil Service Board.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Character of Appointment".

5. Municipal corporations ⚷185(4)

Under charter provision that appointment in civil service shall be on probation of character and for period to be fixed by rules of Civil Service Board not to exceed one year, where Board adopted rule that probationer should be subject to removal by appointing power with approval of Board, patrolman holding probationary appointment in police department was subject to discharge before expiration of probationary period without necessity for filing of charges and hearing before Board.

6. Municipal corporations ⚷185(4)

Under Oakland charter and rules of Civil Service Board, patrolman holding probationary appointment in Oakland police department was subject to removal at any time before expiration of probationary period, without notice on hearing.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by John W. Snelling against the Civil Service Board of the City of Oakland and others, for an injunction, and action by John W. Snelling against the city of Oakland and others, for writ of mandate. From an order denying an injunction, and from a judgment denying a writ of mandate, the plaintiff appeals.

Appeal from order dismissed; judgment affirmed.

J. Paul St. Sure and Edward H. Moore, both of Oakland, for appellant.

John W. Collier, City Atty. and J. Kerwin Rooney, Asst. City Atty., both of Oakland, for respondent.

NOURSE, Presiding Justice.

These two appeals are presented on the same record. The first is an appeal from an order denying an injunction, the second from a judgment denying a writ of mandate.

Appellant held a probationary appointment as a patrolman in the Oakland police department. Before he had served a full year as such he was discharged from duty. The sole question raised by him on both appeals is whether, under the charter and the applicable rules, he was entitled to serve the full year period subject to discharge only after charges filed and a hearing before the Civil Service Board.

[1,2] Briefly the facts are these: Appellant was given a probationary appointment on December 21, 1946. On November 14, 1947, he was discharged upon request of the city manager. On November 17, 1947, he filed a complaint for an injunction. On December 23, 1947, judgment denying the application for an injunction was entered.

The first appeal presents a moot question since no injunction could have been issued to prevent an act which was already completed. The maximum of probationary service which appellant could claim was one year. This period had expired when the order appealed from was entered. Section 78 of the Oakland Charter provides that all appointments to the municipal civil service "shall be on probation of a character and for a period to be fixed by the rules of the Board [Civil Service] but not to exceed one year."

The appeal from the order denying an injunction, No. 13815, must therefore be dismissed.

[3] The second appeal presents a similar question. The complaint for a writ of mandate was filed January 7, 1948. It prayed for an order "to reinstate petitioner to his position as Patrolman." The only

position to which he could have been reinstated was that of a probationer and his period of probation had expired before the petition was filed.

[4, 5] However on examination of the municipal charter we reach the same result. Section 78 of the Oakland Charter provides for the certification to the appointing power of persons eligible to appointment in the Civil Service: "Such appointment shall be on probation of a character and for a period to be fixed by the rules of the Board, but not to exceed one year."

Rule 56 of the Civil Service Board provides: "Any person who has accepted a regular appointment from an entrance eligible list shall be on probation for a period of one year from the date of regular appointment * * *."

Rule 97 provides: "(a) When an appointing power determines that a probationer, who has been appointed from an entrance eligible list, is incompetent or unqualified to perform the duties of his position, he shall report the same to the Board in writing with a statement of the reasons therefor, and request approval of the removal of such probationer. Upon approval by the Board, such probationer shall be removed by the appointing power, * * *."

It should be noted that the charter section declares that probationary appointments shall be "of a character" fixed by rule of the Board; that Rule 97 authorizes removal when the appointing power "determines" that a probationer is unqualified. Read together the conclusion is that the "character" of the appointment is that stated in Rule 97—that the probationer is subject to removal by the appointing power with the single limitation that the Civil Service Board must give its approval. This is the condition which the legislative bodies have seen fit to enforce and it is the condition upon which appellant accepted the appointment. It is not competent for the courts to add further restrictions by reading something into the charter and rules which the properly constituted legislative bodies did not provide for.

[6] The proper reading of these provisions force the conclusion that a probationer is subject to removal under Rule 97 at any time before the expiration of his year of service and that therein lies the distinction between a probationer and a regular employee. This interpretation is supported by Neuwald v. Brock, 12 Cal.2d 662, 671, 86 P.2d 1047, 1051: "It is equally clear that he was subject to dismissal during the period of such probationary term, for otherwise the term 'probationary' would be meaningless, and the distinction between civil service employees with permanent status and probationary employees with temporary status would be obliterated." And we should add that if appellant's interpretation of the rules were to be followed a probationer would be in a better position than a regular employee because he could not be removed for any cause until the end of the year whereas a regular employee would always be subject to removal on charges filed. This would follow because the provisions for charges, trial and removal apply only to regular employees, whereas the "character" of the employment of the probationer is fixed by the Civil Service Board under the express terms of the charter. As we have seen the rule of the board does not require either charges or trial for the removal of a probationer.

We conclude that Rule 97 is all inclusive and fixes the rights of the parties hereto. But if we should assume that appellant is correct in his contention that he was entitled to a full year of probation his removal at the end of the eleventh month would nevertheless become effective automatically at the end of the year. Hence when this petition was filed there was nothing to mandate, Palmer v. Wolff, 88 Cal.App.2d 979, 200 P.2d 167, and the appeal becomes useless.

Appeal in No. 13815 dismissed.

Judgment in No. 13895 affirmed.

GOODELL and DOOLING, JJ., concur.

91 Cal.App.2d 39

KELLER v. KELLER.

Civ. 13835.

District Court of Appeal, First District,
Division 2, California.
March 31, 1949.

1. Appeal and error ⚷982(1)
Judgment ⚷344

An application for relief from a judgment, order, or other proceeding taken against a party as provided by statute is addressed to sound discretion of trial court, and appellate court will not interfere with exercise of such discretion unless there is a clear showing of an abuse thereof. Code Civ.Proc. § 473.

2. Divorce ⚷165(1)

Trial court did not abuse discretion in denying wife's motion to vacate an interlocutory judgment of divorce entered in her favor, where divorce case was tried on husband's and not wife's default after amendment of complaint for suit for separate maintenance to one of divorce in consideration of a property settlement which was reached on consultation by wife, not only with her attorney, but with a family friend who was a business man. Code Civ.Proc. § 473.

3. Divorce ⚷165(5½)

Evidence was insufficient to establish that husband exerted economic pressure on wife causing her to amend complaint for separate maintenance to one for divorce to accept a property settlement and justified trial court's denial of wife's motion to vacate an interlocutory judgment of divorce entered in her favor. Code Civ. Proc. § 473.

◆

Appeal from Superior Court, City and County of San Francisco; Melvyn I. Cronin, Judge.

Action by Violet A. Keller against Julius M. Keller for a divorce. From an order denying plaintiff's motion to vacate an interlocutory judgment of divorce which had been entered in her favor, she appeals.

Affirmed.

Lucille F. Athearn, of San Francisco, for appellant.

J. Bruce Fratis, of San Francisco, for respondent.

GOODELL, Justice.

This is an appeal from an order denying appellant's motion to vacate an interlocutory judgment of divorce which had been entered in her favor.

The parties were married in Honolulu in December, 1943, while respondent was stationed there as an army officer. Appellant owned and operated a children's nursery and also owned a piece of residential property in Honolulu and certain personal property. Respondent was transferred to San Francisco in 1945 and several months later, after appellant had sold her business and real estate, she joined him in San Francisco, where they settled. These sales realized about $30,000 and out of the proceeds investments were made in two pieces of San Francisco real estate, one a house of two flats on Clay Street, the other a home on San Felipe Avenue.

On February 21, 1947, the parties separated and on March 1, appellant filed suit for separate maintenance. Respondent was ordered to pay $200 a month as temporary support, $250 to appellant's attorney and $150 for costs. Respondent shortly before had made quitclaim deeds to appellant of the two parcels of San Francisco property, and soon after she filed suit he sued her to set aside these two deeds and recorded a lis pendens.

While the separate maintenance suit was pending, appellant changed lawyers and her new attorney received a proposal from respondent's attorney for a settlement of the property matters, and that the action be changed from one for separate maintenance to one for divorce. A property settlement was entered into on May 22, 1947, the complaint was so amended, and the divorce case was tried without contest. On June 7, 1947, an interlocutory judgment was entered in appellant's favor incorporating the terms of the property settlement, which were that respondent would pay appellant $100 a month for 14 months.

Respondent had paid only $75 on the temporary support order, which sum he had borrowed. When the formal settlement agreement was made a separate agreement was signed by the parties which admitted respondent's arrearages of $475 for temporary alimony, $250 attorney fees and $150 costs, and that he was indebted to appellant for the amounts expended and to be expended by her for attorney fees and court costs in the litigation then pending. Respondent therein agreed to pay appellant $1200 in cash, and she therein acknowledged that such payment would release him from the several precedent and current obligations so admitted. This $1200 was paid when the interlocutory judgment was entered, and it was raised by respondent borrowing $1000 from his parents and $200 on his insurance. It was also part of the settlement that respondent would dismiss (with prejudice) the suit which he had brought to set aside the quit claim deeds. This he did.

A few days before the statutory 6 months would have run appellant moved under section 473, Code Civ.Proc., to set aside her interlocutory judgment of divorce. Those proceedings were brought by her present counsel, who did not represent her in her divorce case. After a full hearing the motion was denied.

[1, 2] The law is well settled that an application for relief under section 473 is addressed to the sound discretion of the trial court, and that an appellate court will not interfere with the exercise of such discretion unless there is a clear showing of an abuse thereof. Morton v. Morton, 117 Cal. 443, 446, 49 P. 557; Clark v. Clark, 56 Cal.App.2d 324, 325, 132 P.2d 527; Estate of Rabinowitz, 67 Cal.App.2d 840, 841, 155 P.2d 915; Wetzel v. Wetzel, 71 Cal.App.2d 168, 170, 162 P.2d 299; Trujillo v. Trujillo, 71 Cal.App.2d 257, 260, 162 P.2d 649.

Section 473 provides for relief "from a judgment, order, or other proceeding taken against" a party. Assuming that the interlocutory judgment in this case was *taken against* appellant—although, on the contrary, it was in her favor—there was no showing of "mistake, inadvertence, surprise or excusable neglect." The divorce case was tried on respondent's, not appellants, default, after the amendment had been deliberately made and the settlement deliberately reached, based on consultations by appellant not only with her attorney but with at least one family friend (as in Clark v. Clark, supra) who was a business man, and with their advice that it was the thing to do. At the divorce trial the judge, after developing the fact that appellant had "entered into a property settlement with the defendant covering all * * * community property" asked her "And you are satisfied with that agreement?" to which she answered "Yes." On the statutory grounds quoted above, taken by themselves, no sufficient showing was made.

The courts, however, on motions under section 473, seem to have gone into broader questions. The other grounds of the motion are fraud, coercion and duress. The coercion relied on is economic pressure claimed to have been exerted by respondent by taking advantage of appellant's straightened circumstances during March, April, May and June when the case was pending.

Appellant contends that the evidence shows beyond dispute that by such economic coercion she was forced into amending her complaint and that this was a fraud on the court, making it mandatory that the interlocutory judgment be set aside, relying on Lake v. Lake, 124 App.Div. 89, 108 N.Y.S. 964. She claims that during those four months she was practically indigent, was threatened with losing her property, and had been forced to borrow money from friends for living expenses and that respondent when he offered her the $1200 in cash, the dismissal of his suit, and $100 a month for 14 months, if she would amend her complaint and obtain a divorce, used her financial distress as a leverage.

The only question presented for decision is whether the court abused its discretion in denying the motion.

There is ample evidence that from the time respondent left Honolulu until the separation, a period of about a year and a half, appellant advanced considerable money to him from her own funds, including money used for the furnishing of his office, which advances were never repaid. The record shows that during that period, and up to the time of the hearing, respondent's earnings were inconsiderable. He testified that his income tax return for the year shows net earnings "of a little better than a thousand dollars". It was for this reason, respondent claims, that he was unable to make the payments initially ordered by the court. His ability or inability to make these payments was pertinent to the issue presented on the motion only in so far as it bore on the possibility that he had in fact the ability to make the payments, but had wilfully withheld them as a weapon to force appellant to accept his terms. Respondent's testimony respecting his small earnings was not contradicted, and appellant admitted that she had no way of questioning his figures.

As to whether appellant was coerced into amending the complaint, the attorney who represented her on the settlement testified (privilege having been waived) that when he first became her attorney, *and before the amendment had been proposed by respondent's attorney,* he submitted reasons to her why a divorce would be preferable, and questioned her as to whether she wanted to adhere to separate maintenance. In that connection he asked her whether she was inclined to a reconciliation and her reply was in the negative; "that she thought that she could get more out of him by bringing a suit for separate maintenance," and "she didn't want to let him be free to do as he pleased." He added: "And I think she was reluctant to amend her complaint and get a divorce, but that she did so because she didn't care one way or another whether she was divorced from him, and she wanted to get her property, and she wanted to get as much in return of the money which she felt she had wasted in this marriage on him, as she could. And her expression to me, on more than one occasion, was to get all I could." The court asked him whether he urged her to amend, and he answered: "Yes. I thought that that was the best thing for her to do. She had all of her property tied up." He also testified that when the amendment was proposed by respondent's attorney, "she agreed that if that was the quickest way to get her money, that the thing to do was to go ahead and amend the complaint."

The evidence is undisputed that from the time of the separation to mid-June appellant borrowed $2300 (made up of cash and checks, as needed) from a friend of both spouses. Appellant used part of this money to buy furniture so as to rent the Clay Street property furnished, and thus get a higher rental; part of it to keep up payments on the Clay Street and San Felipe Avenue properties; part of it for living expenses, doctor's bills, schooling for her son (by a former marriage), payments on an automobile loan; expenses connected with the litigation and other necessary outlays. All this $2300 loan has been repaid.

The friend who lent the $2300 testified that "There was a tremendous desire on the part of—justifiably so, possibly—Mrs. Keller to wreak vengeance upon her husband * * * there was a most desperate desire that brooked no interference whatsoever * * *." When asked as to his conversation with appellant concerning the settlement agreement, he testified that she said " 'I am going to get all my money back * * * I don't care how much he suffers, let him go to jail, he has made me suffer.' And language in the vein of that type." He testified that he and appellant discussed the terms of the agreement quite thoroughly; that they had quite a number of conversations about it; that she indicated finally that she was going to sign it; that she seemed quite able to coherently and intelligently discuss the provisions of the agreement with him, and understood the nature and extent of the property and of the agreement. Appellant testified that this witness had advised her to take the settlement and had said "that is all I would ever get out of Keller."

It is undisputed that from March 1 to mid-June, appellant had in addition to the $2300, $450 in rentals from Clay Street and $450 which she earned doing secretarial work. She admitted that during that period she had approximately $1300 to live on after deducting monthly fixed charges and payments. She admitted also that since the settlement she had sold the San Felipe Avenue property at the price of $17,000 and the Clay Street property at the price of $26,000.

On the question whether the filing of respondent's suit to set aside the deeds was designed as leverage to force appellant to his terms, it appears without contradiction that early in the separate maintenance litigation respondent's counsel stipulated in open court and by a letter to appellant's then attorney that in case she had a sale of either piece of property in prospect respondent would cooperate so that the sales could go through provided the proceeds were impounded to abide the court's judgment as to whether respondent was entitled to any part of the proceeds.

It is clear from uncontradicted evidence that at the time of the hearing respondent had made no payments at all on account of the $1400 he had agreed to pay in 14 monthly installments, but as this agreement was part of the settlement itself it can have no bearing on the question of claimed pressure exerted *before* the settlement.

Respondent's failure to pay anything beyond $75 is another matter and it has been already discussed. However, appellant's attorney at the time of the settlement testified at the hearing that he had satisfied himself respecting respondent's resources as of that time. He said "But I decided he didn't have it" (the money). Moreover, the $1200 paid at the time of the settlement was expressly recognized in the written agreement as paying off respondent's obligations on the initial court order for temporary support, attorney fees and costs.

The court just before ruling remarked that there was no question that appellant had sufficient grounds for divorce or separate maintenance. The record shows that clearly.

The court also asked the appellant: "Then the only purpose is to have the matter restored in order to proceed only with the separate maintenance suit * * * rather than the divorce?" and she answered: "Yes * * * I don't see why I should have a divorce; I have been a good wife."

[3] It is clear from the record, which we have summarized at considerable length, that there was ample evidence to support the order and that there was no abuse of discretion in denying the motion.

The order is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

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91 Cal.App.2d 62

In re SELDITCH'S ESTATE.

FORTH et al. v. LEVINE et al.

Civ. 16673.

District Court of Appeal, Second District,
Division 1, California.

April 1, 1949.
Rehearing Denied April 25, 1949.
Hearing Denied May 26, 1949.

1. Wills 🔑98

Where two documents, written and signed by decedent and found in his safety deposit box clipped to an invalid will wherein two persons were named as executors, stated that such persons were executors of decedent's will, there was no incorporation of invalid will by reference into such holographic instruments so as to make the invalid will a part thereof.

2. Wills 🔑76, 206

Holographic instruments which merely stated that two named persons were executors of the writer's will were testamentary in nature and entitled to probate, and in such case decedent's property would be distributed in accordance with the laws of succession.

3. Continuance 🔑48

Where it was agreed by counsel and the court that if the court felt that the testimony of an additional witness was necessary the court would allow depositions for which a continuance had been asked for and denied, the denial was within the discretion of the trial court.

Appeals from Superior Court, of Los Angeles Couney; Kurtz Kauffman, Judge.

Proceeding in the matter of the estate of Herman Selditch, on petition of Clara Forth for probate of will, to which Annie Levine filed a contest and to which Ben Gould, as guardian of the estates of Lewis Hamburger and Aaron Hamburger, minors, and Nettie Robbins and Rose Schwartz, legatees, were made parties. From the judgment rendered, Clara Forth and Annie Levine appeal.

Judgment affirmed.

Ben Gould, of Los Angeles, for appellant Clara Forth.

Bachrack & Wilson, of Los Angeles (Ralph Wilson, of Los Angeles, of counsel), for respondent cross-appellant.

DORAN, Justice.

Herman Selditch, a resident of Los Angeles County, died on August 15, 1946, at Mexico City. Thereafter, one Clara Forth, named as executor, petitioned for probate of two holographic documents written upon Western Union telegraph blanks, together with a typewritten will signed by decedent but attested by only one witness, the latter document being sometimes referred to as the "incomplete will." These documents were found in decedent's safe deposit box. The theory of the petition and of appellant is that the so-called "incomplete will" was entitled to probate by reason of its incorporation by reference in the holographic Western Union documents. The trial court refused to adopt this theory.

A contest to the probate of the above described documents was filed by Annie Levine, a sister of decedent, who would be entitled to succeed to a part of the estate under the California laws of succession. The trial court found that the Western Union holographic documents constituted the decedent's will but refused probate of the so-called "incomplete will" either by itself or as a part of the Western Union documents.

The petitioner, Clara Forth, has appealed from that portion of the judgment denying probate of the "incomplete will," and also from the trial court's denial of a continuance sought for the purpose of producing additional evidence. Annie Levine has appealed from that portion of the judgment granting probate to the holographic Western Union documents.

In the language of the trial court's findings, the so-called "incomplete will" found in the decedent's safe deposit box was, "a typewritten document bearing date of July 12, 1946, * * * signed by the decedent and witnessed by one John W. Buzzell, and * * * no other subscribing witnesses." A letter, signed, dated and entirely in decedent's handwriting, written on Western Union telegraph blank, found in the same safe deposit box, read as follows:

"8-7-46

"To the Officers of the Bank of America
"7th and Broadway Branch,
"Los Angeles, California

"Please honor the requests of Mrs. Clara Forth and Samuel Selditch. They are the Executors of my Will without bond. Please notify my brother at 5019—Beverly Road, Brooklyn New York. Thank You.

"Herman Selditch
"Box 560, Los Angeles."

On another similar telegraph blank, likewise holographic and found in the same box, was the following letter:

"I have a safe deposit box 560 at Bank of America, 7th and Broadway Branch Los Angeles, California

"8-7-46
"Los Angeles, California

"Dear Sam:

"You and Clara are both Executors of my Will without bond.

"Please get in touch with her at 51—Rose Street, "Venice, California, Santa Monica 84956, or 1622—Ridgely Drive, Los Angeles, California, Webster 4673.

"I have in War Bonds	5812.00
Traveling Checks	2000.00
Cash	3400.00
	$11212.00

"I also have three suitcases in Bekins Storage Company, 1335—South Figueroa, Los Angeles, California 1 trunk which I shipped to Mexico City by Railway Express prepaid $27.16

"Herman Selditch"

The trial court found that the above letters "do not incorporate, by reference or in any other manner," the typewritten will attested by only one witness, heretofore referred to as the "incomplete will"; for which reason probate of the latter was refused. As hereinbefore noted, the Western Union documents set forth above, not disposing of decedent's estate and denominated "a mere nomination of Executors," were held solely entitled to probate as constituting an holographic will of the decedent.

Appellant's brief argues that the trial court was in error in refusing probate of the typewritten "incomplete Will" for the reason that "The law favors testacy rather than intestacy"; and that "The incomplete will was found under circumstances which resulted in an incorporation in the Western Union blanks by reference." The claim of incorportion by reference is based on the fact that the "incomplete will" was found in the safe deposit box with the holographic letters written on Western Union blanks, the latter documents, however being enclosed in an unsealed envelope.

Mrs. Clara Forth testified that the "incomplete will" "was lying in the box, and the envelope containing these were clipped to this, to the will." Appellant also calls attention to the fact that the holographic letters made reference to the fact that certain persons were executors of decedent's will, and gave information "which the decedent deemed necessary and helpful in connection with the Probate of Decedent's estate." It is claimed that "a series of acts more definitely calculated to demonstrate testamentary intent would be difficult to construct."

As bearing upon the issues herein, both parties have made use of Simon v. Grayson, 15 Cal.2d 531, 533, 102 P.2d 1081, 1082, where the court said: "It is settled law in this state that a testator may incorporate an extrinsic document into his will, provided the document is in existence at the time and provided, further, that the reference to it in the will clearly identifies it, or renders it capable of identification by extrinsic proof." The case further says, 15 Cal.2d at page 534, 102 P.2d at page 1083, that the authorities "do not require that the informal document be identified with exact precision; it is enough that the descriptive words and extrinsic circumstances combine to produce a reasonable certainty that the document in question is the one referred to by the testator in his will. * * * Here the letter was found in the safe deposit box with the will. It was addressed to the executors, as the will stated it would be. No other letter was found. * * * It identifies itself as the letter mentioned in the will."

In re Estate of Sullivan, 94 Cal.App. 674, 678, 271 P. 753, 755, has been cited in support of appellant's position that the "incomplete will" found in the safe deposit box can, "by reference," be considered a part of the Western Union holographic documents, and therefore granted probate. The Sullivan case held, in the language of the headnote, that "Where a holographic codicil is validly executed as a will according to law and its terms are such as to incorporate into and as a part thereof a defective prior holographic will, the two documents constitute the will of the testator." It was also there said that, "In determining the sufficiency of the description in the second document to incorporate the first by reference, logic directs that the sealing of the two documents in one envelope is just as eloquent as the attaching together of the two documents by other mechanical means."

Appellant's brief also points out that under the holding in Re Estate of Philippi, 71 Cal.App.2d 127, 134, 161 P.2d 1006, 1010, quoting from In re Estate of Hickman, 101 Cal. 609, 36 P. 118, "The fact that a testator nominates an executor, but without giving a legacy or devising any part of his property, makes it none the less a will." The Western Union blanks, which do not attempt to dispose of decedent's property, but merely refer to the executors named in the prior "incomplete will," are therefore, according to the appellant's argument, to be considered as testamentary instruments.

It is respondent's contention that, before there can be any incorporation by reference, there must be a *valid* will in existence, and that "There is absolutely no evidence in the record which would establish that the decedent intended the Western Union blanks to be his last will. Respondent also insists that "There is nothing in those Western Union blanks which makes any reference to the previously executed typewritten document" (the so-called "incomplete will" which was not properly witnessed).

[1] The facts disclosed by the record in the instant case are in various respects different from those which existed in the cited cases. This is particularly true in reference to the matter of "incorporation by reference," under which theory appellant maintains that the incomplete typewritten will should be granted probate along with and as a part of the holographic Western Union letters. It is obvious that considerable caution should be exercised in applying the doctrine of "incorporation by reference." That the testator's intent to incorporate other documents into a will should be reasonably apparent either from direct reference thereto in the will or from some rather unequivocal surrounding circumstances clearly indicating the same intent, is likewise clear. The record herein, as found by the trial court, indicates nothing of this nature save the fact that the improperly witnessed typewritten will, referred to as the "incomplete will," was found in the same safe deposit box as the holographic letters. The "envelope containing these (letters) were clipped to this, to the (incomplete) will."

It may be true that the testator considered and intended that the "incomplete will" would govern disposition of the estate. This however, cannot be, for that document was not attested by the two witnesses required by law. And the Western Union letters, although valid as an holographic will, can give no validity to the "incomplete will." Nor can any validity be imparted to the "incomplete will" from the mere fact that it was found in the same box which contained the holographic instruments. None of the cited cases go so far as to suggest such a procedure. To sanction such a doctrine would establish a precedent providing a convenient and dangerous by-pass wherewith to avoid the usual testamentary requirements.

[2] In respect to the trial court's finding that the letters bearing date August 7, 1946, written by the decedent on Western Union telegraph blanks, "solely, are the Last Will and Testament of the decedent and are entitled to admission to probate," it need only be said that such finding is supported by substantial evidence and is in accord with existing law. While it is true that these holographic documents did nothing more than name the executors and furnish certain information concerning decedent's property, such instruments are undoubtedly testamentary in nature and entitled to probate. Under the law as stated in Re Estate of Philippi, 71 Cal. App.2d 127, 161 P.2d 1006, and elsewhere, it is unnecessary that a will do more than nominate an executor. And in such a case, as observed by the trial court, decedent's property "shall be distributed in accordance with the laws of succession."

[3] The trial court denied a motion for continuance "with the understanding that if it becomes necessary, or the Court feels it is necessary to have the testimony of this additional witness * * *, then the court may allow Depositions." To this disposition of the motion appellant's attorney apparently agreed, and stated: "Yes, that is the understanding." Respondent's attorney likewise said: "That is correct, your Honor." In this state of the record, and since the denial of such a continuance was a matter clearly within the discretion of the trial court, no error is apparent.

There is no merit either in the appeal or in the cross appeal filed herein, and the judgment of the trial court is therefore affirmed.

WHITE, P. J., concurs.

Hearing denied; CARTER, J., dissenting.

90 Cal.App.2d 841

PASTORINO v. GREENE BROS. et al.

GREENE BROS. et al. v. PASTORINO.

Civ. 13806.

District Court of Appeal, First District,
Division 2, California.
March 29, 1949.

1. Trial 🔑45(1)

In action by master of fishing vessel for wrongful discharge when master attempted to engage in clam hauling operations, offer of proof on question of damages by way of prospective profits that master had arranged for another similar trip and the amount of profits he would receive therefrom was erroneously excluded over objection that owner did not authorize any future trips.

2. Customs and usages 🔑15(1)

In action by master of a fishing vessel who was discharged by owners for failure to engage in fishing operations when he attempted to complete an engagement for hauling of clams where master sought to prove a common custom that master had complete control of his own ship for the term of the contract which was silent respecting control, rejecting evidence of the alleged custom was error. Civ.Code, §§ 1637, 1646, 1655, 1656; Code Civ.Proc. § 1870.

3. Customs and usages 🔑10, 15(1)

Generally, when there is a known usage of the trade, persons carrying on that trade are deemed to have contracted in reference to usage becoming a part of contract unless contrary appears, and evidence of usage is always admissible to supply a deficiency or as a means of interpretation where it does not alter or vary terms of contract.

4. Customs and usages 🔑12(2)

A party to a contract may be bound by a custom not inconsistent with terms of contract even though he is ignorant of custom if that custom is of such general and universal application that he may be conclusively presumed to know of custom.

5. Customs and usages 🔑12(2)

In action by master of fishing vessel for wrongful discharge by owners when master attempted to engage in hauling of clams contrary to wishes of the owners where the contract was silent as to control of the operation of the vessel, evidence of general custom in the fishing business giving master of the ship complete control of the ship for the term of the contract was erroneously excluded on ground that it was not shown that owners had knowledge thereof because they were in the building business, since a person will be presumed to have contracted with reference to a general custom, whether he knew thereof or not.

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action by John L. Pastorino against Greene Brothers, a partnership, Ralph H. Greene, Paul A. Greene, and Robert T. Greene, individually and as partners doing business under the name of Greene Brothers, for breach of contract wherein the defendants filed a cross-complaint. From a judgment for the defendants on their cross-complaint, plaintiff appeals.

Reversed and remanded for a new trial.

W. C. Black, of San Francisco, and A. F. Mack, Jr., of Los Angeles, for appellant.

McCarthy & Rowell, of Redwood City, for respondents.

GOODELL, Justice.

Appellant sued for $7,250 damages for the breach of a contract whereby he was employed as master of a fishing vessel owned by respondents. By cross-complaint respondents claimed $999.47 as expenses incurred in repossessing the vessel, plus $239.91 alleged damage to the vessel, and $2,000 exemplary damages. The court awarded respondents judgment for $520 on their cross-complaint and this appeal was taken.

Appellant has been a commercial fisherman on this coast since 1926 and a master of fishing vessels since 1942. Respondents are in the construction business in San Mateo county, but in 1945 they had a fishing vessel 62 feet in length and of 15 foot beam, built for themselves, at a cost of $45,000. She was named the "Green Dolphin". On July 30, 1945 respondents and appellant entered into a contract providing in paragraphs 1 and 3 that Pastorino would act as her Captain for one year from July 31, 1945 to July 31, 1946. By paragraph 2 Pastorino agreed "in his capacity of Captain * * * to operate and take care of the said vessel to the best of his ability at all times." By paragraph 4 Greene Brothers agreed to pay Pastorino "for acting as Captain" 5% "of the Boat share", and by paragraph 5 the parties agreed that Pastorino should receive in addition thereto "a regular Crew Member's one (1) share, as per the common method of dividing the Fishing vessel's Shares." Those were its only provisions.

The vessel's first trip was to fish for tuna off the Oregon coast. Respondent Ralph Greene, who had just made a six-months study of the fishing business, went along on this trip, which lasted from August 16 to November 1, 1945. The day after the vessel returned she sailed from San Francisco to fish for tuna out of San Pedro. While so engaged appellant made arrangements to haul clams from the coast of Lower California to a cannery at San Pedro which, according to appellant's judgment, was the only profitable activity for the boat as she was then equipped. Respondents were consulted by appellant about this expedition and did not object to it. This trip lasted for the first two weeks of December, and the vessel then returned to San Francisco for a copper painting job, also for a check-up by her builders. She remained from December 20, 1945 to January 5, 1946 during which time respondents attempted to find marine-ways on which she could be painted. The ship-yards were crowded, a machinists' strike was on, and it appeared that there would be a further delay of two or three weeks. From the record it fairly appears that appellant became restive and impatient; of course he was earning nothing during this lay-up and was under expense. Moreover, it appears that while engaged on the clam hauling operation appellant had made a commitment to return on January 9 for another tour carrying clams from the coast of Lower California to San Pedro, and time was running short. Respondents had brought up the question of dragnet fishing out of San Francisco and had told appellant that they disapproved of any further hauling of clams. The vessel was equipped only for tuna fishing; new and different gear would be required for dragnet fishing and respondents had taken no steps toward procuring it beyond the making of inquiries. In this situation appellant on January 5, sailed from San Francisco for San Pedro to keep the engagement he had made for the hauling of clams. The first the owners knew of his departure was a radio message which he sent after getting out to sea. Respondents immediately radioed him to return, which he refused to do, and they had the Coast Guard send out a cutter which ordered the "Green Dolphin" into Santa Barbara. Ralph Greene went there at once, ordered appellant to take the vessel back to San Francisco, which he refused to do, and Greene discharged him and took possession of the vessel.

Appellant's action in sailing from San Francisco on January 5 without consulting respondents and after they had disapproved any further clam operations indicates his position with respect to his power and authority as master; respondents' action in ordering him back indicates theirs.

It is appellant's contention that what he did was fully justified by the custom and usage surrounding contracts such as the one in question.

The court sustained objections to every question by which appellant attempted to prove custom and usage and he followed up these adverse rulings with offers of proof—four or five of them—all of which were rejected.

Appellant's contention on this appeal is fairly indicated by the following tender: "I would like to make an offer of proof that there is a common custom or usage amounting to uniform practice as followed in the commercial fishing business as to whether or not the owners or master or Captain shall have full control of the operation of the vessel under such circumstances as I enumerated in my preamble. This common custom or usage isn't a local custom, but pertains to the * * * entire coastal country. This custom or usage is followed by all of the people in the fishing business and it is of universal application to all those in the commercial fishing industry and isn't just used occasionally and there is absolutely no exception to it. It is well known in the fishing business. This common custom or usage * * * is that the master of the ship has complete control of his own ship for the term of the contract. He can take the vessel out and he can decide when and where the vessel should operate and the owners of the vessel have no authority to determine when and where the vessel is to be taken over the captain's decision under such circumstances."

Appellant also made the following tender which involved the question of damages by way of prospective profits. After he had described the modus operandi of the initial clam hauling venture he was asked whether, while on that trip he had made arrangements for a future trip. Respondents objected on the ground that "The owners didn't authorize any future trips and on the contrary specifically refused to permit any future trips." Appellant's counsel argued that the question bore "on the question of damages as to what he could do and how much he could make." The court sustained the objection. Appellant then offered to prove that while appellant was on the first clam hauling operation he had arranged for another similar trip; "that he made arrangements for 400 of these Mexicans to be digging clams so he could leave on the trip January 9th from San Pedro, meet them down there with fresh water and pick up the clams * * * that this same canning company made an agreement with him, a verbal one, that they would guarantee him one trip a month for the next seven months and that they would purchase the clams that he would bring up on each of these trips for the next succeeding 7 months, and * * * that in boats of this size and equipped as this boat was, they made more money and profit than any other boat in any other type of fishing equipped the same as this boat."

The trial court's view of the case is illustrated by one of the rulings rejecting evidence of custom, namely, "The contract is the basis of this whole affair, this whole action."

[1] The court erred in sustaining the objections and in rejecting the proffered evidence of custom. The contract is, of course, "the basis of this whole affair" but it is absolutely silent respecting control, and upon that question this case must turn. If appellant had the right as master to take the vessel south on January 5 the respondents breached the contract; if not, then he did. In the absence of a written provision or oral testimony of an understanding see Buckner v. A. Leon & Co., 204 Cal. 225, 227, 267 P. 693, the court had to be informed from some source as to what the contract meant and that source was evidence as to custom and usage.

[2, 3] In Hind et al. v. Oriental Products Co., 195 Cal. 655, 667, 235 P. 438, 443, it is said: "It is the general rule that when there is a known usage of the trade, persons carrying on that trade are deemed to have contracted in reference to the usage unless the contrary appears; that the usage forms a part of the contract; and that evidence of usage is always admissible to supply a deficiency or as a means of interpretation where it does not alter or vary the terms of the contract [citations]". This was quoted in Buckner v. A. Leon & Co., supra, 204 Cal. 225, 227, 267 P. 693. And in the recent case of Isenberg v. California etc. Commission, 30 Cal.2d 34, 37, 180 P.2d 11, 14, the court again followed the Hind case, saying: "Clearly, the existence of a contractual right may be shown by usages and customs." This need not be elaborated nor further authorities cited since the rule is definitely settled not only by case law but by statute. Section 1637, Civil Code provides that "For the purpose of ascertaining the intention of the parties to a contract, if otherwise doubtful, the rules given in this chapter [Interpretation of Contracts] are to be applied." Sections 1646, 1655 and 1656, Civil Code state such rules, while section 1870, Code Civ.Proc. provides that evidence may be given of "Usage, to explain the true character of an act, contract, or instrument, where such true character is not otherwise plain; but usage is never admissible, except as an instrument of interpretation; * * *".

[4] One of the objections to the proffered evidence was that "it doesn't appear that any such custom, if there ever was one,

was known to the owners and agreed by them" and that point is now pressed by respondents, the argument being that they were in the building business and this fishing venture was new to them. Miller v. Germain Seed & Plant Co., 193 Cal. 62, 69, 222 P. 817, 819, 32 A.L.R. 1215, answers this contention. It is there said: "The rule seems to be uniform that a party to a contract may be bound by a custom not inconsistent with the terms of the contract, even though he is ignorant of the custom, if that custom is of such general and universal application that he may be conclusively presumed to know of the custom. * * * The rule that a person will be presumed to have contracted with reference to a general custom or usage whether he knew of that custom or not has frequently been invoked."

[5] Appellant's tender represented to the court that he proposed to prove that the custom was general and universal up and down the Pacific Coast. He was precluded from doing so. Whether he could have convinced the court that such general and universal custom existed is not now before this court. Appellant could not prove his whole case by one question and answer but was entitled to take one step at a time. The rule of the Germain Seed case was applied in Newcomb & Co., Ltd., v. Sainte Claire Realty Co., 55 Cal.App.2d 437, 440, 130 P.2d 793, where the same claim was made of ignorance of the custom. Over and above what has been said, Ralph Greene's own testimony shows that it was he who drew the contract. Appellant's testimony shows that the contract was the same as those "commonly used, whether oral or written, in the operation of fishing vessels." Ralph Greene had spent the six months just before the vessel was completed making a study of the fishing business, journeying up and down the coast to familiarize himself with its operations and practices. When the $45,000 vessel was commissioned respondents had definitely embarked in the commercial fishing business and could not claim to be strangers to its practices, hence Latta v. Da Roza, 100 Cal.App. 606, 280 P. 711, 281 P. 655 and People v. Seymour, 54 Cal.App.2d 266, 128 P.2d 726, relied on by respondents are not in point.

There is enough in this record to show that commercial fishing is decidedly unlike ordinary business enterprises. The evidence shows, for instance, that the captain and crew of this vessel got no stated compensation whatever from the owners but had to depend on a share of the proceeds of the catch—the result of their own skill, experience and industry. Judging by this record, an owner does not even supply the provisions for a fishing vessel; these are paid for by those who man it.

It would appear (but on this question we make no holding) that the contract of July 30, 1945 is what is known as a "fishing lay" of some type or other. Definitions of a "fishing lay" are found in Vol. 24, Words and Phrases, Perm.Ed., page 444. See, also 56 C.J. p. 1058 title "Lay or share of earnings". The cases of Cromwell v. Slaney, 1 Cir., 65 F.2d 940 cited by appellant and The Carrier Dove, 1 Cir., 97 F. 111 cited therein give some idea of what "fishing lays" are and how they operate. Such authorities show at a glance the necessity for admitting evidence of custom and usage in a case of this kind. They are not cited by us as authority on any point herein, but simply because of the general discussions found therein of fishing contracts.

There was considerable testimony as to the claimed unseaworthiness of the vessel, and her condition when she was repossessed at Santa Barbara, but it is not necessary to review that part of the record in view of the prejudicial errors already discussed.

The judgment is reversed and the cause remanded for a new trial.

NOURSE, P. J., and DOOLING, J., concur.

90 Cal.App.2d 837

SACRAMENTO–YOLO PORT DIST. et al. v. RODDA.

Civ. 7627.

District Court of Appeal, Third District, California.

March 28, 1949.

1. States ⚷119

In determining whether proposed application of public funds is "gift" within constitutional prohibition, primary question is whether funds are to be used for public or private purpose. Const.art. 4, § 31.

2. Municipal corporations ⚷871

The proposed advancement of funds of Sacramento-Yolo Port District to federal government would be for "public" and not "private purpose" and hence would not be unconstitutional gift of public funds, where advancement was to enable Army Engineer to promptly proceed in advance of appropriation of federal funds with work on project for which federal government alone was responsible and which must be completed before district could proceed with construction of terminal facilities contemplated by the project. Harbors and Navigation Code, § 6800 et seq., 6900; St.1947, cc. 55, 1152; Act Cong. July 24, 1946, 60 Stat. 634; Const. art. 4, § 31.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Private Purpose" and "Public Purpose".

3. Municipal corporations ⚷918(2)

While proceeds from sale of bonds voted for special purpose cannot be devoted to another purpose, public board may submit bond proposals in general terms as broad or as narrow as board is willing to be bound by, and an authority having responsibility of proposing bond issue and not confining itself to inflexible plan of construction and expenditure by proposal submitting bond issue and proceeding free from fraud and in good faith in accordance with such broad program, will be permitted to carry on improvement to extent of funds available.

4. Municipal corporations ⚷918(2)

A proposal submitted by Sacramento-Yolo Port District to voters for issuance of bonds for acquisition, construction and completion of river port project did not preclude district from cooperating with federal government in carrying out project by advancing money to federal government for moving of large quantities of material for embankment purposes. Harbors and Navigation Code, §§ 6800 et seq., 6900; St.1947, cc. 55, 1152; Act Cong. July 24, 1946, 60 Stat. 634.

Mandamus proceeding by Sacramento-Yolo Port District, and others, against A. S. Rodda, as auditor of the Sacramento-Yolo Port District.

Writ granted.

Downey, Brand, Seymour & Rohwer, of Sacramento, for petitioners.

John Quincy Brown, Dist. Atty., William A. Green, Asst. Dist. Atty. and John B. Heinrich, Supervising Deputy Dist. Atty., all of Sacramento, for respondent.

PEEK, Justice.

By this proceeding in mandamus, the petitioners, sometimes referred to hereinafter as the District, seek an order of this court compelling respondent A. S. Rodda, auditor of said District, to certify the correctness of a warrant duly approved by petioners and drawn in favor of the treasurer of the United States for the Secretary of the Army in the sum of $1,000.00. The warrant represents a portion of a total of $500,000.00 which the petitioners propose to advance to the Secretary of the Army in accordance with a resolution duly adopted by the petitioners' board of directors. According to said resolution the advancement will enable the Army Corps of Engineers to promptly proceed with the work on the portion of the project to be performed by the federal government without the necessity of waiting for a federal appropriation. The Secretary of the Army has authorized the Army Corps of Engineers to accept the advance and has entered into an agreement with the District to reimburse it for such advances from anticipated federal appropriations. The respondent refused to certify the warrant on the ground that said proposed advance constitutes a gift of public moneys in violation of Article IV, Section 31 of the California Constitution.

The District is a public agency organized under and pursuant to Part 6 of Division VIII of the Harbors and Navigation Code of this state to co-operate in the construction, development and operation of such project with the United States government, which project has been regularly approved by both the federal, Public Law 525, 79th Congress, Second Session, 60 Stat. 634, and state governments, Statutes of 1947, Chapters 55 and 1152.

The reason for the proposed advance, as stated by the District, is that it cannot proceed with the construction of terminal facilities until the United States commences work for which it alone is responsible, namely, the moving of large quantities of material for embankment purposes; and that the initial federal appropriation in the sum of $250,000.00 is inadequate to enable the Army Corps of Engineers to properly proceed with such work.

Respondent does not deny the power of the District to "contribute" money to the federal government under section 6900 of the Harbors and Navigation Code, wherein it is specifically provided that,

> "It may contribute money to the Federal * * * government * * *, for the purpose of defraying the whole or a portion of the cost and expenses of work and improvement to be performed, * * * or in doing other work, if such work will improve navigation and commerce, in or to the navigable waters in the district."

But he contends (1) that as the word "contribute" means in part to "give", the power so given by said section 6900 violates Section 31 of Article IV of the state Constitution, which provides in part:

> "The Legislature shall have no power to give or to lend, or to authorize the giving or lending, of the credit of the State, or of any county, city and county, city, township or other political corporation or subdivision of the State now existing, or that may be hereafter established, in aid of or to any person, association, or corporation, whether municipal or otherwise, or to pledge the credit thereof, in any manner whatever, for the payment of the liabilities of any individual, association, municipal or other corporation whatever; nor shall it have power to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation";

and (2) that an advance to the United States to assist in carrying out the project is without the authorization contained in the bond proposal approved by the electors at the election held for that purpose.

[1] It is true that the word "contribute" means in part to "give" since the term is defined in Webster's International Dictionary as follows:

> "To give or grant in common with others, as to a common stock or for a common purpose; to furnish or supply in part; to give (money or other aid) for a specified object."

However, the question presented is not one which can be determined by application of the precise dictionary definition of the word "contribute", but rather it is one to be resolved in light of the Constitutional provision, i. e. if the proposed advancement of public funds constitutes a gift of public funds within the meaning of the term as used in said section 31, Article IV of the Constitution. In City of Oakland v. Garrison, 194 Cal. 298, 302, 228 P. 433, 434, where a similar question was presented the court pointed out that "where the question arises as to whether or not a proposed application of public funds is to be deemed a gift within the meaning of that term as used in the Constitution, the primary and fundamental subject of inquiry is as to whether the money is to be used for a public or a private purpose." In so stating, the court was following the rule laid down in the earlier case of Conlin v. Board of Supervisors, 99 Cal. 17, 33 P. 753, 21 L.R.A. 474, 37 Am.St.Rep. 17, which rule has been affirmed repeatedly in succeeding years. See County of Los Angeles v. La Fuente, 20 Cal.2d 870, 877, 129 P.2d 378.

[2] There can be no doubt that the proposed advancement in question herein is for a public purpose. Particularly is this true in view of the resolution of the District relative to the necessity and purpose of the advancement, the several statutes, both federal and state, in regard to the construction, development and operation of the project, and the overall statement of purpose contained in the bond proposal submitted to the voters of the District. Therefore the conclusion is inescapable that the proposed advance is for a public and not a private purpose and therefore does not violate said constitutional provision.

[3] In support of his second contention respondent argues that a voter at the bond election could have gathered the impression that the work was to be done entirely by the District and that the money to be derived from the sale of the bonds was to be expended solely by the District. In so contending respondent seemingly relies upon the general rule that proceeds from the sale of bonds voted for a specific purpose cannot be devoted to another purpose. O'Farrell v. County of Sonoma, 189 Cal. 343, 208 P. 117. Such contention is predicated only upon a portion of the rule and fails to consider the remaining portion thereof which is that public boards may submit bond proposals in general terms, just as broad or just as narrow and specific as it is willing to be bound by, and when the authority, having the power and responsbility of proposing the bond issue, has not confined itself to an absolutely definite and inflexible plan of construction and expenditure by the proposal submitting the bond issue, and has proceeded free from fraud and in good faith in accordance with such broad program, there is no reason why it cannot be permitted to carry on the improvement to the extent of the funds available. Sacramento Municipal Utility District v. All Parties, etc., 6 Cal.2d 197, 57 P.2d 506.

Turning to the proposition submitted by petitioners to the voters of the District we find the following language:

"Proposition: (Port Project.) Shall Sacramento-Yolo Port District incur a bonded indebtedness in the amount of $3,750,000 for the acquisition, construction and completion of the following improvement, to-wit:

"Sacramento-Yolo River Port Project, including wharves, docks, warehouse, grain elevators, transit sheds, storage facilities, belt railroad, lands, easements and rights-of-way, together with harbor connecting road-ways, sanitary and storm sewer, electric light, power, water supply and fire protection harbor facilities, and all other works, property, structures, equipment and facilities incident to or necessary for said Sacramento-Yolo Port District?"

[4] While the language of the bond proposal properly may be construed as conferring the power upon the District to expend the funds to carry out the entire project it cannot be said that such language thereby committed the District to complete the entire project by itself any more than such language can be construed to limit the District to the completion of only one phase of the project or to preclude the District from co-operating with any other governmental agency in carrying out the project. In other words the course pursued by the District comes squarely within the broad powers and purposes set forth in the proposal submitted to and approved by the voters of the District, and therefore is governed by the rule expressed in the case last cited. 6 Cal.2d 197, 57 P.2d 506.

For the foregoing reasons the writ is granted.

ADAMS, P. J., and THOMPSON, J., concur.

91 Cal.App.2d 134

MORGAN v. CITY OF LOS ANGELES et al.

Civ. 16512.

District Court of Appeal, Second District, Division 3, California.

April 5, 1949.

1. Mandamus ⚷187(9)

Whether police officer had contracted poliomyelitis while in the discharge of his duty so as to entitle his widow to a pension was a question of fact for trial court.

2. Evidence ⚷594

Trial court was not required to accept as true statement by witness even though it was not contradicted.

3. Municipal corporations ⚷187(9)

Where widow of police officer sought a pension on ground that officer had died of a disease contracted during the performance of his duties, burden was on the widow to show a causal relation between the duty performed by the officer and the immediate cause of his death.

4. Appeal and error ⚷931(1)

In determining the sufficiency of the evidence to support finding of trial court, the appellate court must resolve all conflicts in the evidence in favor of respondent.

5. Municipal corporations ⚷187(9)

Evidence sustained finding of trial court that police officer had not contracted poliomyelitis in the performance of his duty so as to entitle his widow to a pension.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Petition by M. Louise Morgan against the City of Los Angeles and others for a writ of mandate directing the Board of Pension Commissioners of the city to grant plaintiff, as the widow of a police officer, a pension pursuant to the city charter. From a judgment denying the petition, the plaintiff appeals.

Judgment affirmed.

Haas & Home, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty. and John J. Tully, Jr., Asst. City Atty., both of Los Angeles, for respondents.

WOOD, Justice.

The petitioner sought a writ of mandate directing the Board of Pension Commissioners of the City of Los Angeles to grant to her, as the widow of a police officer, a pension pursuant to section 183 of the city charter of Los Angeles. That section provides in part, that whenever any member of the police department shall die from sickness caused by the discharge of his duty a pension shall be paid to his widow. Petitioner alleged that the immediate cause of the death of her husband was poliomyelitis contracted by him during the performance of his duties as such police officer. She appeals from the judgment denying her petition.

Appellant contends that the court erred in concluding that the officer did not die from sickness contracted in line of duty. She asserts that the officer contracted poliomyelitis while, in the performance of his duty, he was at the front door of a house talking to a woman therein who had recently rendered nursing services in the house to her son who was afflicted with that disease.

Officer Morgan, petitioner's husband, had been a police officer in Los Angeles for 12 years. Prior to September 21, 1945, there had been several burglaries in a certain district in Los Angeles, and Officer Morgan and Officer Nash were assigned to investigate the burglaries in that district. On September 21, 1945, after having gone to a house within that district where a burglarly had occurred, those officers, in the performance of their duty, went to all the houses (about 15) within 3 or 4 blocks of that house. Officer Nash testified that about 4 p. m. of that day he saw Officer Morgan, in the performance of his duty, go up the entrance steps and onto the porch of the residence of a Mrs. Paschek. While Officer Morgan went to that residence Officer Nash went to a residence next door. Officer Nash also testified that he could not see the door of the Paschek residence from his position at the next residence; that he returned within about

8 minutes to their automobile, in front of the Paschek residence, and Officer Morgan was then in the automobile; that Officer Morgan then told him that he had talked to "the mother" at the house where he had been. About September 6, 1945, the son of Mrs. Paschek had become afflicted with poliomyelitis, and from that day until September 8th, when he was taken to the hospital, Mrs. Paschek had taken care of him at that residence. On September 21st he was discharged from the hospital and he returned home about 4 p. m. The son testified that on said last mentioned day Mrs. Paschek had a slight cold.

About October 1, 1945, Officer Morgan developed a slight cold. He continued to get worse, and was off duty from the 5th to the 10th of October, inclusive, by reason of his illness. On October 11th he returned to his duties and performed them to and including October 15th. After October 15th he did not return to his duties. On October 20th he was admitted to a hospital and his illness was diagnosed as bulbar paralysis due to poliomyelitis. He died from that disease on October 25, 1945.

According to testimony, the incubation period of poliomyelitis varies from 5 to 18 days; a symptom of poliomyelitis is a condition that simulates a head cold; and a person may be infected with the poliomyelitis virus and be infectious but have no symptoms of the disease.

Plaintiff testified that Officer Morgan had been in good health prior to the illness that caused his death; that from September 1st to October 1st, 1945, she and her husband had not gone to any places of amusement or where there were large gatherings of people; and that after June, 1945, they had been at home "almost completely."

Mrs. Paschek testified that she did not remember anyone particularly who came to her house the day her son returned from the hospital; that a great many persons "inquired and called," but she did not remember anything in particular because she was under a terrific strain. About November, 1945, a picture of Officer Morgan was shown to her by Officer Nash and another officer, and she was asked if the person whose picture was then shown to her had been to her house. She testified that she replied that she did not know, that she may have seen him but there was nothing definite about it.

In response to a hypothetical question based upon the assumption that the facts and testimony above stated were true and that the officer talked to Mrs. Paschek, a physician called as a witness by petitioner testified in substance that in his opinion Officer Morgan did contract poliomyelitis by his contact with the mother of the afflicted boy. A physician called as a witness by the respondents testified, in response to such hypothetical question, that in his opinion Officer Morgan did not contract poliomyelitis by his contact with the mother. He also testified that in his opinion, even if it be assumed additionally that the mother did have poliomyelitis at the time she talked with the officer, the officer did not contract poliomyelitis from the mother. A doctor of philosphy in medical sciences, who specializes in micro-biology, was called as a witness by respondents. He testified, in response to such hypothetical question, that in his opinion it would be highly improbable that Officer Morgan contracted poliomyelitis by his contact with the mother. He also testified that during the month of September, 1945, 81 persons afflicted with poliomyelitis were admitted to the general hospital, which number was twice the average number of such admissions in the month of September over a 5-year period.

[1-5] The question as to whether the officer contracted the disease while he was in the discharge of his duty was a question of fact for the determination of the trial court. In this connection an important fact to be determined by the trial court was whether the officer talked to Mrs. Paschek. The evidence regarding this was, in substance, that Mrs. Paschek said that she did not remember such an event, and Officer Nash said that Officer Morgan told him that he had talked to "the mother." The court found that it was not true that Officer Morgan had talked to Mrs. Paschek on September 21, 1945. In view of the evi-

dence that Mrs. Paschek did not remember the alleged call by the officer, that she returned from the hospital about 4 p. m. on that day, and that Officer Morgan went up on the porch about 4 p. m. and returned to the automobile before Officer Nash had finished his call at the house next door, the court might have concluded that Mrs. Paschek had not arrived home at the time the officer called at her house. The court was not required to accept as true the statement to the effect that Officer Morgan said he had talked to "the mother," even though that statement was not contradicted. Other important facts to be determined by the court were whether the allegations were true that (1) on September 21, 1945, Mrs. Paschek showed symptoms of what appeared to be a head cold, (2) on said date she was suffering from an abortive poliomyelitis, (3) she was a temporary carrier of that disease, and (4) the officer contracted poliomyelitis from Mrs. Paschek. The son testified, as above stated, that his mother had a slight cold the day he returned from the hospital; but the mother did not testify as to whether she had a cold at that time. The only other evidence as to whether she was suffering from an abortive poliomyelitis and was a carrier of that disease was the evidence that she was exposed to the disease while caring for the son. There was a substantial conflict in the expert testimony as to whether the officer contracted the disease from Mrs. Paschek. Also it appears, from the statistics above referred to, that the disease was prevalent in September, 1945. The court found that she did not have such symptoms, was not suffering from such disease, and was not such a carrier, and that the officer did not contract poliomyelitis from Mrs. Paschek. The burden was upon petitioner to show a causal relation between the duty performed by the officer and the immediate cause of the death. Lundrigan v. City of Los Angeles, 82 Cal.App.2d 238, 252, 186 P.2d 12. "Where the facts are such that contradictory inferences can reasonably be drawn from them, an appellate court will not substitute other inferences for those adopted by the" trier of the facts. Arundel v. Turk, 16 Cal.App.2d 293, 296, 60 P.2d 486, 487. In determining the sufficiency of the evidence to support the findings, this court must resolve all conflicts in the evidence in favor of respondent. Hobart v. Hobart Estate Co., 26 Cal.2d 412, 422, 159 P.2d 958. The findings above mentioned are supported by the evidence.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

90 Cal.App.2d 826

MONTERROSA v. GRACE LINES, Inc.

No. 13977.

District Court of Appeal, First District,
Division 1, California.
March 28, 1949.

1. Appeal and error ⚷110

An appeal does not lie from order denying motion for new trial.

2. Appeal and error ⚷930(1)

Appellate court must assume in favor of verdict the existence of every fact which jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.

3. Seamen ⚷29(5.14)

Evidence supported finding that injury to seaman when starboard guy block attached to jumbo boom used for unloading heavy equipment from ship broke loose and struck him, was proximately caused by joint negligence of employees of stevedoring company who were operating winches and of employees of ship in using strap in lieu of shackle in fastening starboard block to starboard king-post, so as to render owner of ship liable for seaman's injuries. Jones Act, 46 U.S.C.A. § 688.

4. Trial ⚷143

The determination of conflict in testimony is a matter for jury, and if jury cannot reconcile that conflict, it is their province to affix their own value to the contradictory evidence.

5. Negligence ⚷136(25)

Whether negligence of a defendant should be held to be proximate cause of injuries is ordinarily a question of fact for jury.

6. Negligence ⚷59

A defendant's breach of a legal duty may be considered proximate cause of an injury and impose liability upon defendant even though defendant might not have foreseen particular injury which did happen.

7. Appeal and error ⚷1004(1)

For appellate court to hold an award to be excessive, it must be so large as to indicate passion or prejudice on part of the jurors.

8. Damages ⚷132(4)

Award of $30,000.00, as reduced to $23,500.00, to 24 year old seaman for injuries, including loss of spleen, necessitating several surgical operations, was not excessive, in view of testimony that seaman would not be able to perform heavy work required of an able seaman which he had performed before his injuries.

9. Appeal and error ⚷1004(3)

Trial judge's denial of a motion for a new trial on ground that verdict was excessive is persuasive in determining whether verdict was based upon passion or prejudice, but a reduction of damages by trial judge is not a determination that verdict was based upon prejudice or passion.

10. New trial ⚷157

Trial court, in passing on motion for new trial on ground that verdict was result of passion and prejudice, acts as a 13th juror with power to weigh evidence and judge credibility of witnesses.

◆

Appeal from Superior Court, San Francisco County; John J. McMahon, Judge.

Action by Victor V. Monterrosa against Grace Line, Inc., for personal injury under Jones Act, 46 U.S.C.A. § 688. From judgment for plaintiff and from order denying a new trial, the defendant appeals.

Appeal from order dismissed, and judgment affirmed.

Williamson & Wallace and Wm. R. Ray, all of San Francisco, for appellant.

Albert Michelson and Newell J. Hooey, both of San Francisco, for respondent.

BRAY, Justice.

[1] In an action for damages for personal injury under the Jones Act, 46 U.S.C.A. § 688, a jury awarded plaintiff judgment against defendant Grace Line, Inc., in the sum of $30,000. The court denied defendant's motion for a new trial upon remittance by the plaintiff of that portion of the verdict in excess of $23,500. Defendant appeals from the judgment and from the order denying a new trial. No appeal lies from the latter order.

There are only two questions presented: (1) sufficiency of the evidence; and (2) alleged excessiveness of the verdict.

Facts:

Plaintiff is 24 years old and licensed as an able seaman. In December of 1946 he signed on as a member of the crew of the Coastal Nomad, which left San Francisco in January, 1947. After several stops, it reached La Union, El Salvador. The day before arriving there the jumbo boom was rigged on the port side for the purpose of unloading some heavy equipment at La Union.

The boom is a large beam attached and hinged near the bottom of a mast. It can be placed at any desired angle from the horizontal. It can be held in such a position and lifting and lowering done by means of pulleys. The movement of the boom itself or of the hook is controlled by electric winches. There are also "guys" running from the boom to each side of the ship. At each side the guy passes through a block, with a wheel inside, and thence to a winch. The boom is moved sidewise by one winch operator "heaving" on his line, and the other slacking. The block on each side must be attached in some manner to a "king-post" or stanchion. On each king-post is a pad eye, i. e., eye bolt on a metal plate.

There were three heavy pieces of cargo to be discharged at La Union. On the port side of the ship the block was attached to the king-post by means of a shackle (U-shaped piece of metal placed through the pad eye on the king-post, and a pin, which joined the ends of the shackle, placed through a hole or groove in the block.) A shackle was normally used for this purpose.

On the starboard side of the ship the guy was not attached to the king-post with a shackle, because the crew could not find a proper sized pin. Instead, a wire cable strap was used. The strap was about four feet long and five-eighths of an inch in diameter. One looped end was forced through the pad eye and the other through the block. The two looped ends were then coupled with a shackle.

When the ship came alongside the dock, loading and unloading of cargo was done by a stevedoring company, International Railways of Central America. Employees of the stevedoring company operated the winches and performed all acts necessary in moving the cargo from the ship to the dock. The injury occurred on January 20, 1947, at about 2:00 in the afternoon. All of the loading and unloading had been completed, and the crew was securing the jumbo boom in preparation for putting to sea. The winches were still being operated by employees of the stevedoring company. There was testimony that these employees erroneously heaved on the port guy, without slacking on the starboard guy. At any rate, the strap holding the starboard block to the starboard king-post broke and the starboard guy block flew across the ship to the port side and struck plaintiff. His injuries will be discussed later.

Sufficiency Of The Evidence.

Defendant contends that plaintiff failed to prove, as required by the Jones Act, that the accident was due to the negligence of the defendant, and claims that the sole proximate cause was the negligence of the winch operators who were in the employ of the stevedoring company. "* * * the exact cause of the injury was the action of two native stevedores in putting winches in operation to exert opposing forces of at least five tons each on gear that was used to move the boom." (Appellant's opening brief, p. 3.)

[2, 3] Having in mind the rule as set forth in People v. McKnight, 87 Cal.App.2d 89, 196 P.2d 104, 109, "The duty of this court is expressed in People v. Pratt, 77 Cal.App.2d 571, at page 576, 175 P.2d 888, at page 890, where the court quotes from People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, as follows: '"We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict"'"—there is sufficient evidence to support the conclusion that the accident was proximately caused by the joint negligence of the stevedores and the defendant. The following is some of that evidence: The use of a wire or strap was not customary. It was only used because a pin for the shackle could not be found. The boatswain testified that it was not customary to use a strap and that they never used one if they possibly could help it. One Captain Greenleaf, an expert called by plaintiff, testified that it was not customary to use a strap of the type used here, "if it could possibly be avoided" and that if used the gear should be inspected by an officer throughout the day while in use. In use there was a "possibility of chafing of the strands" and there would be wear on the strap where it went through the block. He further testified: "Well, it is obviously quite an old piece of wire. It is being subjected to considerable strain, and it appears to be—I would say that it was—it could be depended on very far." It is obvious that Captain Greenleaf meant that it could not be depended on very far. The bending of the wire necessary for it to be used as it was, reduced its strength. The break was not one "that resulted from any certain strain. Apparently chafed completely—hung on until just these last few strands let go at the time of the accident." He further testified that the use of the wire was very bad practice "because they are damaging the wire to begin with by the cutting edges." The witness Rodriguez said that it was an old wire, bent and a little rusty; while the witness Ross, who

had been a seaman for 25 years referred to it as a "rusty one" and "all rusted through" and stated that he had never seen a wire strap used to rig a guy line before. Rodriguez, who had had some sea experience prior to this voyage, in the steward's department and in the engine room (how much experience does not appear) never before had seen a strap used on a jumbo boom. He said the wire was old and a little rusty. Witness Rice, rigging expert called by defendant, testified that the shackle was the safest instrument, and that in his opinion when the strain came the rigging broke at its "weakest link," the wire strap. Witness Gallagher, Fort Captain for defendant, testified there were other shackles on board the ship which could and should have been used, and that it was not good seamanship to use the strap in lieu of a shackle. The breaking strain of a shackle, the device customarily used would be 33.4 tons. A safe working strain under a factor of five, would be 6 or 7 tons. On the other hand, the breaking strain of a strap such as was used, when new would be 14 tons. The manufacturers recommend a safety factor of five, so that a safe working strain would be 2.8 tons. The strap, which it was testified was in the same condition as at the time of the accident, was admitted in evidence and exhibited to the jury.

Thus, there is substantial evidence that the use of the strap was negligent, that the method was unusual and unsafe, and that the strap itself was not in good condition. Defendant contends that the fact that it did not give way in the strain of unloading heavy materials, shows that the strap was a safe appliance to use, and shows that the sole proximate cause of its breaking was not its condition or use, but the violent strain put on it by the winch operators, which fact could not have been foreseen. These were matters for the jury to determine.

[4] While defendant contends that the strain on the equipment was abnormal, due to the negligence of the stevedores, the method used for securing the boom for the voyage placed considerable strain on the equipment. Witness Boyer stated that they were going "to secure it [the boom] by the outboard guys and the purchase" and that that would "be by taking a strain on both the outboard guys and also the purchase." Although there was evidence that the two winches were heaving in opposite directions at the same time, there was also evidence that the starboard winch controlling the port guy was stopped. The jury may have adopted the latter theory, although the other theory would not relieve defendant of responsibility for the accident. It is a reasonable inference from the evidence that the combination of the excessive strain and the weakness of the strap caused the accident. There is evidence in the record conflicting with the testimony above set forth as to the cause of the accident, but the determination of that conflict, of course, was a matter for the jury. If the jury could not reconcile that conflict, it was their province "to affix their own value to the contradictory evidence." McKean v. Alliance Land Co., 200 Cal. 396, at page 398, 253 P. 134, at page 135.

[5, 6] Many of the contentions made by defendant concerning its claim that the use and condition of the wire were not proximate causes, together with the negligence of the stevedores, of the accident were made and answered in the case of Jackson v. Utica Light & Power Co., 64 Cal.App. 2d 885, 149 P.2d 748. In that case a power pole of the defendants' had broken, permitting defendants' high power wires to fall upon a farmer's telephone wire. Deceased, a power shovel operator on a nearby project, met his death when his power shovel came in contact with the telephone wire. Defendants contended that the breaking of their pole was not the proximate cause of the accident, but that the alleged contributory negligence of the deceased in causing his power shovel to come into contact with the farmer's telephone line, was. The court, in discussing the matter of "proximate cause" said, 64 Cal.App.2d at page 891, 149 P.2d at page 751: "The doctrine of 'proximate cause' or 'causal relation necessary to the existence of liability' is one which has presented some difficulty in its application to cases grounded upon negligence in which an act of the plaintiff or another has intervened in such manner that the intervening act may be said to be

immediate cause of the resulting injury. There are many authorities holding that the intervention of such act does not necessarily prevent the negligence of the defendant from being the proximate cause of the resulting injury. [Citing cases.] While the question of whether the negligence of a defendant may be held to be the proximate cause of the injury despite such intervening act is a question of law for the determination of the court [citing cases], the foregoing authorities clearly indicate the question of whether the negligence of a defendant should be held to be the proximate cause of the injury is ordinarily a question of fact for the determination of the jury. * * * In the Restatement of Law of Torts, Sec. 430 et seq., the necessary 'causal relation' is said to be determined on the basis of whether defendants' negligence was a 'substantial factor in bringing about the harm' (sec. 431; see, also, sec. 433); and that 'If the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable' (sec. 435). It is there said that if the question of whether defendants' negligence is a 'substantial factor' is 'open to a reasonable difference of opinion', the question is one for the jury (sec. 434). And even in this state where the test seems to be based generally upon foreseeability, it has been said that a defendant may be liable even though 'it might not have foreseen the particular injury which did happen' [citing cases] and that it is not necessary that defendant should have been able to anticipate the 'precise form of the consequential injury' [citing case] or the 'precise accident'. [Citing case.]"

The principles discussed are applicable here. Although it may not have been foreseeable exactly what kind of accident would occur, it should have been foreseeable that some type of accident was likely if the starboard block was not fastened securely to the starboard king-post. All of the rigging is subject to great strain during the handling of cargo, and there are always seamen close by who might be hurt if the rigging gives way.

Plaintiff contends that defendant is liable for the acts of the winch operators on the ground that at the time of the accident admittedly they were not loading or unloading cargo, but were doing work for the ship, that is, helping get it shipshape to put out to sea. In view of our holding that one of the proximate causes of the accident was the defendant's negligence, we do not deem it necessary to discuss this question.

Were The Damages Excessive As Matter Of Law?

The flying block struck plaintiff on his left side near the bottom of the rib cage. When taken to a hospital in San Miguel, some 20 miles away, it was found that his spleen had been ruptured, and it was removed by an operation under general anesthetic. Plaintiff remained in San Miguel 38 days, during which time he developed pneumonia. The coughing caused his incision to reopen and it was necessary to resuture the incision. Plaintiff boarded a ship for San Francisco on February 27, 1947, but on March 1 was running a temperature and efforts were made to land him at Acajutla. This was not done, probably due to the weather, and he was taken 60 miles to San Jose de Guatemala, where he remained in a hospital for nine days. From there, plaintiff was flown to San Francisco in an ambulatory condition, and reported to the Marine Hospital in San Francisco as an out-patient. He reported there from time to time until August 2, 1947, at which time he was examined and reported fit for duty. On October 4, 1947, herniation in the abdominal incision appeared, and, upon recommendation of the Marine Hospital, he was operated on for surgical repair on October 11. He remained in the Marine Hospital until November 6, and on December 8 the hospital found him no longer disabled. In March, 1948, plaintiff went to sea again, but was unable to carry out the more strenuous duties of a seaman, such as cargo handling, etc. Prior to this time, he had worked for two months in a cannery, in 1947.

Dr. Mitchell testified that he last saw plaintiff three weeks prior to the trial; that there was a slight amount of weakness in the scar resulting from his three operations; that there was a hernia condition present; that plaintiff probably had adhesions; that while plaintiff can get along without a spleen, he is definitely weakened in many respects; that plaintiff is required to wear a corset or belt because of weakness of the abdominal wall; that if plaintiff contracts a serious disease or another hernia, his chances of survival are less than those of a normal person. Plaintiff testified that he continually feels weak and that on the 20 day trip from which he returned just before the trial he could do only light work; he could not go up the mast or pull guys.

[7, 8] The jury awarded $30,000. The court reduced the amount to $23,500. To hold this award excessive we must determine that it is so large as to indicate passion or prejudice on the part of the jurors. Holmes v. Southern California Edison Co., 78 Cal.App.2d 43, 177 P.2d 32; Buswell v. City & County of San Francisco, 89 Cal.App.2d 123, 200 P.2d 115. In the face of the loss of his spleen, the fact that "he had every kind of complication a fellow could have after a surgical operation," that he will never be able to perform the heavy work required of an able seaman which he had always performed before, and the other circumstances of his injury, we cannot say that the award is excessive as a matter of law. This, in spite of the fact that a doctor called by defendant testified, in effect that in his opinion plaintiff was just as healthy as a person with a spleen.

[9, 10] Defendant contends that we must assume as matter of law that the reduction by the trial judge of the amount of the verdict is a finding that the verdict was the result of passion and prejudice, citing Cooksey v. Atchison, Topeka etc. Ry. Co., 78 Cal.App.2d 504, 178 P.2d 69. That case does not so hold. There the trial judge did not modify the verdict. He refused to grant a new trial, one of the grounds of the motion being alleged excessiveness of the verdict. The court held that in view of that ground having been urged and the judge having refused to order a new trial 78 Cal.App.2d at page 508, 178 P.2d at page 71, "His ruling, in denying the motion, 'is persuasive in determining whether the verdict was based upon passion or prejudice.' Foster v. Pestana, 77 Cal.App.2d 885, 890, 177 P.2d 54, 57." There is nothing in the opinion to support defendant's contention that because of the holding there, the converse would be true, namely, that a reduction of damages by the judge would be a determination that the verdict was based upon prejudice and passion. Even if the action of the judge in reducing the award could be so considered, it would not follow that the amount to which the verdict was finally reduced was one awarded through the passion and prejudice of both the jury and the judge. The opinion shows that the court on such a motion is acting as a "thirteenth juror." 78 Cal.App.2d at page 509, 178 P.2d 69. In Holder v. Key System, 88 Cal.App.2d 925, 200 P.2d 98, this court in discussing the difference in the powers of the trial judge and an appellate court in reviewing the amount of the verdict said 88 Cal.App.2d at page 939, 200 P.2d at page 106: "The proper rule is set forth in Holmes v. Southern California Edison Co., 78 Cal.App.2d 43, 51, 177 P.2d 32, 36, in the following language: 'The powers and duties of a trial judge in ruling on a motion for new trial and of an appellate court on an appeal from a judgment are very different when the question of an excessive award of damages arises. The trial judge sits as a thirteenth juror with the power to weigh the evidence and judge the credibility of the witnesses. If he believes the damages awarded by the jury to be excessive and the question is presented, it becomes his duty to reduce them. [Citing cases.] When the question is raised his denial of a motion for new trial is an indication that he approves the amount of the award. An appellate court has no such powers. It cannot weigh the evidence and pass on the credibility of the witnesses as a juror does. To hold an award excessive it must be so large as to indicate passion or prejudice on the part of the jurors.' The question is not what this court would have awarded as the trier of the fact, but whether this court can say that the award is so high as to suggest passion or prejudice." See also Tyson v. Romey, 88 Cal.App.2d 752, 199 P.2d 721, "* * * it is not to be assumed from the making of such conditional order that the trial court concluded that the verdict was the product of passion or prejudice." Standiford v. Cantrell, 87 Cal.App. 736, 743, 262 P. 800, 803, to the same effect, Hughes v. Hearst Publications, Inc., 79 Cal.App.2d 703, 180 P.2d 419; Swett v. Gray, 141 Cal. 63, 74 P. 439.

The appeal from the order denying the motion for a new trial is dismissed; the judgment is affirmed.

PETERS, P. J., and WARD, J., concur.

In re GARCIA'S ESTATE.

MARSHALL v. ROGERS.

Civ. 13911.

District Court of Appeal, First District,
Division 2, California.
March 29, 1949.

Rehearing Denied April 28, 1949.
Hearing Granted May 26, 1949. *

1. Descent and distribution ⇨71(7)

On appeal from judgment denying petitioner who was born the illegitimate son of decedent's brother right to participate as an heir in the distribution of the estate, where the petitioner did not allege that his parents had intermarried and that the father had thereafter acknowledged him as his child or adopted him into his family, the appellate court must assume that the parents had not intermarried and that the petitioner had not been so acknowledged or adopted. Probate Code, § 255.

2. Statutes ⇨224

All statutes must be read together.

3. Statutes ⇨228

An express statutory exception must prevail over a general provision.

4. Statutes ⇨225½

Under Civil Code, providing that on public acknowledgment of illegitimate child by father as his own, etc., he thereby adopts it and that child is deemed legitimate for all purposes, and section of Probate Code providing that illegitimate child is heir of mother and of father who acknowledges in writing such child, but that the child may not inherit from father's kindred unless parents shall have intermarried and father shall have thereafter acknowledged the child and adopted him into the family, etc., the provision of the Probate Code controls so far as child's right of succession is concerned. Civ.Code, § 230; Probate Code, § 255.

5. Constitutional law ⇨208(1)

A statute may not be declared unconstitutional as discriminatory unless it is clear that there is no reasonable basis for the discrimination.

6. Bastards ⇨97

The Probate Code, providing that an illegitimate child is the heir of his mother and of his father who acknowledges in writing such child, but that the child may not inherit from father's kindred unless parents shall have intermarried and father shall have thereafter acknowledged the child and adopted him into the family, etc., is not unconstitutional on ground that it wrongfully discriminates against illegitimate children. Civ.Code, § 230; Probate Code, § 255.

◆

Appeal from Superior Court, City and County of San Francisco; Geo. W. Schonfeld, Judge.

Proceeding in the matter of the estate of Theresa Garcia, deceased, on petition of Henry Marshall for distribution of paternal aunt's estate, which was opposed by Mary Rogers, as administratrix, and which raised the question whether the petitioner, as the illegitimate son of a brother of the deceased, and who was later legitimated, was entitled to participate as an heir in the distribution of such estate. From a judgment for the administratrix, the petitioner appeals.

Judgment affirmed.

A. B. Bianchi and Benj. C. Mickle, both of San Francisco, for appellant.

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* Subsequent opinion 210 P.2d 841.

Donahue, Richards, Rowell, & Gallagher, of Oakland, for respondent.

NOURSE, Presiding Justice.

The illegitimate son of decedent's brother petitioned for distribution of the paternal aunt's estate. A judgment adverse to petitioner was entered on motion for judgment on the pleadings. The issue on the appeal is whether the petition pleads a case entitling petitioner to participate as an heir to the estate.

It is alleged that decedent was a sister of Joseph M. Noya, also known as Joe Marshall, who predeceased decedent; that petitioner was born the illegitimate son of Noya but that he was legitimated during his minority by his father's public acknowledgment of him as his son and by his receiving petitioner in his family as a legitimate son.

An answer to the question presented requires an interpretation of these code sections: Section 230 of the Civil Code reads: "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this chapter do not apply to such an adoption." Section 255 of the Probate Code reads: "Every illegitimate child is an heir of his mother, and also of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father, and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he does not represent his father by inheriting any part of the estate of the father's kindred, either lineal or collateral, unless, before his death, his parents shall have intermarried, and his father, after such marriage, acknowledges him as his child, or adopts him into his family; in which case such child is deemed legitimate for all purposes of succession. An illegitimate child may represent his mother and may inherit any part of the estate of the mother's kindred either lineal or collateral." The exception found in the latter section relating to the right of a legitimated child to participate in the "estate of the father's kindred" in the event "his parents shall have intermarried" is the portion particularly applicable here.

[1] It would seem that a simple reading of the two code sections would call for no Daedalian process of interpretation. Section 230 of the Civil Code fixes the status of an illegitimate child for all general purposes. Section 255 of the Probate Code is a statute of succession which specially limits the right of a legitimated child to succeed to the estate of the "father's kindred." The latter section states in plain language that an illegitimate child is an heir of his mother and of his father who acknowledges him as such, but that he is not an heir to the estate of his father's kindred unless the parents have intermarried, and the father thereafter has acknowledged him as his child or adopts him into his family. The petition herein does not allege that either of these conditions were met, and on this appeal we must assume that they were not.

[2-4] Appellant relies on Wolf v. Gall, 32 Cal.App. 286, 163 P. 346, 350; In re Estate of Lund, 26 Cal.2d 472, 159 P.2d 643, 649, 162 A.L.R. 606, and similar cases holding generally that section 230 of the Civil Code makes a legitimated child legitimate "for all purposes" and that he is then entitled to the benefit of the "general succession statutes." There is no longer any quarrel with this view. Section 230 expressly states that that is the legal status of the child. However, no one of these cases involved the question at issue here—the right in the absence of a subsequent marriage, to succeed to the estate of the father's kindred. In the Wolf case the parents had intermarried and the claimants had been accepted and acknowledged as members of the family. The claimants sought to inherit from their paternal grandmother. In the Lund case the claimant sought to inherit from his own father. In the latter the exception

found in section 255 of the Probate Code was in no way involved. In the Wolf case the issue was there and the District Court of Appeal merely held that the section had no application. However, in denying a transfer the Supreme Court filed its opinion saying [32 Cal.App. 286, 163 P. 351]: "We cannot agree either that section 1387, Civil Code [now section 255 of the Probate Code], has no application to children situated as are the respondents" and that, in so far as it lays down rules of succession contrary to general rules, it "must prevail as to any child born illegitimate." In Re Estate of Lund, supra, the Supreme Court approved the interpretation of section 230 of the Civil Code found in the Wolf case. Whether it approved its own opinion in denial of a transfer does not appear, but it does appear that it did not pass upon the application of the exception in section 255 of the Probate Code and that such exception was not involved since Lund was seeking to establish the right to inherit directly from his father and not from the "father's kindred." However, there can be no controversy on this—that all statutes must be read together and that an express exception must prevail over a general provision. Kahrs v. County of Los Angeles, 28 Cal.App.2d 46, 49, 82 P.2d 29. This principle forces the conclusion that an illegitimate child legitimated under section 230 of the Civil Code is not entitled to participate in the estate of his "father's kindred" unless the parents have intermarried and his father, "after such marriage" has acknowledged or adopted him into his family as provided in section 255 of the Probate Code.

[5, 6] The argument that such interpretation of section 255 would render it unconstitutional is not sound. A statute may not be declared unconstitutional as discriminatory unless it is clear that there is no reasonable basis for the discrimination. An illegitimate child is given the right to inherit from both the father and the mother. As to the estate of the "father's kindred" the section imposes an exception. The reason for the exception is clear. When the putative father is dead and the mother seeks to establish heirship in her illegitimate child the necessity of establishing the fact of intermarriage and acknowledgment of the paternity is a salutary requirement for the protection of the legitimate heirs against a false and fraudulent claim of paternity as is illustrated in the well known litigation in the Estate of Baird, ending in the third opinion of the Supreme Court in 193 Cal. 225, 223 P. 974. We must assume that the legislature had some such a contingency in mind and made the exception to meet it. The exception does not wrongfully discriminate between illegitimate children. It merely gives proper protection to the legitimate against fraudulent claims of paternity.

Judgment affirmed.

GOODELL, J., concurs.

DOOLING, Justice.

I concur only because I feel bound by the plain language of the Supreme Court in its opinion on denial of a hearing in Wolf v. Gall, 32 Cal.App. 286, 297, 163 P. 350: "To our minds the term 'illegitimate child,' as used in both sections 1387 and 1388, includes illegitimate children who have been legitimated, and in so far as they lay down rules of succession contrary to the general rules found in section 1386, Civil Code, must prevail as to any child born illegitimate." Until the Supreme Court sees fit (if it should) to change this interpretation this court is bound by it. Speaking with any attempt at accuracy a legitimated child ceases to be an "illegitimate child" and if the question was not controlled so far as this court is concerned by the language of the Supreme Court above quoted I would accept the interpretation put on the code sections involved by Mr. Justice Kerrigan in Wolf v. Gall, supra, 32 Cal.App. 286, at pages 290-291, 163 P. 346; but the Supreme Court in the language quoted expressly disapproved that portion of the opinion of the District Court of Appeal and I must follow the course so charted.

91 Cal.App.2d 182

WASHINGTON v. WASHINGTON.

Civ. 16712.

District Court of Appeal, Second District, Division 2, California.

April 8, 1949.

1. Husband and wife ⚿264

In divorce suit, evidence sustained finding that realty was wife's separate property because purchased with wife's own money.

2. Appeal and error ⚿989

When a finding of fact is attacked on ground that there is not any substantial evidence to sustain it, power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding of fact.

3. Divorce ⚿252

In divorce suit wherein court found that husband was guilty of cruelty entitling wife to divorce, an award to husband of $500 for his interest in any community property of the parties was not error. Civ. Code, § 146.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Suit for divorce by Lulu Belle Washington against Alious Washington, wherein the defendant filed a cross-complaint for divorce. From a judgment granting the plaintiff a divorce, awarding her realty as her separate property, and awarding defendant $500 for his interest in community property, the defendant appeals, and the plaintiff cross-appeals.

Affirmed.

Porter and Ragland and Everette M. Porter, all of Los Angeles, for appellant.

H. L. Richardson, of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff in a divorce action awarding a parcel of real property in Los Angeles county to her as her separate property, defendant appeals.

Facts

On August 6, 1947, plaintiff filed a complaint for divorce from defendant on grounds of extreme cruelty. Thereafter defendant filed an answer and cross-complaint for divorce on the same grounds. Plaintiff by answer denied all material allegations of the cross-complaint. When the case was called for trial the trial judge suggested that they try first the question whether plaintiff was entitled to a divorce, stating, "If she gets a default divorce that won't deprive him of his rights to the property, we can try the divorce first and then hear the facts on the property." This procedure was followed and after evidence for both sides had been received the trial court granted an interlocutory decree of divorce to plaintiff and adjudged, "[A] that certain real property described as being in the City and County of Los Angeles, State of California, known as Lot 35, Block 7 of Howes Tract, as per map recorded in Book 16, page 6 of Miscellaneous Records in the office of the Recorder of said County, is the *separate property* of the plaintiff, Lulu Belle Washington. [B] It is further ordered, adjudged, and decreed that the said plaintiff, Lulu Belle Washington, pay the defendant, Alious Washington, the sum of $500.00 on or before six (6) months after the making of this order, as and for his share of any community property that may have been accumulated by the parties hereto." (Italics added.)

Questions

First: *Was there substantial evidence to sustain the trial court's finding that the real property described in paragraph "A" of the decree was the separate property of plaintiff?*

This question must be answered in the affirmative. Plaintiff testified relative to the purchase of the real property as follows:

"Q. There is a certain piece of real property here that is in dispute. Tell the court how you came to buy that. A. Well, we were living in a rented house, I had a grandbaby to take care of, and the lady was fixing to evict us from the home, and I talked to Mr. Washington about buying the house. He said he wasn't going to buy a house for a lot of widows to live in. *I advanced the money*—

"Q. How much was that? A. $1,200.00. I lacked $200 of having enough, and I borrowed this from Mr. Scherer.

"Q. *Who has made the payments on the property since you purchased it?* A. *I have.* (Italics added.) * * *

"Q. Isn't it also a fact that your husband gave you the money to make every payment that was made? A. He has not given me one cent on the place but $125, and I had the house six months before that."

[1, 2] This testimony clearly supported the trial court's finding that the real property was the separate property of plaintiff since it was purchased with her money. This being true it is unnecessary for us to consider evidence presented by defendant which might have sustained a contrary finding in view of the rule that when a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with a determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact. In re Estate of Isenberg, 63 Cal.App.2d 214, 217, 146 P.2d 424.

Second: *Did the trial court err in awarding defendant the sum of $500 for his interest in any community property of the parties?*

[3] This question must be answered in the negative for the reason that if a divorce is granted on the ground of extreme cruelty the trial court has the power to assign any community property to the respective parties in such proportions as the court from the facts of the case and the condition of the parties may deem just. (Civil Code, Sec. 146.)

In the present case the trial judge in dividing the community property between the parties has applied the foregoing rule.

Affirmed.

MOORE, P. J., and WILSON, J., concur.

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91 Cal.App.2d 1

CHIN OTT WONG et al. v. TITLE INS. & TRUST CO. et al.

Civ. 16494.

District Court of Appeal, Second District,
Division 1, California.
March 30, 1949.

1. Appeal and error 🔑1218

After the issuance of a remittitur, the appellate court does not have power to recall it for the purpose of reconsidering or modifying its decision in the absence of inadvertence, fraud or mistake.

2. Appeal and error 🔑1218

Where opinion did not direct that judgment be entered for appellants, court was without power to recall its remittitur and to direct that judgment be so entered. Const. art. 6, § 4c.

3. Appeal and error 🔑1221

If a party is dissatisfied with the judgment rendered in an appellate court, his remedy is to petition for a rehearing or modification of the judgment within the time allowed by law and before the remittitur has issued.

◆

On respondents' motion to recall remittitur, and to vacate prior orders recalling remittitur and amending opinion.

Motion granted.

Prior opinion, see 200 P.2d 541.

Harry M. Irwin, of Los Angeles, for plaintiffs and respondents.

Anthony H. Mauer, of Los Angeles, for defendants and appellants.

PER CURIAM.

The record in this case discloses that the judgment on appeal was pronounced on December 16, 1948, and that on February 10, 1949, the Supreme Court made its order denying respondents' petition for a hearing of the cause before that court. On February 15, 1949, the remittitur was forwarded to the trial court. On February 28, 1949, and after the remittitur was lodged in the superior court, this court made its order recalling the same. Subsequently, and on March 14, 1949, this court made the following order:

"The concluding clause of the opinion heretofore filed in the above entitled appeal having failed to correctly set forth the conclusions of this Court as stated in said opinion, it is hereby ordered that said opinion be corrected by adding to the last sentence of the last paragraph of said opinion the words 'with directions to the court below to enter judgment for the defendants.'"

Thereupon respondents made a motion in this court "to recall remittitur and to vacate orders." At the hearing upon such motion respondents contended that the aforesaid order of March 14 was made after this court had lost jurisdiction either to alter or amend its judgment on appeal or any part of the opinion upon which such judgment was based.

[1] An appellate court, after the issuance of a remittitur, does not have the power to recall the same for the purpose of reconsidering or modifying its decision, in the absence of (1) inadvertence, (2) fraud, or (3) mistake. In the instant case there is no claim of fraud or mistake, but appellants insist that there was inadvertence because that term means simply an oversight, and that if through oversight the court neglected to direct the entry judgment in their favor upon issuance of of judgment in their favor upon issuance of the remittitur, we are authorized to recall the same to correct such inadvertence or oversight. That it was for the court to determine whether the decision rendered, and the remittitur issued thereon, was complete and all that it was intended to be, or whether through inadvertence it was deficient. Livesay v. Deibert, 3 Cal.App.2d 140, 147, 39 P.2d 466. That we alone knew whether a mistake had been made and how it had been made, and that we "had a right to rely upon [our] own memory". Livesay v. Deibert, supra, 3 Cal.App.2d at page 147, 39 P.2d at page 469.

[2] However, in the present case we are persuaded that, assuming the state of the record on appeal would have warranted the directions to enter judgment in favor of appellants, such directions were not given, and any attempt upon our part to give such directions now in effect amounts to an amendment of the judgment on appeal and the opinion upon which it was based after the court had lost jurisdiction. After our decision became final, Const. Calif., Art. VI, sec. 4c, such decision, in its legal aspect, stood in the same position as any other case in which an erroneous decision may chance to have been made by the court. Ellenberger v. City of Oakland, 76 Cal.App.2d 828, 830, 174 P.2d 461; Noack v. Zellerbach, 14 Cal.App.2d 249, 251, 57 P.2d 1390.

[3] We are impressed that the facts in the instant case bring it within the rule that if a party is dissatisfied with the judgment as rendered in an appellate court, his remedy is to petition for a rehearing or modification of the judgment within the time allowed by law and before the remittitur has issued. Chaney v. Los Angeles County Peace Officers' Retirement Board, 61 Cal.App.2d 701, 703, 143 P.2d 707. The judgment having become a finality, the claimed inadventence was not such as would warrant the court in modifying or amending the judgment or remittitur issued pursuant thereto.

For the foregoing reasons, the motion of respondents is granted and the order of March 14, 1949, directing the correction of the opinion and remittitur by adding thereto the words "with directions to the court below to enter judgment for the defendants" is vacated and set aside. The remittitur issued pursuant to said order of March 14, 1949, is recalled, and the clerk is directed to issue forthwith a remittitur in accordance with the original opinion.

91 Cal.App.2d 26

PEOPLE v. ARESEN.

Cr. 2564.

District Court of Appeal, First District,
Division 1, California.
March 31, 1949.
Rehearing Denied April 15, 1949.
See 204 P.2d 957.

1. Criminal law 🔑1081

Where it was obvious from notice of appeal that defendant desired to appeal from judgment, notice was sufficient.

2. Criminal law 🔑1081

Where defendant, while confined in prison, gave notice of appeal to proper mailing authorities in ample time so that letter should have reached clerk within time limited for filing notice of appeal, and defendant did all that a prisoner could do to get notice filed, court would relieve prisoner of his default when notice was received late. Rules on Appeal, rule 31.

3. Licenses 🔑42(4)

Evidence authorized conviction of violation of the Corporate Securities Act by selling stock without a permit.

4. Criminal law 🔑742(1), 747

Conflicts in testimony and motives of witnesses are for jury.

5. Criminal law 🔑641(1), 700

Record failed to disclose that defendant was denied a fair trial on the grounds that defendant's counsel allegedly misled him and incompetently handled the case and that prosecution was allegedly guilty of improper conduct.

6. Criminal law 🔑747

Contradictions in evidence for prosecution were for jury.

7. Criminal law 🔑742(1)

Whether testimony of witness for prosecution indicated that witness had been coached was for jury.

8. Licenses 🔑42(5)

In prosecution for selling securities without a permit, an instruction that acting on advise of counsel would not be a defense if it was a fact that the defendant's conduct constituted a crime was authorized. Gen.Laws, Act 3814, §§ 1 et seq., 18, 33.

9. Criminal law 🔑686(2)

Where defendant had testified at great length on direct examination by his counsel and district attorney declined to cross-examine him, refusal of court to permit defendant to add to his testimony, in view of act of defendant's counsel in resting his case upon judge's inquiry as to whether he had anything else to present, was not error.

10. Indictment and Information 🔑108

Where specific acts constituting offense with which defendant was charged were set forth in indictment with sufficient clearness to show crime with which defendant was charged, the designation of wrong statutory section as the section under which defendant was charged was immaterial.

11. Licenses 🔑42(2)

In prosecution for selling securities without a permit, act of defendant giving his personal note to persons to whom he was selling stock was not a defense. Gen. Laws, Act 3814, §§ 18, 33.

12. Licenses 🔑42(4)

Evidence was insufficient to authorize conviction of defendant, an individual, of violating statute prohibiting a company from selling a security without a permit. Gen.Laws, Act 3814, § 3.

13. Criminal law 🔑29

One may not be convicted twice, under different counts of same indictment, for the same act and charge.

14. Licenses 🔑42(4)

Evidence was insufficient to authorize conviction of defendant of violating Corporate Securities Act by acting as an agent and broker for sale, without a permit, of an instrument in writing evidencing a right to participate in earnings and profits from business carried on by a corporation. Gen. Laws, Act 3814, § 6.

Appeal from Superior Court, City and County of San Francisco; Daniel R. Shoemaker, Judge.

Nils Aresen was convicted on three counts of violating the Corporate Securities Act, and he appeals.

Affirmed as to first count and reversed as to second and third counts.

Nils Aresen, in pro. per.

Fred N. Howser, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

BRAY, Justice.

Defendant appeals in propria persona from a judgment of the superior court, after jury trial, finding him guilty on three counts of violating certain sections of the Corporate Securities Act, and also finding that he had suffered a prior felony conviction and had served a term of imprisonment therefor. His grounds of appeal, set forth generally as conspiracy, perjury and collusion, actually constitute a claim of insufficiency of the evidence. In examining the record of the case we have found that the convictions under the second and third counts cannot be sustained.

Motion to Dismiss Appeal.

[1] Plaintiff moved to dismiss the appeal on two grounds. One of the grounds, namely, that the notice of appeal does not state that it is taken from the judgment or any appealable order, is easily disposed of. While the notice is drawn in laymen's language and is by no means a model, it is obvious that defendant desires to appeal from the judgment. It reads: "I * * * do this day move the entitled court that an appeal be granted in my case, on the grounds of consperícy, collusion and that the evidence was and is insufficient to warrant the conviction." The notice is sufficient to constitute an appeal from the judgment.

The second ground presents a more serious situation. It is that the appeal was filed too late. The judgment was rendered September 8, 1948. The notice of appeal, while dated September 15, was not filed until September 20. Rule 31, Rules on Appeal, requires that the notice of appeal be filed with the clerk of the superior court within ten days of the rendition of judgment. The notice is two days too late, unless the defendant can bring himself within the rule of People v. Slobodion, 30 Cal.2d 362, 181 P.2d 868. In an apparent effort to do so, defendant filed an "Affidavit In Opposition To Motion To Dismiss Appeal," which, in effect, constitutes a request to relieve him from his default. In this affidavit he swears that on the seventh day after the rendition of the judgment, to wit, on September 15, in accordance with the rules of San Quentin Prison where he is confined, he delivered the notice of appeal to the "proper mailing authorities" of the prison, in an envelope addressed to the clerk of the San Francisco superior court; that there is a regular daily mail between San Quentin and San Francisco and that "was in ample time for said mail to have been delivered to the Clerk of Said Superior Court in the City of San Francisco, State of California." No denial of the allegations of this affidavit has been made. The attorney general stated in open court that he had verified the fact that the notice was delivered to the proper mailing authorities of the prison on September 15, but that he was informed by the trial judge that the envelope was addressed to him instead of to the clerk, and that immediately upon its receipt the judge filed it with the clerk.

[2] Do these facts entitle defendant to be relieved from default? It appears that defendant did all that a prisoner could do to get the notice filed, being, as said in the Slobodion case, 30 Cal.2d at page 366, 181 P.2d at page 871, "Without direct access himself with the 'clerk of the superior court.'" He delivered it to the proper authorities for mailing on the seventh day. Three days should have been more than sufficient for the notice to be received by the clerk, if directed to him, or if directed to the judge, for it to have been received by him and turned over to the clerk. In view of the concession by the attorney general hereinafter mentioned that the evidence fails to show that defendant is guilty under the third count, an interpretation of the facts most strongly in favor of defendant should be adopted. In the Solbodion case the prisoner dropped the notice of appeal in the prison mail box on the fourth day after the rendition of judgment. Three days later the prison mailman returned it to him without explanation. The next day he delivered it to the prison authorities. It was not filed with the clerk until the fifteenth day, five days too late. The court

relieved the prisoner from his default, saying, 30 Cal.2d at page 366, 181 P.2d at page 872: "It would be absurd to hold in a criminal case that the state may extend the right of appeal contingent upon timely pursuit thereof and then deny such fundamental right because the state's employees were remiss in complying with the state's law. Such a paradoxical result would have no legal justification, and so it must be said here that when appellant timely deposited his notice of appeal with the state's employees as required by the state prison rules, such action constituted a constructive filing of the specified notice." The concurring opinion of Mr. Justice Carter bases the relief on a different ground, saying, 30 Cal.2d at page 372, 181 P.2d at page 874 "* * * a much sounder theory on which to base the decision would be to hold that when the failure to file a notice of appeal is the result of fraud, mistake, inadvertence or neglect on the part of the adverse party and there is no negligence or lack of diligence on the part of the appellant, the time to file the notice of appeal is extended and the appellant loses no rights thereby. This is the general rule and is supported by a wealth of authority." In a discussion of "Late Appeals in California" in Volume 36, Cal.Law Review, p. 303, a third and very sound basis for relief (although apparently not recognized in California) is suggested, namely (p. 311): "In criminal cases * * * the interest of the state that justice be done should reinforce the appellant's claim that his appeal be considered on the merits. There late appeals might well be permitted wherever appellant has not been guilty of culpable negligence." Under any or all of these theories, defendant, under the circumstances of this case, is entitled to be relieved from his default.

Facts.

The general background of this case as shown by the evidence is as follows: Defendant was 65 years of age, a carpenter by trade, who had been crippled and thereafter worked on inventions. In October of 1947 he returned to San Francisco from a visit to Norway. Shortly thereafter he consulted Attorney Keller concerning the organization of a corporation to market his patentable devices. He told the attorney that he wanted to be sure to keep within the law as once before he had been convicted in Minnesota of selling unregistered securities (the prior conviction which the judgment found he had suffered). Keller agreed to advise him and there were a great many conferences between the attorney and client. Defendant wanted to be advised how he could raise money to get the corporation going and his inventions made and marketed. Keller suggested and prepared for him a pre-incorporation subscription agreement, but advised defendant that while he could accept signatures to this agreement, he could not and must not accept any cash. Defendant showed Dominic Palmisano and Victor Henricksen a clothespin he had invented and they signed the subscription agreement. Defendant complained to Keller that this arrangement gave him no cash. Keller advised him that while he could not sell stock in the corporation until a permit from the Corporation Commissioner had been obtained, he could borrow money personally on his own promissory note, provided he did not promise stock in the corporation or an interest in his inventions. Keller gave him several blank promissory notes. Palmisano gave defendant $150 and received defendant's note in exchange. Henricksen gave him $50 at one time and $850 at another, receiving a note for $1000 with the understanding that Henricksen was to put up the other $100 "whenever I got it." Both Palmisano and Henricksen testified that these moneys were paid for stock to be issued when the corporation was organized and were not personal loans. Defendant contends that these payments as well as those made to him by other witnesses were personal loans and that nothing was said about their being in payment of stock to be issued.

Early in December, defendant interested Philip Beargeon in his clothespin and after visiting the engineer for the proposed corporation (as did Palmisano and Henricksen before investing) Beargeon gave defendant $500 early in December, receiving his promissory note in return. On January 15, 1948, Beargeon paid defendant $1000 more, both payments being made for the purchase of stock when issued. On receipt of the latter sum defendant wrote out, signed and delivered to Beargeon the following document dated the same day: "For the consideration of $1000.00 (One Thousand Dollars) as Mr. P. A. Beargeon agrees to pay in, in order to have more money on hand for expenses, I, Nils Aresen, agree to transfer to Mr. P. A. Beargeon 300 shares of my personal stock as soon as we have the right to do so. And it is understood in case Mr. P. A. Beargeon should care to sell this 300 shares of stock, that I, Nils Aresen, have the first right to buy the 300 shares, and I will pay the market price, or the price as anyone else would pay for the stock."

On December 19, 1947, the articles of incorporation of the Aresen Wire and Metal Company, Inc., were signed by defendant, Palmisano, Henricksen, Farrel (the engineer—he dropped out before the first stockholders' meeting), and one Holme. At the stockholders' meeting January 8, defendant was elected president, Henricksen treasurer, and Palmisano secretary. All three counts of the indictment are directed to defendant's dealings on January 17 with Wendla Ness and John T. Ness, husband and wife. These dealings will be discussed later. About February 17 or 19 defendant went to Salt Lake City, leaving with his wife a power of attorney to represent him. Mrs. Aresen was told by Keller that there was a possibility of her husband being arrested (apparently for his transactions with Henricksen, Palmisano and Beargeon). A meeting was had between these three and Mrs. Aresen in Keller's office. The three men claimed that Aresen had promised them some of his promotional stock, and on Keller's advice, Mrs. Aresen gave five per cent thereof to each. Mrs. Aresen put in escrow $1800 of her own money, plus $400 her husband had given her before he left "as partial security that nobody is going to lose anything." Defendant registered in Salt Lake City as coming from Portland, Oregon, and used an assumed name, because, he told Inspector Wall later, "he expected trouble and he didn't want to be arrested."

Count I. Charge.

Defendant is charged in count I with violation of section 33 of the Corporate Securities Act (Stats.1917, p. 673, as amended; Act 3814, Deering's General Laws), in that on or about the 17th day of January, 1948, he "did willfully, unlawfully, and feloniously accept and receive the sum of One Thousand Dollars ($1,000.00) in money, lawful money of the United States in consideration of the sale by defendant to Wendla Ness and John T. Ness, of one hundred (100) shares of stock at Ten Dollars ($10.00) per share, in the Aresen Wire and Metal Company, Inc., when no permit had been issued by the Commissioner of Corporations of the State of California authorizing and permitting the sale of said security." Section 33, after providing that subscriptions for shares of a corporation may be made prior to incorporation and to obtaining the Corporation Commissioner's permit to issue shares on certain conditions not important here, states: "* * * nothing herein contained shall be construed as permitting the collection of any portion of the consideration to be paid on account of such subscriptions, unless and until a permit shall have been issued by the commissioner authorizing such collection; * * * nothing herein contained shall be construed as permitting the taking of subscriptions for any security of any company other than a domestic or foreign corporation or to make collection of any portion of the consideration to be paid on account of subscriptions unless and until a permit shall have been issued by the commissioner authorizing the taking of such subscriptions or the collection thereof." Section 18 makes any sale contrary to the provisions of the act, or any violation of any provision of the act, a public offense.

Count I. Facts.

In addition to the background above mentioned, there is the testimony of Wendla Ness and John T. Ness. Wendla testified that at her sister's place (her sister is the wife of Henricksen) she met defendant who showed her the clothespin, explained to her about the corporation and that he had a lot of inventions, all of which would go into the corporation; that on the 17th of January, the third time she had seen defendant, she brought with her her husband who had drawn $1000 out of the bank at her suggestion. Defendant explained to them about the corporation and asked if they would invest in it. At first they said they would invest $500 and defendant suggested that they let him have $1000, "and then you can get your stock quicker." For this sum defendant said they would get 100 shares, of the value of $10 per share, in about a week or ten days. They paid him $1000 and he gave them a promissory note, which he signed in their presence. This note was introduced in evidence and is in the usual form of a promissory note, there being no mention of stock or the incorporation in it. Defendant at no time said anything about a loan.

John T. Ness testified that he knew about the clothespin from his nephew, Henricksen Jr., that he drew the $1000 out of the bank; that on the night of January 17, defendant, a Miss Hedman, Victor Henricksen, Henricksen's wife and his mother, came to the Ness home. Defendant had the clothespin with him, and stated that "they were going to work and organize a corporation and they were going to apply for stock when they had enough money." The corporation was to be named Aresen's Wire and Metal Company, or some similar name. They talked about other inventions of defendant which were to be thrown into the corporation. Ness invested $1000 for which he was to get 100 shares of the corporation. After defendant received the money he said, "Now, I have enough. We close the books. We have enough money to make a start, and the next thing is to apply for a permit from the Corporate Commission and you will have the stock within a week or ten days." Defendant signed the note. There was nothing said about a loan. Defendant stated that he "issued that note until we got the stock and then he wanted that note back again."

[3, 4] The testimony of Mr. and Mrs. Ness was corroborated by Miss Aina Hedman, Victor Henricksen, Mrs. Gladys Henricksen and Mrs. Victor Henricksen. Defendant testified, admitting the receipt of the $1000, as well as the sums before mentioned paid by other persons, but claiming that at no time did he represent that he was selling or that the persons were buying, any stock whatever or that they were subscribing for stock. He claimed, further, that, pursuant to the advice of his attorney, Keller, he was very careful to explain that the moneys were being given as personal loans for which he was giving his personal note. Defendant further points out that these witnesses were all related to the Nesses and to one another, and claims that they conspired together to put him in prison, so that Henricksen, Palmisano and Beargeon might secure for themselves the control of the corporation and defraud him of his inventions, which the corporation now owns. The conflict in the testimony and the motives of the witnesses were all matters within the province of the jury. There is ample evidence that the $1000 admittedly paid to defendant was for the purchase of stock to be issued, and was not paid as a loan.

[5] Defendant contends that his counsel at the trial lied to and misled him, incompetently handled his case, and that the prosecution was guilty of improper conduct and "leading questions." Defendant fails to point out any specific instances of any of these matters. We have carefully examined the record and find nothing to support the charges against his counsel. On the contrary, the evidence demonstrates that his counsel diligently and conscientiously represented him. In a few instances, the prosecution asked leading questions of witnesses, but defense counsel promptly objected and the objections were sustained. We can find no evidence of improper conduct by the prosecution.

[6, 7] There are some contradictions in the testimony. For example, Mrs. Ness testified that defendant came alone to her home on the night of January 17. Both her husband and Gladys Henricksen testified that others came with him. The effect of those contradictions was for the jury to determine. There is no inherent improbability in any of the testimony. Defendant makes other charges, such as that "It is evident from her testimony and her nervous condition that she has been coached, but not well enough," referring to the testimony of Mrs. Ness. Again, this was a matter for the jury to consider.

[8] We have examined the rulings of the court on introduction and exclusion of

evidence and find no error. Nor can we find any error in the instructions given to the jury. One of the instructions stated that acting on the advice of counsel would not be a defense if it was a fact that defendant's conduct constituted a crime. This principle is supported by People v. McCalla, 63 Cal.App. 783, 220 P. 436, where the conviction of the defendant for selling a security without a permit was upheld. The defendant's main defense was that he acted under advice of counsel and did not know that the instrument he was selling constituted a "security." The court held that intent is not made an affirmative element of the crime set forth in the Corporate Securities Act. The statute forbids the act, regardless of intent. While in our case defendant claims that he was acting under advice of counsel, still both he and his counsel agree that he was informed that he must not accept money on account of the sale or subscription for stock; that the giving of a note must be as evidence of a personal loan completely independent of any stock transaction. The defendant contends that the notes were given independent of such a transaction. The prosecuting witnesses testified to the contrary. The jury believed those witnesses.

[9] Defendant complains that at the end of the taking of testimony the court refused to let him testify further. Under examination by his counsel, defendant had testified at great length. Upon completion of the direct examination the district attorney asked defendant's counsel if he had finished with the direct examination. On being answered in the affirmative, the district attorney announced that he would not cross-examine. Thereupon the defendant stated: "There is some things I would like to say." The court then said: "Well, you had your chance on direct examination, sir." Defendant said: "That I must say before I get through. The Court: Well, you have had your chance. Is that all, Mr. Douglas? Mr. Douglas [defendant's counsel]: Yes. That is our case." In view of the fact that defendant's counsel rested his case there is no error in the action of the court.

The Indictment.

[10, 11] While the defendant does not raise the point we deem it advisable to pass upon the sufficiency of the indictment. The count, in effect, charges defendant with violating section 33 by accepting and receiving $1000 in consideration of the sale without a permit of 100 shares of stock in the corporation. Section 33 does not refer to a sale. It prohibits the collecting of any money on account of stock or security subscription. The offense set forth in the charging part of the indictment is really a violation of section 17, which prohibits the sale of stock without a permit. However, this error in the number of the section is immaterial. As the specific acts constituting the offense with which the defendant is charged are set forth in the indictment with sufficient clearness to show the crime with which defendant is charged, the designation of the wrong section is immaterial. People v. Eppinger, 105 Cal. 36, 38 P. 538; People v. Adair, 3 Cal.App.2d 323, 39 P.2d 274. That the acts of defendant in delivering his personal note to persons to whom he was selling stock is not a defense to a charge of violating the Corporate Securities Act by knowingly selling stock without a permit, is well shown in People v. Sidwell, 27 Cal.2d 121, 162 P.2d 913, 914. There the defendant gave a note which stated "that this transaction does not constitute a sale or a purchase" of the interest in an oil well which the defendant was selling without a permit. The court upheld the conviction of defendant for violating the act.

Count II.

In this count, defendant is charged with violating section 3 of the Corporate Securities Act in that he did unlawfully and feloniously sell to Wendla and John T. Ness "an instrument in writing evidencing and representing to be one hundred (100) shares of the Aresen Wire and Metal Company, Inc., stock, for * * * the sum of One Thousand Dollars ($1,000.00) * * * the said defendant being at said time and place an officer and director in the aforesaid purported corporation formed under the laws of the State of California for profit, and that the aforesaid stock was then and there offered to the public for sale and sold to the said Wendla Ness and John T. Ness by the said defendant Nils Aresen, without the said defendant or anyone else having first applied to, or obtained a permit from, the Commissioner of Corporations of the State of California so to do."

Section 3, so far as it applies here, provides that no company shall sell or offer for sale any security without the permit of the Corporation Commissioner first having been obtained.

[12, 13] There is no evidence to support the conviction under this count. While the charging portion of this count is the important part, it is evident that defendant did not violate section 3, which prohibits a "company" from selling a "security" without a permit. Of course, the company did not make any sale of anything, nor authorize defendant in any way to act for it, even though defendant was president of the company. Subdivisions 3 and 6 of section 2 of the act include in the definition of "company" an individual who without a permit sells, offers for sale or takes subscriptions for any security of his own issue. See also People v. Woodson, 78 Cal.App.2d 132, 177 P.2d 586. Under the act, a promissory note may be a "security." However, there is no evidence that defendant was selling or offering for sale, his notes. Everyone with whom he dealt, understood they were buying stock in the corporation and not buying his note. Again, the charging portion of this count does not charge him with selling his note. It charged him with selling "an instrument in writing evidencing and representing to be one hundred (100) shares of the" company stock, and there is no evidence that at any time he sold, or offered for sale, such an instrument. The only written instruments in the case are the defendant's promissory notes, which did not purport to represent 100 shares of stock. Those who received them, the testimony shows, regarded them as "receipts" for money paid for stock which defendant represented would be delivered to them when issued. Insofar as this count charges defendant with selling the stock itself to Mr. and Mrs. Ness without a permit, it is merely a repetition of the charge in the first count. A defendant may not be convicted twice for the same act and charge.

Count III.

[14] Inasmuch as the attorney general concedes that there is no evidence to support the conviction under this count, little need be said about it. The charge is violating section 6 of the Corporate Securities Act by acting as "an agent and broker for the sale of an instrument in writing evidencing and representing a right to participate in the earnings and profits derived from the business carried on by the Aresen Wire and Metal Company, Inc., for profit without first having applied for and secured from the Commissioner of Corporations of the State of California, a certificate authorizing the said defendant to do so." There is no evidence whatever that the defendant was attempting to act as an agent or broker, or that the instruments in writing given by him were ones "evidencing and representing a right to participate in the earnings and profits derived from the business carried on by the Aresen" company.

As to the first count, the judgment is affirmed. As to the second and third counts respectively, the judgment is reversed.

PETERS, P. J., and WARD, J., concur.

90 Cal.App.2d 869

CITY OF LOS ANGELES et al. v. TOWER et al.

Civ. 16466.

District Court of Appeal, Second District, Division 3, California.

March 30, 1949.

1. Eminent domain 🔑**124**

The statute providing that right to compensation and damages accrues at date of trial of eminent domain action if issue is not tried within one year after date of commencement thereof is a procedural statute and applies to cases where possession of property is taken soon after commencement of action under ex parte order of court obtained upon deposit of security under eminent domain provision of Constitution requiring immediate payment as soon as the same can be ascertained according to law. Code Civ.Proc. §§ 1237 et seq., 1249, 1254; Const. art. 1, § 14.

2. Eminent domain ⚷122

Constitutionally guaranteed right to receive just compensation for property taken or damaged for public purpose implies no right to have such compensation ascertained by any particular procedure or as of any certain date. Code Civ.Proc. § 1249; Const. art. 1, § 14.

3. Eminent domain ⚷124

Legislature may designate for purpose of assessing compensation for property taken or damaged for public purposes any stage of proceedings prior to judgment by which owner is wholly divested of title to land or interest taken, and determining compensation as of time of issuance of summons accords owner full benefit of his constitutional right. Code Civ.Proc. § 1249; Const. art. 1, § 14.

4. Eminent domain ⚷247(1)

An owner who is deprived of use and occupancy of his land before he is actually compensated in amount of its value as result of taking for a public purpose is entitled to be recompensed for his loss; and to that end, an allowance of interest on amount of award to time of judgment is proper. Code Civ.Proc. §§ 1237 et seq., 1249, 1254; Const. art. 1, § 14.

5. Eminent domain ⚷124

Where city entered into possession of private land under ex parte court order obtained on deposit of security, but eminent domain action was not brought to trial for five years thereafter, assessment of compensation according to value of land as of date of trial did not deprive owner of constitutionally guaranteed right to compensation as of date of taking of his property notwithstanding value at date of trial was substantially lower than value at date of entry. Code Civ.Proc. §§ 1237 et seq., 1249, 1254; Const. art. 1, § 14.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action in eminent domain by the City of Los Angeles, a municipal corporation and others, against M. J. Tower, Hughes Tool Company, a corporation, and others. From a judgment awarding compensation, the Hughes Tool Company appeals.

Judgment affirmed.

Wright & Millikan and Charles A. Loring, all of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Gilmore Tillman, Chief Asst. City Atty. and Russell B. Jarvis, Asst. City Atty., all of Los Angeles, for respondents.

SHINN, Presiding Justice.

Hughes Tool Company, a corporation, appeals from a judgment awarding it compensation for a right of way for a high power transmission line condemned by the City of Los Angeles, and the Department of Water & Power of the city, over a corner of a triangular parcel of land containing approximately 138 acres situated on a mountain peak some two miles north of the business section of Hollywood. The parcel taken contained about 1-¾ acres. The complaint was filed July 7, 1942, and in December following, plaintiffs took possession under an order authorizing them to do so, and constructed the transmission line. Summons and complaint were served on appellant May 5, 1945, and the trial was had October 8, 1947, resulting in a judgment in plaintiffs' favor in the amount of $200 as the value of the land taken, with interest thereon from the date plaintiffs went into possession.

Upon the trial, over the objection of appellant, the court received evidence as to the value of the property at the time of trial. Appellant urges here, as it did in the trial, that the value of the land should have been fixed as of December, 1942, at the time plaintiffs went into physical possession of the property. Such is the question presented here. There was conflicting evidence as to whether the taking resulted in severance damage; the court found none was sustained and the finding is not questioned by appellant.

In receiving evidence of value as of the date of trial and rejecting evidence of value as of the date when possession was taken the court was following the procedure outlined in section 1249, Code of Civil Procedure. That section provides: "For the purpose of assessing compensation and damages the right thereof shall be deemed to have accrued at the date of the issuance of summons and its actual value at that date shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken but injuriously affected * * * provided, that in any case in which the issue is not tried within one year after the date of the commencement of the action, unless the delay is caused by the defendant, the compensation and damages shall be deemed to have accrued at the date of the trial. * * *" The proviso was added in 1911. It is not contended that the delay of over five years in bringing the matter to trial was caused by the defendant. If section 1249 was controlling it is clear that appellant's compensation was properly assessed according to the property value as of October, 1947.

[1] Appellant takes the position that section 1249 was inapplicable for the reason that possession of appellant's property was taken soon after commencement of the action under an ex parte order of court obtained upon deposit of security pursuant to the provisions of Article I, section 14 of the California Constitution. It is said that the right of eminent domain may be exercised either under Part 3, Title 7 of the Code of Civil Procedure, or under the cited constitutional provisions; that the former procedure is the normal course, whereas the latter is an extraordinary procedure to which the provisions of section 1249 cannot be applied.

This contention cannot be sustained. We find no inconsistency between the provisions of Article I, section 14, of the Constitution and section 1249 of the Code of Civil Procedure. The mere fact that one procedure is statutory and the other incorporated in the Constitution creates no conflict. The substance of the present constitutional provisions for an immediate entry into possession upon the commencement of the action was in 1897 enacted as section 1254 of the Code of Civil Procedure. This section, however, was declared to be unconstitutional in Steinhart v. Superior Court, 1902, 137 Cal. 575, 70 P. 629, 59 L.R.A. 404, 92 Am.St.Rep. 183. Section 14, as amended in 1918, provides that "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid in to court for, the owner, * * * which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, *as shall be prescribed by law;* provided, that in an action in eminent domain brought by the state, or a county, or a municipal corporation, or a drainage, irrigation, levee, or reclamation district, the aforesaid state or political subdivision thereof or district may take immediate possession and use of any right of way required for a public use whether the fee thereof or an easement therefor be sought upon first commencing eminent domain proceedings according to law in a court of competent jurisdiction and thereupon giving such security in the way of money deposited as the court in which such proceedings are pending may direct, and in such amounts as the court may determine to be reasonably adequate to secure to the owner of the property sought to be taken immediate payment of just compensation for such taking and any damage incident thereto, including damages sustained by reason of an adjudication that there is no necessity for taking the property, as soon as the same can be *ascertained according to law.*" Except for the guarantee of a jury trial, section 14 does not purport to specify the procedure by which the amount of the owner's compensation is to be determined. The quoted portions of the section which we have italicized clearly demonstrate that in other respects the procedure is to be governed by the applicable legislation on the subject. Section 1249 is such a procedural statute and is fully applicable to all eminent domain proceedings irrespective of whether immediate possession is taken.

Appellant relies upon a statement appearing in Metropolitan Water District v. Adams, 16 Cal.2d 676, 678, 107 P.2d 618, to the effect that section 1249 has no application to a controversy in which possession of land sought to be condemned is taken prior to judgment in pursuance of Article I, section 14. The statement was made solely in reference to the question whether under section 1249 the condemnor was liable for interest from the time when possession was taken to the time of judgment. Since the only provision in section 1249 for interest on an award related to possession taken after judgment and pending an appeal pursuant to section 1254 of the Code of Civil Procedure, the court held that an award of interest could not be supported by section 1249. The case is not authority for the proposition urged by appellant.

We are also met with the contention that the ascertainment of the amount of appellant's compensation as of the date of trial, pursuant to section 1249, deprives appellant of a claimed constitutionally guaranteed right to compensation as of the date of "taking" of his property. Appellant's insistence that the value should have been fixed as of 1942, rather than 1947, is predicated upon its claim, to be referred to more fully later, that the values were greater in 1942. The legal basis of the contention that the 1942 values should have been considered, necessarily is that appellant had a constitutional right to have compensation fixed as of the date when plaintiffs entered into actual possession, and that the legislature therefore was without the power to provide that values should be fixed as of any other time. The contention is not sound unless entry into possession by the condemnor was a "taking" of appellant's property, which would require that compensation be assessed according to the value at that time.

[2] Prior to the addition to section 1249 in 1911 of the proviso for fixing values as of the date of trial in actions not tried within a year, the section provided that in all cases values and severance damage should be fixed according to the value of the property on the date of issuance of summons. Consequently, where trials were delayed, and even unduly delayed, the landowner, although deprived of his compensation until the conclusion of the trial, was not allowed any benefit attributable to an increase in value of the land. It was often insisted that the owner was entitled under the constitution to have his compensation fixed on the basis of the values at the time of the actual taking, namely, at the time of trial, and it was denied that the legislature had the power to provide for assessing compensation as of the date of a constructive taking, namely, the issuance of summons. This contention was rejected in the early case of California Southern R. Co. v. Kimball, 61 Cal. 90, and in many later cases. In answering the contention in Los Angeles v. Gager, 10 Cal.App. 378, 381, 102 P. 17, 19, the court said, "the Supreme Court of this state has since 1882, repeatedly and uniformly held to the contrary". In City of Oakland v. Wheeler, 34 Cal.App. 442, 453, 168 P. 23, 28, it was said, "The trial court properly instructed the jury that the value of the property should be fixed as of the date of the issuance of the summons, as is provided in the Code of Civil Procedure, section 1249. The question of the constitutionality of this section of the Code raised by defendants is no longer an open one in this state. Los Angeles v. Gager, 10 Cal. App. 378, 102 P. 17; California Southern Ry. Co. v. Kimball, 61 Cal. 90; San Jose etc. Co. v. Mayne, 83 Cal. 566, 23 P. 522; Tehama Co. v. Bryan, 68 Cal. 57, 8 P. 673; Sacramento [Terminal] Co. v. McDougall, 19 Cal.App. 562, 126 P. 503. This section is constitutional." Similar results were reached in Marin Municipal Water Dist. v. Marin Water etc. Co., 178 Cal. 308, 173 P. 469, and in City of Pasadena v. Porter, 201 Cal. 381, 257 P. 526, 53 A.L.R. 679. In City of Los Angeles v. Oliver, 102 Cal.App. 299, at pages 312, 315, 283 P. 298, 303, the District Court of Appeal made it clear that the matter of fixing the time as of which values are to be determined is entirely one of procedure, without constitutional control or direction; and with respect to the validity of section 1249, said, "It has frequently been held that the fixing of a particular date as a time basis for the estimation of property values in condemna-

tion suits is not a legislative interference with the right to just compensation guaranteed by the Constitution—which is but another way of stating that there is no vested right to have compensation assessed as of any particular date. [Citing cases.] * * * It seems clear to us that the foregoing authorities amply sustain the proposition that the constitutionally guaranteed right to receive just compensation for property taken or damaged for public purposes neither includes nor implies the right to have such compensation ascertained by any particular procedure or as of any certain date."

[3] It may not be questioned that appellant had a right to be paid the value of its land at the time it was taken. It is, however, well established that the legislature may designate, for the purpose of assessing compensation, any stage of the proceedings prior to the judgment by which the owner is wholly divested of title to the land or interest taken. The issuance of summons has generally been deemed to be a constructive taking, and, as we have seen, determining compensation as of this time accords the owner the full benefit of his constitutional right. So, too, where the statute in like manner specified the order appointing referees to be a constructive taking, City of Pasadena v. Porter, 201 Cal. 381, 257 P. 526, 53 A.L.R. 679, or the setting of the case for trial, City of Los Angeles v. Oliver, supra, 102 Cal.App. 299, 283 P. 298, appeal dismissed by U. S. Supreme Court for want of substantial federal question, 283 U.S. 787, 51 S.Ct. 348, 75 L.Ed. 1415, or the hearing before the Railroad Commission, Marin Municipal Water Dist. v. Marin Water etc. Co., 178 Cal. 308, 173 P. 469; Sacramento etc. Dist. v. Pacific Gas & Electric Co., 72 Cal.App.2d 638, 165 P.2d 741.

As the question has heretofore arisen, the values at the time of the actual taking, namely, at the time of trial, were higher than they were at the time of the constructive taking. Under the decisions we have cited the owner was not allowed the benefit of such increased values and the 1911 amendment of section 1249 was doubtless enacted to correct that supposed injustice. As previously noted, it is urged in the present case that the values were higher at the time plaintiffs went into possession than they were at the time of trial, but even assuming this to be true, the fact is without legal significance. The basic protection given by the Constitution is that the owner may not be divested of his title until full compensation has been paid or deposited in court. As indicated by the authorities previously cited, legislation on the subject has always recognized that certain steps in the proceedings amount to such an interference with the right of ownership as to justify their being regarded as a constructive taking, for the purpose of assessing compensation, even though condemnation has not taken place. Although it was held in Steinhart v. Superior Court, supra, 137 Cal. 575, 70 P. 629, 59 L.R.A. 404, 92 Am.St.Rep. 183, decided in 1902, that entering into possession under a preliminary order, as authorized by statute, was a taking of the property, and that payment into court was not payment for the owner, as required by the Constitution as it then stood, a different conclusion must be reached when effect is given to the 1918 amendment to section 14 of Article I. That amendment authorizes an entry into possession of a right of way whether the fee or an easement thereto be "sought" upon the deposit in court of funds to secure payment of just compensation to the owner of the property "sought to be taken" etc. Manifestly, such deposit must be deemed to meet the requirement that the land may not be taken until compensation be made to or money paid into court for the owner. The further requirement that the amount must be adequate to compensate for the property *sought to be taken* recognizes the preliminary order for possession as merely a stage in the proceedings leading up to the final step, namely, the passing of title by condemnation. We think it is also significant that the 1918 amendment does not require values to be fixed as of the time possession is taken, in view of the fact that for more than 30 years prior to its adoption the courts had upheld the power of the legislature to provide that compensation should be assessed on the basis of values prevailing at the time one or another of the preliminary steps in the proceedings should be taken.

[4, 5] An owner who is deprived of the use and occupancy of his land before he is actually compensated in the amount of its value is entitled to be recompensed for his loss. To that end, an allowance of interest on the amount of the award to the time of judgment is proper. Metropolitan Water Dist. v. Adams, supra, 16 Cal.2d 676, 107 P.2d 618; Los Angeles County Flood Control Dist. v. Hansen, 48 Cal.App.2d 314, 119 P.2d 734. But it cannot be successfully contended that the mere entry into possession by the condemnor amounts to such a complete and irrevocable taking as to require application of the rule that the owner is entitled to the value of his land at the time it is taken. The Constitution guarantees that he be compensated only for whatever is taken from him—the value of use for the time he is deprived of it, and the value of the fee or easement, and damages as of the time when title either actually or constructively passes. No doubt it would have been competent for the legislature to provide that compensation should be assessed according to values at the time the condemnor enters into possession before trial, which is frequently at the time or shortly after summons is issued. However, had this procedure been prescribed and made applicable in all cases, landowners would be unable to derive any benefit through an increase in values to the time of trial, a right which was given them in certain cases by the 1911 amendment of section 1249. The provisions of this amendment are not brought into conflict with the Constitution by the condemnor's going into possession, and they were properly held controlling in the assessment of appellant's compensation. A contrary holding would be in conflict with the decision in Metropolitan Water District v. Adams, supra, in which contentions essentially the same as those of the appellant here were held untenable. The trial of that case occurred more than a year after the issuance of summons; values were fixed at the time of trial. While no objection was made to this procedure, it was contended that interest was properly awarded on the amount of the judgment from the date possession was taken under order of court for the reason that the condemnor's right to the property and the owner's right to payment became vested when the condemnor took possession. This contention was rejected by the court for the reason that the respective rights of the parties were tentative and conditional, inasmuch as the proceeding might have been dismissed or abandoned by the plaintiff, or the issue of public necessity to take the land might have been decided against the plaintiff. The allowance of interest was sustained on other grounds.

Appellant cites People v. Klopstock, 24 Cal.2d 897, 151 P.2d 641, and People v. Joerger, 12 Cal.App.2d 665, 55 P.2d 1269, in support of his contention that values must be fixed as of the time when the condemnor takes actual possession. Neither case so holds. It was held in each case that the rights of interested parties to compensation accrued as of the time the property was deemed to be taken for public use. In the Klopstock case this was stated to be the date of the issuance of summons, and in the Joerger case it was said to be the date the condemnor entered into possession under order of court, which appears to have been made the day following the issuance of summons. The question was not raised, and the court did not decide, in either case, whether values should have been fixed as of the date when the condemnor entered into actual possession. We can conceive of no reason why the legislature may not, within the Constitution, provide that the amount of compensation shall be assessed as of a time other than when the right thereto accrues.

Even if we held views contrary to those we have expressed, it is extremely doubtful that we could properly reverse the judgment. Appellant asserted at the trial and now asserts that the value of his land was greater in 1942 than it was in 1947, and that he would have been able to establish large severance damages on the basis of the former value. He sought to question his expert witness as to the 1942 values and the court sustained the plaintiffs' objection. Our attention has not been called to any offer, and we have not found that appellant made an offer to prove the value of his land in 1942, nor the amount of its severance damage based upon such values. It might even be inferred that its expert witness on values was not prepared to testify that they were higher at the time possession was taken in 1942 than they were at the time of trial. However, we prefer not to consider the point that appellant has failed to show that he suffered prejudice through the rulings complained of, for the reason that appellant's case presents a unique factual situation which calls for a decision of the constitutional question as applied thereto.

The judgment is affirmed.

WOOD and VALLÉE, JJ., concur.

PEOPLE v. UNIVERSAL FILM EXCHANGES, Inc.

Civ. 7563.

Sac. 5959.

District Court of Appeal, Third District, California.

March 28, 1949.

Rehearing Denied April 27, 1949.

Hearing Granted May 26, 1949.*

1. Licenses ⇨30, 32(2)

A return by taxpayer consisting of two parts entitled "Computation Of Resale Sales Tax" and "Computation Of Use Tax" in which entries appeared only under the first heading, and no entries appeared under the second heading except that in one item therein the same figures were entered, as in an item of the first heading, of the amount shown to be due for sales tax, constituted a return of sales tax only, so that the three year statute of limitation did not bar an action by the state to recover use tax for the period involved, notwithstanding the form was designated "sales tax and use tax return" and that taxpayer's signed certification at the bottom of the form, stated that it was filed pursuant to both acts. Revenue and Taxation Code, §§ 6451 et seq., 6487.

2. Licenses ⇨30

Section 7 of the Use Tax Act specifying information to be set forth in the return requires that taxpayer to make an affirmative showing of those facts required by such section and upon which such liability or nonliability depends in view of the purpose to obtain sufficient information so that the physical task of handling and verifying the returns may be readily accomplished. Revenue and Taxation Code, § 6451 et seq.

3. Licenses ⇨32(2)

That return of taxpayer was accepted by the Board of Returns as returns of both retail sales and use taxes which might have lulled taxpayer into a false position, would not bar an action by the state to recover use tax for the period involved where the return actually was the return of the sales tax only, where it did not appear that such conduct was result of any administrative interpretation or regulation of the board regularly adopted by that body. Revenue and Taxation Code, § 6451 et seq.

4. Administrative law and procedure ⇨330, 385

Licenses ⇨30

The power delegated to the Board of Returns in auditing return of sales in use taxes to adopt rules and regulations is not a grant of legislative power nor can it be used to alter or enlarge a legislative enactment nor can the interpretation of the statute be predicated upon an erroneous administrative construction thereof, since final responsibility for interpretation of the law rests with the court.

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Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by the People of the State of California against the Universal Film Exchange, Inc., to recover a use tax. Judgment for the State and defendant appeals.

Affirmed.

Adrian A. Kragen and Loeb & Loeb, all of Los Angeles, Downey, Brand, Seymour & Rohwer, of Sacramento, and T. B. Richardson, of Oakland, for appellant.

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* Subsequent opinion 213 P.2d 697.

Fred N. Howser, Atty. Gen., James E. Sabine, Deputy Atty. Gen., and Irving H. Perluss, of Sacramento, for respondent.

PEEK, Justice.

This is an action brought by the state to recover use tax allegedly due and owing from the defendant under the Use Tax Act of 1935, Stats.1935, p. 1297, for the period from July 1, 1935 to March 31, 1937. Defendant's answer generally denied liability therefor, and as a separate defense alleged that by reason of the statute of limitations contained in section 15 of said act, now section 6487 of the Revenue and Taxation Code, the action was barred. After a hearing in the trial court upon a stipulation of facts, judgment was entered in favor of the state, and from the judgment so entered defendant has appealed.

From the record before us it appears that the Universal Film Exchanges, Inc., is a foreign corporation engaged in business in the State of California; that on March 20, 1946, a use tax determination was made by the State Board of Equalization (hereinafter referred to as the Board) with respect to the use or shortage of prints of motion pictures, certain office supplies and film equipment during the period from July 1, 1935 to and including March 31, 1937, or approximately ten years prior to the commencement of these proceedings; that the defendant petitioned the Board for a re-determination of the tax, which petition was denied, and that during the period referred to, the defendant filed the returns in question upon a form prepared by the Board and denominated "Sales Tax and Use Tax Return."

The form upon which the returns were made consist of two parts, both of which appear in sequence on one page and include eleven items of information showing the figures from which both taxes are computed. The first six of these items which are also numbered in sequence appear under the title "Computation of Retail Sales Tax" and the remaining five appear under the heading "Computation of Use Tax"; Item 6 is entitled "Retail Sales Tax due and payable * * *"; Item 10 is entitled "Amount of use tax required to be collected"; and Item 11 is entitled "Total amount of tax due and payable (Item 6 plus Item 10)". In the returns filed by defendant the only entries appear in items 1 to 6, inclusive, under the sales tax sub-heading. No entry, notation or mark of any kind appears after the items listed under the use tax sub-heading, except in Item 11, wherein defendant entered the same figures as were entered in Item 6, the amount shown to be due for sales tax.

The stipulation of facts further discloses that from July 1, 1935 to October 20, 1943, it was the practice of the section of the Board which audited Sales and Use Tax Returns to treat the filing of such a return as is involved herein as a return of both sales and use tax; that during such period the Board issued no notice of determination that such a return as was so filed by defendant was not a Sales and Use Tax Return within the meaning of the applicable statute, Section 7 of the Use Tax Act, Revenue and Taxation Code, § 6451 et seq.; but that after an opinion of the Attorney General dated October 21, 1943, which stated that the filing of a return on which there was no information or notation entered under the sub-heading "Computation of Use Tax" was not a return of use tax, the practice of the Board was changed, and such a return was considered as one of sales tax only. Thereafter a notation which indicated either none or zero in such lines was a sufficient notation within the administrative practice of the Board. The parties further stipulated that the returns were filed by defendant in good faith with no intent to evade or avoid payment of either sales or use tax.

The sole question presented for decision to the lower court and to this court on appeal is whether or not the filling in of the form in the aforesaid manner constituted a return of both sales and use taxes or was a return of sales tax only. The parties agree that if it is to be regarded as a return of sales tax only then the three year statute of limitations, Section 6487, Rev. & Tax Code, did not bar this action to recover use tax for the period involved, in that under such interpretation no use tax return would have been made and hence the statute would have been tolled during such period, but if it is regarded as a return of both sales and use taxes the action is barred.

In support of its main contention, that the trial court committed error in holding that the return filed was not a return of both taxes, appellant argues that the Board was authorized to prescribe a single form for the combined return of sales and use tax; that the form prescribed is denominated "Sales Tax and Use Tax Return"; that line 11 thereof accumulates the total of the two tax liabilities in a single item "Total amount of *tax* due and payable", and that the certificate which the taxpayer is required to sign constitutes a statement by the taxpayer "that the statements made and the figures shown herein and in any accompanying schedules are to the best of my knowledge and *belief a true and complete return, made in good faith for the period stated, pursuant to the Retail Sales Tax Act of 1933 and the Use Tax Act of 1935*". (Italics ours.) From the foregoing appellant concludes that the form prescribed by the Board constituted a single, inseparable return of sales and use tax and not two separate returns, each of which was required to be completed as if it were a single and completely separate return, and that the taxpayer, by leaving blank the items under the computation of the use tax, impliedly alleges that he has no use tax liability.

Appellant refers to the action by the audit section of the Board in treating the filing of a return in the manner and form of the return herein involved and the apparent approval thereof by the Board as being a return on both sales and use tax liabilities. Such practice, it contends, is consistent with the supplementary nature of the two taxes and of aid in construing the provisions of Section 7 of the Use Tax Act and Section 9 of the Sales Tax Act, supra, Revenue and Taxation Code, § 6451 et seq., in regard to the filing of returns.

Paraphrasing the court in Douglas Aircraft Co. v. Johnson, 13 Cal.2d 545, 549, 90 P.2d 572, the adoption by the legislature of these two taxes constitutes a comprehensive taxing program applicable to the sale, use, storage, or consumption of personal property, each taxing privileges not taxed by the other and both of which are mutually exclusive. While the taxes thus complement each other it does not follow therefrom nor from the fact that as the Board has prescribed a form enabling the taxpayer to report both tax liabilities on a single form, that the furnishing of information as to one tax thereby renders the form a return of both tax liabilities. The applicable statutes require a return as to each tax liability, and while the Board has prescribed a single form it is clear that the form itself provides for the separate computation of each tax, and has not, therefore, attempted to change the exclusive character of the two taxes.

[1] Section 7 of said Use Tax Act of 1935, wherein the information specifically required in the return is set forth, states that it shall be in such form as may be prescribed by the Board "*showing the total sales price of the tangible personal property sold by the retailer during such preceding quarterly period, the storage, use or consumption of which is subject to the tax imposed by this act * * **". (Italics ours.) Section 9 of the Sales Tax Act of 1933 contains similar language in regard to the return of sales tax. In view of this language it seems clear that the inference drawn by appellant from the fact that by leaving completely blank the items on the form relating to the computation of the use tax thereby impliedly stated that it had no use tax liability cannot be sustained.

[2] The determination as to whether or not a taxpayer has use tax liability can be made only from the facts of each particular case, and hence it would appear that the foregoing language of said Section 7 should be interpreted as requiring the taxpayer to make an affirmative "showing" of those facts required by said section and upon which liability or non-liability must of necessity depend. This is reasonable and necessary under our system of tax administration based on self-assessment wherein the purpose of a return is not to obtain information in some form but rather to obtain it with sufficient completeness, uni-

formity and arrangement that the physical task of handling and verifying the returns may be readily accomplished. Whitmore Oxygen Co. v. Utah State Tax Commission, Utah, 196 P.2d 976. While the Board is authorized to prescribe a single form of return to show the combined sales and use tax liability, it is a non sequitur to conclude, as does appellant, that the filling in of such form relating to the computation of sales tax liability also constitutes a return as to the use tax liability where the items pertaining to the computation of such liability are left completely blank. The fact that the Board has made it possible to make a return for both sales and use tax on the same form does not obviate the necessity of furnishing information as to both taxes.

While it is true that appellant signed the certification at the bottom of the form, which states that the form is filed pursuant to the Retail Sales Tax Act of 1933 *and* the Use Tax Act of 1935, it does not follow that appellant thereby filed a return of use tax liability, since it is also true that in so certifying it stated that "the statements made and the figures shown herein * * *" were to the best of its knowledge and belief "a true and *complete*" return (italics ours), which can mean only *complete* as to both sales and use tax. Hence, where, as here, it subsequently develops that a use tax has accrued, but that return for the period in question is silent as to any basis for the computation thereof, it seems obvious that such a return was and is insufficient within the meaning of the act.

Appellant's final contention that the purpose of the statute of limitations will be defeated if the judgment is not reversed is without merit, since the statute, by its own terms, does not purport to run in the absence of a proper showing, and as that which was filed herein cannot be held to be a return within the meaning of the act, the statute did not run.

[3, 4] In conclusion it should be noted that while the stipulation of facts shows acceptance by the audit section of the Board of returns such as were filed by defendant as returns of both taxes, which action might well have lulled defendant into a false position, there is nothing in the record to show that such conduct was the result of any administrative interpretation or other ruling or regulation of the Board regularly adopted by that body. However, even if the contrary were true, the power delegated to the Board to adopt rules and regulations is not a grant of legislative power nor can it be used to alter or enlarge a legislative enactment nor can the interpretation of a statute be predicated upon an erroneous administrative construction thereof. In the last analysis the final responsibility for the interpretation of the law must rest with the court. Whitcomb Hotel, Inc. v. California Employment Commission, 24 Cal.2d 753, 757, 151 P.2d 233, 155 A.L.R. 405.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

KEENAN v. SAN FRANCISCO UNIFIED SCHOOL DIST. et al.

Civ. 13886.

District Court of Appeal, First District, Division 2, California.

March 30, 1949.

Hearing Granted May 26, 1949.*

Schools and school districts 🔑141(5)

Where elementary school teacher after she had been employed for three consecutive years as probationary teacher was notified by letter on March 28, that her physical condition would not permit her employment after June 30 of that year, and teacher thereafter failed to indicate to school board before May 15, which was last day upon which board could decide whether teacher would be employed for ensuing year, that she desired a formal hearing on issue of her physical condition, she was estopped from thereafter raising question of board's failure to give her a formal hearing. Education Code, §§ 13001 et seq., 13002, 13081, 13201 et seq., 13521 et seq., 13581 et seq., 13583.

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* Subsequent opinion 214 P.2d 382.

GOODELL, J., dissenting.

Appeal from Superior Court, City and County of San Francisco; Herbert C. Kaufman, Judge.

Proceeding by Grace B. Keenan against San Francisco Unified School District, Board of Education of the San Francisco Unified School District, and others, for a writ of mandate to compel reemployment and certification of petitioner as a permanet elementary school teacher. From adverse judgment, the petitioner appeals.

Affirmed.

Alexander S. Keenan, Jr. and Albert A. Spiegel, both of San Francisco, for appellant.

John J. O'Toole, City Atty., Walter A. Dold, Chief Dep. Atty., and Irving G. Breyer, all of San Francisco, for respondents.

NOURSE, Presiding Justice.

In her petition for a writ of mandate petitioner sought reemployment and certification as a permanent elementary school teacher. The cause was tried on the theory that petitioner had been dismissed from her probationary status on the ground that she was physically unfit and that she should have been given a trial before the governing board on the question of her physical fitness. A greater portion of the trial was directed to the reasonableness of the board's finding on that question and the court found that petitioner was suffering from an incurable disease and was physically unfit to continue her teaching. Petitioner had been employed by respondents for three consecutive school years in a position requiring certification qualifications. On March 28, 1947, she was notified by letter that her physical condition would not permit her employment after June 30th of that year.

If this action was within the statutory powers of the school board it is obvious that no court has power to mandate the board to do otherwise. A brief summary of the applicable statutes will suffice.

Section 13002 of the Education Code reads: "Persons in positions requiring certification qualifications *may be elected* for the next ensuing school year on or after the first day of May, and each person so elected shall be deemed reelected from year to year except as provided in this chapter." (Emphasis ours.)

Section 13081 reads in part: "Every employee of a school district * * * who, after having been employed by the district for three complete consecutive school years in a position or positions requiring certification qualifications, *is reelected* for the next succeeding school year to a position requiring certification qualifications shall, at the commencement of the succeeding school year be classified as and become a permanent employee of the district." (Emphasis ours.)

Section 13581 reads: "Governing boards of school districts shall dismiss probationary employees during the school year for cause only, as in the case of permanent employees."

Section 13582 reads in part: "On or before the fifteenth day of May in any year the governing board may give notice in writing to a probationary employee that his services will not be required for the ensuing year."

Section 13583 reads: "Anything in Section 13582 to the contrary notwithstanding, governing boards of school districts having an average daily attendance of 60,000 or more pupils *shall dismiss* probationary employees *for cause only*. The determination of the board as to the sufficiency of the cause for dismissal shall be conclusive, but the cause shall relate solely to the welfare of the schools and the pupils thereof." (Emphasis ours.)

Reverting to the conceded facts we find that petitioner was a probationary teacher having served for three consecutive school years. She was not reelected for the ensuing school year and therefore could not become a permanent employee under the terms of section 13081. On March 28, 1947, she was notified by letter that her services would not be required for the succeeding or fourth year because of her physical condition.

On May 6, 1947, the board adopted the following resolution:

"Whereas: Keenan, Mrs. Grace B., a probationary teacher in the elementary division of the San Francisco Unified School District (Parkside School) has not been approved by the physician employed by the Board of Education for permanency on the basis of her physical condition; and

"Whereas based on such physical condition her dismissal is deemed necessary as being for the welfare of the schools and the pupils thereof;

"Now, Therefore, Be It Resolved: That Keenan, Mrs. Grace B., be and she is notified that her services as an employee of the San Francisco Unified School District will no longer be required after June 30, 1947; that said dismissal is based solely upon the welfare of the schools and the pupils thereof."

The general provisions of the Education Code for employment and the rights and duties of employees are found in chapters 8 and 9 of this division. Thus section 13002 provides for the election for one school year of a probationary employee and section 13081 provides for the classification as permanent employees of those who have been "reelected" after service of three years as probationers.

In article 2 of chapter 11 of division 7 we find an involved plan for the removal and trial of permanent employees in proceedings in the superior court. The article is headed "Dismissal of Permanent Employees." Article 3 is headed "Dismissal of Probationary Employees." Two articles follow headed "Dismissal" of substitute and temporary employees. It is in article 3 that the three sections with which we are now concerned appear. The first authorizes dismissals "during the school year" for cause but incorporates the complicated procedure of charges and trial before a superior court "as in the case of permanent employees." The second specifies the time of notice to a probationer that his services will not be required for the ensuing year. The third provides that in certain school districts the governing board "shall dismiss probationary employees * * * for cause only." While the language of the section is complicated and confusing it is susceptible of two conflicting interpretations—either that the dismissal means a failure to reelect at the end of the school year, or it means that the legislature intended to provide that in the large school districts with many probationary employees the governing board could dismiss "for cause" during the school year without the necessity of the complicated procedure of trial in the superior court.

The whole scheme of civil service would be defeated if the appointing power were not given some opportunity of selection of an employee on the basis of efficiency and competence. Naturally this cannot obtain if a probationary employee takes permanent status automatically at a fixed period without the approval of the appointing power. If section 13583 takes from the appointing power all right to choose not to make a probationary appointment permanent except upon charges and trial then the theory of probation is elminated because the section is not confined to the third year of probation, but applies from the beginning of the employment. Thus, as to teachers in the large school districts there is no probation at all.

But there is no conflict in our decisions (though this state follows the minority rule) that when the statute permits a removal "for cause" it implies that there shall be notice and a hearing. Bannerman v. Boyle, 160 Cal. 197, 116 P. 732; Steen v. Board, etc., 26 Cal.2d 716, 723, 160 P.2d 816, and cases there cited. We, of course, are not concerned with the wisdom of the legislation. We must take the statute as written. Though it would seem incredible that the legislature could have foreseen the disastrous result of thus destroying the whole scheme of probation in the large school districts, nevertheless we must follow the rules of law laid down in the decision cited.

Granting therefore that before a probationary teacher in these districts can be "dismissed" he is entitled to notice and hearing the law is in further confusion because the statute does not prescribe any form of procedure, and none of the cases cited prescribe what is necessary to meet the demand of "notice and hearing." Because of this uncertainty the question is open in each individual case whether the particular reviewing court thinks that sufficient notice and hearing was accorded. The failure of the legislature and the reviewing courts to cure this uncertainty has caused needless confusion and consequent litigation.

All the decisions voiding an act of an administrative agency under the "for cause" statutes merely declare that the agency did wrong. No one tells the agency how it could do right. Where no statutory procedure is prescribed the agency is in doubt as to what is necessary to constitute the "fair hearing" which the courts have said must be given. Whether it is necessary that the agency have express power to summon witnesses, to administer oaths, to consider affidavits, to take hearsay testimony, to appoint a referee, or to make findings of fact has been a matter of conjecture since the Bannerman case was decided in 1911. This uncertainty was cleared in respect to many state agencies in the Administrative Procedure Act of 1947, Government Code, section 11370 et seq. But that act does not include a local board of education.

It should be noted that some of the cases following the Bannerman case contain a qualification of the flat statement that a trial is necessary, as in the Steen case, 26 Cal.2d at page 723, 160 P.2d at page 820, "unless the statute expressly negatives the necessity of a hearing." This tenders the question when the statute discloses that the legislature intentionally refrained from giving the particular agency power to hold a hearing does that negative the necessity of a hearing under the "for cause" section? Under former section 1609 of the Political Code boards of education were given express power to dismiss permanent teachers after trial and to adopt rules for the conduct of such trials. These powers were taken away when the plan of trial in the superior courts was adopted. School Code, section 5.650 et seq. followed by sections 13521 et seq. of the Education Code. Hence, when the "for cause" provision was inserted in section 13583 of the Education Code the legislature had before it the set plan that the board was denied the power to try permanent teachers and had been given no power to conduct a "trial" for any purpose. It would seem to be a logical conclusion from these circumstances that the legislature did not contemplate a trial when it authorized a dismissal "for cause", or that, if such a trial were necessary, the same prcedure as that applicable to permanent teachers was contemplated—thus a trial before the superior court when, and only when, the teacher demanded it.

However, since the later decisions all follow the Bannerman case, and this defect as to procedure has not been discussed, we are bound to conclude, subject to that rule, that petitioner was entitled to some form of trial or investigation if she asked for it.

But, though appellant be entitled to a "hearing" there are substantial reasons why the mandate should not issue under the facts of this case.

The San Francisco School District is a separate state agency controlled by general laws. Skelly v. School District, 103 Cal. 652, 658, 37 P. 643; Ridge v. Boulder Creek etc. School District, 60 Cal.App.2d 453, 462, 140 P.2d 990. As such it cannot be invested with judicial powers. Standard Oil Co. v. State Board of Equalization, 6 Cal.2d 557, 59 P.2d 119. Hence, whatever hearing is accorded an employee of the district dismissed "for cause" is not a judicial hearing, but an administrative one. This follows from the rule first announced in the Standard Oil case that such proceedings before a state agency are not reviewable in certiorari which is confined to the review of judicial proceedings. The right of a school employee to a hearing is not constitutional, but is one that may be denied by statute and thus one that might be waived by the party in interest. The manner of the employee's appointment, his tenure, salary, duties and the manner of his discharge are all subject to legislative control. It is therefore competent for the legislature to provide that he may be removed at the pleasure of the oppointing power without any charges or hearing. The right to a hearing under the "for cause" theory is therefore a personal right which may be waived by the employee, Reardon v. City of Daly City, 71 Cal.App. 2d 759, 766, 163 P.2d 462, and since no request for a hearing was made by the petitioner herein, she must be deemed to have waived it. This is the rule of Goldsmith v. United States Board, etc., 270 U. S. 117, 118, 46 S.Ct. 215, 217, 70 L.Ed. 494, page 497, where the court said:

> "The petitioner as an applicant for admission to practise was, therefore, entitled to demand from the board the right to be heard on the charges against him upon which the board has denied him admission. But he made no demand of this kind. Instead of doing so, he filed this petition in mandamus in which he asked for a writ to compel the board summarily to enroll him in the list of practitioners, and to enjoin it from interfering with his representing clients before it. He was not entitled to this on his petition. Until he had sought a hearing from the board, and been denied it, he could not appeal to the courts for any remedy and certainly not for mandamus to compel enrollment."

In such a case as this the question of time is of the utmost importance. If the probationer is to be relieved of duty the governing board must know prior to May 15th whether he is to be dropped from the list of probationers or whether he is to be employed for the ensuing school year. Bearing in mind that under section 13583 of the Education Code it is within the discretion of the governing board to determine "the sufficiency of the cause for dismissal" if the employee questions the board's action he should demand a hearing on that issue. Section 13524 of the Education Code, referring to dismissal of permanent teachers, provides, "If the employee does not demand a hearing, he may be dismissed at the expiration of the 30-day period" after notice of "intention" to dismiss. There is no sound reason why a different rule should obtain as to a temporary teacher. When, following notice of the grounds for dismissal he makes no request to be heard he must be presumed to have waived a hearing.

This situation brings into operation another rule—that before a party seeks judicial relief he must exhaust his administrative remedies. Alexander v. State Personnel Board, 22 Cal.2d 198, 137 P.2d 433; Reardon v. Daly City, supra, 71 Cal.App. 2d at page 766, 163 P.2d 462; 1 Cal.Jur. 10 yr. Supp.1947 secondary Pocket Part, Admin.Law, sec. 17; 42 Am.Jur. 580. The complaint herein is silent on this feature. It is not alleged that plaintiff requested a hearing before the board, that such a request if made would have been futile, or that the charges of physical inability were not true, or that they were not made in good faith and in relation to "the welfare of the schools and the pupils thereof." The rule of exhaustion of administrative remedies is allied with that requiring a demand because it can not be assumed that if a demand for a hearing had been made such a hearing would not have been granted.

Since the appellant tendered the issue of her physical condition in the trial in the superior court, and since the court found on conclusive and convincing evidence that she was physically incapacitated the court fairly and properly exercised its discretion in denying the writ applied for. Since the issuance of a writ of mandate is a matter of discretion rather than one of right, Sipper v. Urban, 22 Cal.2d 138, 141, 137 P.2d 425; 16 Cal.Jur. p. 768, the trial court was confronted with these admitted facts in the exercise of that discretion—the written notice or charge was served on appellant on March 28, 1947; the last day upon which the board could decide whether she would be employed for the ensuing school year was May 15, 1947. If during that period appellant had indicated that she desired a hearing before the board on the charges such hearing could have been held prior to the date of May 15th. Having failed to request such a hearing the board was justified in assuming that she waived it—and this assumption would have been fortified by the indisputable evidence that the charges were sound.

The judgment is affirmed.

DOOLING, Justice.

I concur in the order affirming the judgment. I place my concurrence solely on the ground that appellant is estopped by her conduct to raise the question of the failure of respondent board to give her a formal hearing.

As early as January 1947 appellant was orally informed that she would not be reemployed for the ensuing school year because of her physical condition. Appellant's husband acting as her attorney on January 21 wrote a letter to respondent board asking it to "reconsider her case". Appellant sought out, and had conferences with, a member of the board, the board's attorney and a responsible employee of the board in which she sought a reconsideration. As a result of these informal protests the question of her physical fitness for permanent tenure was in fact reexamined. On or about March 26 appellant received written notice that because of her physical condition she would not be passed for classification as a permanent teacher and would be dropped from the list of probationary teachers at the end of the school year, and on or about May 6 the formal written notice was given her by the board that she would not be reemployed after June 30.

By proceeding in this fashion and at the same time making no suggestion that she desired or expected a formal hearing appellant chose her own ground of battle and under the circumstances the board was justified in assuming that she acquiesced in the manner in which the procedure was being carried out on her own initiative.

I am not satisfied that appellant's mere nonaction or failure to demand a formal hearing would amount to a waiver. The implication of the "for cause" cases in this state is that the burden is on the agency to take affirmative action to give "notice and a hearing" although the courts have never expressly laid down a method of procedure. But in this case appellant was active not passive. She voluntarily elected to proceed without a formal hearing to present her protest to the board's contemplated action and secured the reexamination of the question which she requested. Having so proceeded it would be manifestly unfair to permit her, after the May 15 deadline fixed by section 13582 of the Education Code had expired and a formal hearing was no longer legally possible, to complain that no such hearing had been accorded to her.

GOODELL, Justice.

I dissent.

When section 13583 says that probationary employees shall be dismissed "for cause only" it means, according to the California cases, that there must be a trial or hearing of some kind. The prevailing opinion concedes this and cites the cases which so hold.

Counsel for the Board admitted by stipulation that there was no hearing in this case.

That, in my opinion, was the end of the case, and called for the issuance of the writ. It is the basis of this dissent.

Section 13583 says nothing about a demand for a trial, and neither the rule respecting the exhaustion of administrative remedies nor any other rule seems to justify reading that into the section. If the section gives the teacher the right to a trial that seems to be an end of the matter. More will be said about the section later.

It is said that as early as January, 1947, petitioner had reason to know the intention of the Board with respect to her case. The implication is that between that time and the May 15 dead-line she could have asked for a trial. The Board, however, during the same interval knew full well that she was strenuously resisting the proposed dismissal. But, more than that, how about a case where the teacher knows nothing of the Board's intention, until say, May 10, when the time would be too short to have a hearing—demand or no demand?

When the trial judge said: "* * * I am not at all determining * * * whether or not the School Board didn't exercise a proper discretion and whether or not this particular disease isn't sufficient to eliminate a teacher. That all may be very true * * *" he correctly stated the law, for that question was one solely within the Board's discretion, not the court's.

The court is dealing with section 13583 as it now reads. In my opinion—whatever may be thought of the section as a piece of legislation—the courts are bound to follow it.

The section is utterly unworkable and impractical. It is found in the article on "Dismissal of Probationary Employees" but it is destructive of "probation" to which it gives lip-service. It gives tenure from the first day a teacher enters the department whether it be called limited tenure, probationary tenure, or what not. The very fact that, having a "probationary" foothold for one school year, the teacher cannot be dismissed at the end of that year without a trial, proves that the teacher has tenure, rather than a simple probationary status. This section casts the burden on the Department of showing cause why the teacher should not be continued on into the next ensuing year of "probation", and so on.

A probationary teacher in a 60,000-plus district gets this limited tenure while one in a minus-60,000 district gets no tenure at all. In the smaller district if the Board at the end of the school year does not see fit to keep the probationary teacher, all it has to do is to give the notice in writing on or before May 15 as prescribed by section 13582 and that ends the probation. The dismissed teacher can in no way make the Board show cause, or even compel it to give its reason.

As a matter of abstract right, surely if any probationer is entitled to a trial, one in a small district is as much entitled to it as one in a large district. Likewise a School Board in a large district is as much entitled, in the exercise of its discretion, to dismiss a probationer at the end of a school year without a trial as one in a small district. The discrimination is without rhyme or reason.

If any line is to be drawn there is every reason why it should be the other way around. Section 13583 in requiring trials in 60,000-plus districts places a burden on the Boards therein which they are far less able to bear than Boards in minus-60,000 districts, by reason of the very size of their departments, with an immense corps of teachers and a much more complicated organization in the larger centers of population. The Board in a city like San Francisco or Los Angeles would have to sit perhaps for days before May 15 each year hearing cases where the issue for the most part would be whether the teacher on trial gave promise of making good as a permanent teacher. Teachers, principals, supervisors and deputy superintendents would have to leave their regular duties and come in to testify respecting the fitness or unfitness of the teacher. A School Board in a large city has many and varied duties to perform—duties of the highest public importance—and if its time is to be consumed in trying such cases, some of which would be bitterly contested, it would have little time for anything else during the months preceding May 15. One of the consequences would be, naturally, that qualified citizens would be slow to accept positions on the Board, which would be definitely contrary to the public interest.

There is no way of justifying, in my opinion, the unusual provisions of section 13583, and as long as it remains on the statute books it is bound to produce nothing but controversy and litigation.

A probationary teacher is fully protected against dismissal during a school year by the provisions of 13581. That and section 13582 insure a full and unbroken year of probation. But there is no reason under the sun why the burden should be laid on the Department of showing cause why the teacher should not be kept on as a probationer for another year. The section in practice although not in theory puts the Board on trial, not the teacher. Still, in a minus-60,000 district there is no such rule.

While the prevailing opinion holds that this particular petitioner is not entitled to the writ, it also holds, as said at the outset, that "for cause only" means a trial. It will be cited as a precedent for the latter holding just as if it had held that the writ should issue. There will be set in motion a procedure hitherto unknown in the 60,000-plus districts of a series of trials each spring, of teachers who are considered as doubtful material for permanent status. It is because this case is bound to become a precedent that I have ventured this criticism of the draftsmanship of this section.

If section 13583 remains the law in its present form it will seriously interfere with the operations of School Boards in large districts and will give probationary teachers in those districts rights and advantages which those similarly situated in small districts do not have, without any conceivable reason for the discrimination. It should be amended in the interest of parity and uniformity, and of efficiency of school administration.

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90 Cal.App.2d 850

WOMAN'S ATHLETIC CLUB OF SAN FRANCISCO v. ANGLO CALIFORNIA NAT. BANK OF SAN FRANCISCO et al.

AMERICAN AGENCIES, Inc. v. WOMAN'S ATHLETIC CLUB OF SAN FRANCISCO et al.

Civ. 13920.

District Court of Appeal, First District,
Division 2, California.
March 29, 1949.

1. Mortgages 🔑417

A bondholder is entitled to maintain an action for foreclosure when his bonds are in default upon showing a demand upon the trustee to foreclose and his refusal to do so.

2. Mortgages 🔑417

Where trustee was not bound to sell unless the owners of 80 per cent of the outstanding bonds so demanded, the failure of the owners of 80 per cent of the outstanding bonds to make such demand did not prevent an individual bondholder from foreclosing.

3. Mortgages 🔑449

In action by bondholder to foreclose, bondholder was not required to allege that there was no restriction in the deed of trust on the right of foreclosure by a single bondholder.

4. Pleading 🔑67

Plaintiff need not negative in his complaint facts which would constitute an exception to his right to maintain the action, but such facts if they exist are properly left to be raised by the answer.

5. Quieting title 🔑39

In action by property owner to quiet title, cross-complaint by bondholder to foreclose was proper. Code Civ.Proc. § 442.

6. Appeal and error 🔑78(3)

A judgment for plaintiff on the pleadings finally disposed of action to quiet title and was appealable.

Appeal from Superior Court, San Francisco County; Geo W. Schonfeld, Judge.

Action by Woman's Athletic Club of San Francisco against the Anglo California National Bank of San Francisco and American Agencies, Inc., to quiet title, wherein each of the defendants filed cross-complaints. From a judgment for plaintiff on the pleadings, the American Agencies, Inc., appeals.

Judgment reversed.

A. A. Tiscornia, of San Francisco, for appellants.

Morgan J. Doyle and J. Joseph Sullivan, both of San Francisco, for respondents.

DOOLING, Justice.

Plaintiff corporation commenced a quiet title action against The Anglo California National Bank of San Francisco under its true corporate name and joined therein several corporations and individuals as defendants by fictitious names. The named defendant bank by answer and cross-complaint asserted an interest in the real property involved as successor trustee under a deed of trust securing a bonded loan of the plaintiff club. The appellant, American Agencies, Inc., a corporation, was served as a defendant sued by fictitious name. It filed an answer and cross-complaint in which it alleged that it was the owner of bonds of the plaintiff club in the amount of $7700, that these bonds were secured by the deed of trust aforementioned, that the bond payments were in default and that it had demanded of the trustee that it sell the property under the deed of trust and that said trustee had refused to act. It asked for a foreclosure and sale of the property to satisfy its claim under its bonds and those of all other unpaid bondholders. Plaintiff club moved for judgment on the pleadings against defendant and cross-complainant American Agencies, Inc. This motion was granted and from the judgment so entered against it American Agencies, Inc. appeals

[1, 2] Respondent club takes the position primarily that appellant's cross-complaint shows on its face that it has no proper case entitling it to cross-complain. Before considering this question we notice certain matters going to the sufficiency of the cross-complaint to state a cause of action in any event. A bondholder is entitled to maintain an action for foreclosure when his bonds are in default upon showing a demand upon the trustee to foreclose and his refusal to do so. Citizens' Bank v. Los Angeles, etc., Co., 131 Cal. 187, 63 P. 462, 82 Am.St.Rep. 341; California Safe etc. Co. v. Sierra etc. Co., 158 Cal. 690, 112 P. 274, Ann.Cas.1912A, 729. The cross-complaint shows that the trustee is not bound to proceed to sell unless the owners of 80% of the outstanding bonds so demand. The failure of 80% to make such demand does not prevent an individual bondholder from foreclosing. In Citizens' Bk. v. Los Angeles etc. Co., supra, the court said 131 Cal. at pp. 191-192, 63 P. at page 464, 82 Am.St.Rep. 341:

> "Where the deed authorizes the trustee to proceed upon the written request of a majority of the bondholders, it is held in those cases that he cannot act without such petition. But the bondholder has a right of action upon showing that the trustee has refused to bring the suit, even though the trustee may have been justified, under the provisions of the deed, in refusing. If this were not so, it would * * * practically make it possible for a majority to deprive the minority of the remedy of foreclosure altogether."

[3, 4] Respondent argues that the cross-complaint is defective in not alleging that there is no restriction in the deed of trust on the right of foreclosure by a single bondholder. This is not necessary to state a cause of action. Plaintiff need not negative in his complaint facts which would constitute an exception to his right to maintain the action, but such facts if they exist are properly left to be raised by the answer. Jaffe v. Stone, 18 Cal.2d 146, 158-159, 114 P.2d 335, 135 A.L.R. 775; Stanton v. Santa Ana Sugar Co., 84 Cal. App. 206, 208-209, 257 P. 907; 21 Cal.Jur. 61-63.

[5] The main question is whether this is a proper case for cross-complaint under section 442, Code of Civil Procedure. We have no doubt that under the present liberal construction of the "transaction" provision of that section the cross-complaint is proper. It appears without any question that the transaction against which the plaintiff seeks to quiet its title is its deed of trust securing its bond issue. "The more recent cases have approved a broad and liberal interpretation of the phrase 'transaction * * * upon which the action is brought.' (Citing cases.) The facts surrounding the cause of action and not the form of the complaint are determinative of what constitutes the 'transaction.' If the defendant's pleading sets forth matter inextricably related to the matter forming the basis of the plaintiff's complaint, it meets the statutory requirements of a cross-complaint, and it is immaterial that the relief sought thereby is independent of that prayed for in the complaint." Kent v. Clark, 20 Cal.2d 779, 786, 128 P.2d 868, 872, 142 A.L.R. 576.

This rule has had application in several quiet title actions where the purpose was to quiet title against a transaction which was made the basis of the cross-complaint. California Trust Co. v. Cohn, 214 Cal. 619, 624 et seq., 7 P.2d 297; Martin v. Hall, 219 Cal. 334, 337, 26 P. 288, expressly disapproving earlier cases to the contrary; Hanlon v. Western Loan & Bldg. Co., 46 Cal.App.2d 580, 604, 116 P.2d 465. Respondent attempts to limit the rule of these cases strictly to their special facts but we are satisfied that under the liberal rule of construction of the "transaction" portion of Code Civ.Proc., sec. 442 enjoined by the later cases no such strict interpretation is justified.

[6] The judgment appealed from finally disposes of the action as to appellant and hence is appealable, Howe v. Key System Transit Co., 198 Cal. 525, 246 P. 39; Young v. Superior Court, 16 Cal.2d 211, 105 P.2d 363; Trask v. Moore, 24 Cal.2d 365, 149 P.2d 854, and in this respect is distinguishable from Sjoberg v. Hastorf, 33 Cal.2d 116, 199 P.2d 668; and Wood v. Metzenbaum, 90 Cal.App.2d 533, 203 P.2d 105.

Judgment reversed.

NOURSE, P. J., and GOODELL, J., concur.

SAPP et al. v. BARENFELD et al.

Civ. 16581.

District Court of Appeal, Second District, Division 3, California.

April 6, 1949.

Rehearing Denied April 25, 1949.

Hearing Granted June 2, 1949.[*]

1. Arbitration and award 🔑73

The weight to be given the evidence and the province of the reviewing court are the same in an arbitration proceeding as in any civil case.

2. Arbitration and award 🔑73

The power of the appellate court in an arbitration proceeding begins and ends with a determination of whether there is any substantial evidence contradicted or uncontradicted which will support the conclusion reached by the trial court, and the same rule applies where the facts were presented by affidavits.

3. Arbitration and award 🔑73

Trial court's finding that arbitrators so imperfectly executed their powers that a mutual, final and definite award upon the subject matter submitted was not made was supported by substantial evidence. Code Civ.Proc. § 1288.

4. Arbitration and award 🔑57, 77

It is the duty of arbitrators to pass upon all items in controversy submitted to them, and if it appears on the face of the award that they have not disposed of the whole matter, but have left a part open, it is invalid and will be set aside. Code Civ.Proc. § 1288.

5. Arbitration and award 🔑57, 77

If several matters are specified in the submission and the award does not disclose that each is determined, it is defective on its face and will be vacated on application. Code Civ.Proc. § 1288.

6. Arbitration and award 🔑57

In order to be final and conclusive, an award must embrace everything required by and must cover every point included in the submission. Code Civ.Proc. § 1288.

7. Arbitration and award 🔑57

An award must be such as to effectually end all controversies between the parties which have been submitted and prevent future litigation on the points involved. Code Civ.Proc. § 1288.

8. Arbitration and award 🔑57

An award which leaves a controversy for future adjustment otherwise than by mere mechanical computation or measurement is not final and cannot be sustained. Code Civ.Proc. § 1288.

9. Arbitration and award 🔑76

If the award is within the submission it may not be impeached by an arbitrator, but an affidavit of an arbitrator to the effect that the arbitrators did not consider or pass upon one of the claims of the parties did not impeach the award and was admissible. Code Civ.Proc. § 1288.

10. Arbitration and award 🔑31, 32

Under the statute arbitrators must give the parties notice of the time and place for hearing and a fair opportunity to present competent proof in support of their claims. Code Civ.Proc. § 1286.

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[*] Subsequent opinion 212 P.2d 233.

11. Arbitration and award ⚷73

Trial court's finding that arbitrators based their award in large part on information received from third persons and did not hold any hearing in the true sense of the word and that the respondents were not given an opportunity to present any evidence was sustained by the evidence. Code Civ.Proc. § 1286.

◆

Appeal from Superior Court, Los Angeles County; Allen W. Ashburn, Judge.

Proceeding in the matter of the arbitration between David M. Sapp and Maxwell Sapp, doing business under the fictitious firm name and style of the Sapp Construction Company, against Abraham Barenfeld and Jack Barenfeld, doing business under the fictitious firm name and style of A & J Building Company. From an order denying plaintiffs' application to confirm an award of arbitrators granting respondents' application to vacate the award and directing that a rehearing should not be had by the same arbitrators, the plaintiffs appeal.

Order affirmed.

Laurence J. Rittenband and Leo Jay Ross, both of Beverly Hills, for appellants.

Knight, Gitelson & Ashton, of Los Angeles, for respondents.

VALLÉE, Justice.

Appeal from an order denying appellants' application to confirm an award of arbitrators, granting respondents' application to vacate the award, and directing that a rehearing should not be had by the same arbitrators.

On December 31, 1946, appellants, as building contractors, and respondents entered into a written contract by which appellants agreed to reconstruct a loft building owned by respondents which had been damaged by fire. The contract provided for the submission of any disputes arising thereunder to arbitration. Disputes arose and the parties executed an agreement for arbitration. One of the claims submitted to the arbitrators by respondents was for damages which they claimed they had sustained by the alleged failure of appellants to complete the work within the time specified in the contract. The appellants denied the respondents' claim. The agreement for arbitration provided that the arbitrators "shall hold such hearings as may be necessary for the purpose of determining said controversy and dispute." Arbitrators were appointed. They rendered a unanimous award specifying in detail the items included therein.

Appellants applied to the court below for an order confirming the award. Respondents applied for an order vacating the award. After a hearing upon affidavits the court found that (1) the "arbitrators were guilty of misconduct in that they based their award in a large part upon information procured ex parte from third persons, with no notice to the parties hereto that they intended to adopt such a procedure, and gave the parties hereto no opportunity to cross-examine such third persons", (2) "said arbitrators so imperfectly executed their powers that a mutual, final and definite award, upon the subject matter submitted was not made, in that said arbitrators failed to pass upon respondents Barenfelds' claim for damages for delay in completing the building which was the subject of the controversy", and (3) "the arbitrators Herman Charles Light and Herbert O. Alden have adopted such a partial attitude in this proceeding that they are no longer qualified to act as arbitrators herein, * * *" and made its order denying appellants' application to confirm the award, granting respondents' application to vacate the award, and ordering that there be no rehearing by the same arbitrators. From this order the contractors appeal.

Appellants contend: (1) that if it be assumed that the arbitrators based their award in large part on information received from third persons, the information was not prejudicial to respondents, and (2) that the court erroneously concluded that the arbitrators improperly executed their powers in failing to pass upon respondents' claim for damage for delay in completing the building for the reasons (1) that this conclusion was based on a statment of respondents' arbitrator impeaching his own award, and (2) the face of the award proves that all claims were passed upon by the arbitrators.

[1, 2] The weight to be given the evidence and the province of the reviewing court are the same in an arbitration proceeding as in any civil case. Manson v. Wilcox, 140 Cal. 206, 209, 73 P. 1004; In re Bewick, 49 Cal.App.2d 287, 291, 121 P.2d 815. Under this rule our power begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the trial court. Khoury v. Barham, 85 Cal.App.2d 202, 210, 192 P.2d 823. Our power is thus limited where the facts are presented by affidavits. Deyl v. Deyl, 88 Cal.App.2d 536, 199 P.2d 424.

[3] Code of Civil Procedure, section 1288, declares that the court must vacate the award "(c) Where the arbitrators were guilty of misconduct, in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence, pertinent and material to the controversy; or of any other misbehaviors, by which the rights of any party have been prejudiced. (d) Where the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final and definite award, upon the subject matter submitted, was not made." If the trial court's conclusion with respect to either ground found by it as a basis for vacating the award is supported by substantial evidence, the order must be affirmed. We are of the opinion that the finding that the arbitrators so imperfectly executed their powers that a mutual, final and definite award upon the subject matter submitted was not made, is supported by substantial evidence.

The contract provided that the contractor should complete the work within 180 days after commencement thereof, subject to certain delays specified. The submission to arbitration specified each item in dispute submitted to the arbitrators. It included as an item for arbitration a claim of respondents that appellants did not comply with this provision of the contract. One of the arbitrators made an affidavit submitted on the hearing of the application to vacate that the arbitrators did not consider or determine "the question whether or not the Barenfelds were entitled to any allowance by reason of the failure on the part of the Sapp Construction Company to have completed the construction earlier, it being our opinion that we were only concerned with determining whether or not the Sapp Construction Company had done a good job and completed the job." Contrary to the statement of appellants it appears on the face of the award that the arbitrators did not determine this claim of respondents. The award is specific and detailed and no mention of this claim is made. The foregoing facts are adequate to support the order vacating the award.

Appellants argue that the court should not have considered the affidavit of the arbitrator. They say that the effect of the affidavit is to impeach the award and that an arbitrator may not so do after the award is made. They also argue that the burden of establishing the claim for damages for delay was on respondents; that respondents failed to introduce any proof as to their damages and consequently they may not complain; and that in any event the failure of the arbitrators to pass on the claim was a mere error of judgment which is not a ground for vacating the award.

[4-8] It is the duty of arbitrators to pass upon all items in controversy submitted to them and if it appears on the face of the award that they have not disposed of the whole matter but have left a part open it is invalid and will be set aside. If several matters are specified in the submission, as here, and the award does not disclose that each is determined, it is defective on its face and will be vacated on application. Porter v. Scott, 7 Cal. 312, 316; Boyd v. Bargagliotti, 12 Cal.App. 228, 238, 107 P. 150. In Muldrow v. Norris, 12 Cal. 331, at page 339, it was said: "Thus, in Randall v. Randall, 7 East 81, the submission embraced three subjects: one to determine all actions between the parties; another to fix the value to be put upon hop holes and potatoes in certain land; and the third, to ascertain the rent to be paid for other land. The arbitrators made their award upon the first two subjects, but omitted to notice the last, and the Court held that the whole award was vitiated by the omission. * * *

Le Blanc, J., said: 'The contract of the parties is in effect this—One says that he will submit to the arbitrators to ascertain what he is to pay for the hop poles, etc., upon condition that it shall also be referred to them to decide what rent is to be paid for certain land. And he may fairly have said that unless both those matters of difference were referred he would not refer either of them singly. If, then, the arbitrators omit to decide one of them, the condition fails on which the reference was agreed to.'" The award must be coextensive with the submission. In order to be final and conclusive it must embrace everything required by and must cover every point included in the submission. It must be such as to effectually end all controversies between the parties which have been submitted and prevent future litigation on the points involved. White v. Arthur, 59 Cal. 33, 34; Bierlein v. Johnson, 73 Cal.App.2d 728, 733, 166 P.2d 644; 3 Am.Jur., 944, sec. 122; 949, sec. 128; 6 C.J.S., Arbitration and Award, § 80, page 219, § 81, page 226; Annotation 18 L.R.A.,N.S., 1247; 47 L.R.A.,N.S., 444; Ann.Cas.1916A, 345. An award which leaves a controversy for future adjustment, otherwise than by mere mechanical computation or measurement, is not final and cannot be sustained. Bierlein v. Johnson, 73 Cal.App.2d 728, 733, 734, 166 P.2d 644; Annotation 11 L.R.A. 625, 626; Ann. Cas.1916A, 345; 104 A.L.R. 725.

[9] The affidavit of the arbitrator to the effect that the arbitrators did not consider or pass upon one of the claims of respondents did not impeach the award. It did not affect the merits of the controversy, the weight of the evidence, or whether the controversies that were determined were wrongly decided. It did not purport to prove that the award made was unjust, inadequate or excessive as to the matters decided. If the award is within the submission, it may not be impeached by an arbitrator. 3 Am.Jur. 958, secs. 135, 136. The affidavit of the arbitrator, of which complaint is made, merely shows that the arbitrators did not function at all as to one of the controversies submitted; that they imperfectly executed their powers as prescribed in the submission. There is nothing in our statutory provisions with respect to the special proceeding of arbitration, Code Civ.Proc., secs. 1280–1293, inclusive, which says that an affidavit of an arbitrator may not be used to establish any one of the grounds for vacating an award specified in section 1288. "When there is a dispute as to what questions are concluded by the award, parol evidence may be introduced, not in any sense to vary the award, but to show what took place before the arbitrators, what was in controversy before them, and what matters entered into the decision. An arbitrator is a competent witness to establish these facts, and his testimony is admissible thereon either to sustain or to nullify the award, but not to impeach it for his own fraud or misconduct." 3 Am.Jur. 980, sec. 166; see, also, 6 C.J.S. Arbitration and Award, § 131d, page 284. The implications of Loving & Evans v. Blick, —— Cal.2d ——, 191 P.2d 445 are that affidavits of the arbitrators may be considered on an application to vacate an award where the basis of the application is one of the grounds specified in section 1288 Code of Civil Procedure. The error in not determining all of the claims submitted was not an error of judgment. It was an error by which the arbitrators failed to exercise any judgment upon one of the claims submitted.

[10] The contention that respondents waived the right to present evidence to the arbitrators with respect to their claim that appellants had unreasonably delayed the work to the damage of respondents cannot be sustained. The statute contemplates that the arbitrators shall give the parties notice of the time and place for hearing and that they be given a fair opportunity to present competent proof in support of their claims. Code Civ.Proc., sec. 1286; Stockwell v. Equitable Fire & Marine Ins. Co., 134 Cal.App. 534, 541–542, 25 P.2d 873; Cf. Christenson v. Cudahy Packing Co., 198 Cal. 685, 691, 247 P. 207. It appears to be conceded that the arbitrators did not at any time give any notice to the parties of a time or place for hearing. It is a fair inference from the record that the arbitrators did not hold any hearing in the true sense of the word and that the respondents were not

given an opportunity to present any evidence.

[11] In view of what has been said it is not necessary to consider appellants' contention that there is no evidence to support the court's finding that the arbitrators based their award in large part on information received from third persons.

Order affirmed.

SHINN, P. J., and WOOD, J., concur.

91 Cal.App.2d 84

PEDERSON v. CARRIER et al.

Civ. 13827.

District Court of Appeal, First District,
Division 2, California.
April 4, 1949.
Hearing Denied May 26, 1949.

1. Appeal and error 🔑1004(1)

Verdict will not be disturbed unless it is so grossly disproportionate to any reasonable limit of compensation as shown by evidence that it shocks one's sense of justice and raises a presumption that it is based on passion and prejudice rather than sober judgment.

2. Appeal and error 🔑1004(3)

Fact that plaintiff would be seriously handicapped physically and mentally in a market for physical labor, denial of motion for new trial by judge, who tried case and was in a position to appraise testimony and determine whether verdict was excessive and decreased purchasing power of dollar, would all be considered by District Court of Appeal in considering whether award for injuries sustained in automobile accident was excessive.

3. Damages 🔑132(10)

$45,000 to 48-year-old man, who earned his living by physical labor, for severe fracture of right femur resulting in a shortened and stiffened leg and recurrence of insanity, necessitating confinement, from automobile accident, was not excessive.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Lester Pederson, by his guardian ad litem, Martin W. Pederson, against Charles H. Carrier and others, for personal injuries sustained in an automobile accident. From a judgment for the plaintiff, defendants appeal.

Affirmed.

Donald Seibert, Hadsell, Sweet & Ingalls, and Sydney P. Murman, all of San Francisco, for appellants.

Elmer P. Delany and Wm. A. Sullivan, both of San Francisco, for respondent.

DOOLING, Justice.

In an action for personal injuries occasioned by his being struck by an automobile driven by one defendant while acting as the employee of the other, plaintiff was awarded $45,000 by the verdict of a jury. A motion for new trial was denied and defendants appeal from the judgment. The sole ground presented on the appeal is that the amount awarded is excessive.

At the time of the casualty plaintiff was 48 years old with an average life expectancy of 22.88 years. 58 C.J.S., page 1212. He had previously been committed to Napa State Hospital for insanity and was discharged in 1937. Following this discharge he worked as a counterman in a San Francisco cafeteria and later as an electrician's helper. That he was somewhat emotionally unstable is indicated by evidence of temporary periods of hospitalization for minor injuries and intoxication, but between the time of his discharge from Napa State Hospital in 1937 and the date of his injuries which are the subject of the present action he had no recurrence of insanity necessitating his commitment to a state institution.

The injuries for which the verdict was awarded consisted of a severe fracture of the right femur just below the hip joint causing a permanent shortening of the leg by an inch and a half and a recurrence of insanity which necessitated his being committed again as a patient to a state institution. The fracture of the hip joint was reduced by driving a wire through the lower end of the bone to which was attached weights, cords and pulleys to give traction in a Thomas splint and the necessary period of hospitalization covered several months. There is a permanent stiffening of the hip joint which considerably reduces normal abduction, adduction and rotation of the leg and while a lift on the shoe will compensate for the shortening of the leg there will be some postural changes which may result in arthritis in the sacroiliac joints, the lower lumbar vertebrae or back from tilting. The injured leg is also somewhat weaker than before.

The evidence of psychiatric experts was that while a normal man would not have been rendered insane by the accident and resulting injuries, with his background of mental instability the plaintiff was mentally more susceptible and his second attack of insanity was brought on by his injuries and the attendant treatment, confinement and suffering. He was committed for insanity about five months after his accident and at the time of the trial, a year and a half later, he was still confined. He was then greatly improved and the psychiatric experts estimated that if his improvement progressed he might be ready for a trial period on parole from the hospital in from two to six months. After his parole from the hospital he should get some occupation not requiring "too much mental stress and concentration and effort, but something rather of a simple nature and with moderate physical exercise thrown in with it." He will require psychiatric care at least once a week as long as he is on parole with a "50-50 chance that he will carry (the usual loads) without future breaks," but for the unusual ones (hard work, stressful episodes, serious illnes or major injury) "the potentialities are there much more than in any average individual, for a rather frank mental breakdown to return once more to a hospital."

The picture before the jury was one of a man who had theretofore earned his living by physical labor, with a permanently crippled, shortened and stiffened leg, who had spent months in a hospital and a year and a half in a state institution for the mentally ill, who in from two to six months might be well enough to undertake light work, and who would always be prohibited from engaging in hard work under penalty of thereby incurring the risk of another mental breakdown.

[1–3] "The question of what may be reasonable compensation in cases of this kind is a matter on which there legitimately may be a wide difference of opinion." Roedder v. Lindsley, 28 Cal.2d 820, 823, 172 P.2d 353, 354, and for these serious handicaps which the jury were entitled to measure against over 22 years of normal life expectancy we cannot say that the award of $45,000 shocks one's sense of justice and raises the presumption that it was the result of passion and prejudice and unless we can so say our duty is to affirm the award. Roedder v. Lindsley, supra, 28 Cal.2d 820, 823, 172 P.2d 353; Johnston v. Long, 30 Cal.2d 54, 76, 181 P.2d 645. The denial of the motion for new trial by the judge who tried the case and was in a better position to appraise the testimony and determine whether the verdict was excessive, Johnston v. Long, supra, 30 Cal.2d 54, 76, 181 P.2d 645; the fact that plaintiff will be seriously handicapped physically and mentally in a competitive market for physical labor, Hughes v. Hearst Publications, Inc., 79 Cal.App.2d 703, 707, 180 P.2d 419; the serious danger of a recurrence of insanity; and the decreased purchasing power of the dollar, so often referred to by the courts in similar cases in recent years, Kircher v. Atchison, T. & S. F. R. Co., 32 Cal.2d 176, 187, 195 P.2d 427, all combine to support the award.

The decreased purchasing power of the dollar renders unpersuasive the cases cited by appellants from the 1930's and earlier, and still less persuasive are the cases in which relatively small awards for serious injuries were affirmed on appeal. As this court said in Foster v. Pestana, 77 Cal.App.2d 885, 891, 177 P.2d 54, 58:

> "It does not follow that because a plaintiff 36 years ago received a none too generous verdict, the award herein was too generous."

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.

91 Cal.App.2d 79

MILKES et al. v. SMITH.

Civ. 16557.

District Court of Appeal, Second District,
Division 3, California.

April 1, 1949.

1. Municipal corporations 🔑521, 579
Taxation 🔑531(2), 733
Tenancy in common 🔑3

The respective interests of parties in the same property acquired by one at a sale for delinquent city and county taxes and by the other at a sale for delinquent special assessments levied by city is that of tenants in common, and each owns an undivided half interest, subject to a lien in favor of each tenant against the entire property in the amount which he paid for his interest.

2. Specific performance 🔑10(1)

In suit for specific performance of contract to convey real property, where it was disclosed at trial that vendor and another were tenants in common of the property, vendor could be compelled to convey all his interest as a tenant in common, with the purchase price abated to the extent that vendor was unable to convey the whole of the property, and such relief was not barred by statute. Civ.Code, § 3390, subds. 4, 5.

3. Specific performance 🔑13

A vendor who has no title or interest in land he contracts to convey cannot be required specifically to perform, as equity will not compel him to obtain title.

4. Specific performance 🔑13

Where vendor is equitable owner of property and has right to call for legal title, he may be compelled by vendee to specifically perform contract of sale.

5. Specific performance 🔑10(1)

If vendor has any interest in property he has contracted to convey, vendee at his option may enforce contract of sale with respect to whatever interest vendor possesses, and may also receive compensation for deficiency in performance.

◆

Appeal from Superior Court, Los Angeles County; Stanley N. Barnes, Judge.

Action by Edward S. Milkes and another against Charles E. Smith for specific performance or in the alternative for damages. From judgment for plaintiffs in the sum of $250, the plaintiffs appeal.

Reversed with instructions.

R. G. Akers, of Long Beach, for appellants.

Cameron & Perkins, of Long Beach, for respondent.

VALLÉE, Justice.

Plaintiffs and defendant about November 12, 1945, entered into a contract in writing consisting of escrow instructions whereby defendant agreed to sell and plaintiffs agreed to buy a parcel of real property for $4,250. Plaintiffs forthwith deposited $4,250 with the escrow holder. Defendant refused to perform and cancelled his instructions. Hence, this action for specific performance or, in the alternative, for damages.

At the trial it developed that defendant was the owner of an interest in the property acquired as a result of its sale for nonpayment of delinquent taxes. It also developed that one Douglas was the owner of the remaining interest in the property acquired as a result of foreclosure of street improvements bonds. Defendant had unsuccessfully attempted to purchase the interest of Douglas. The court found that plaintiffs had fully performed the contract and that $4,250 was the fair and reasonable value of the property. It concluded that defendant and Douglas "became and are tenants in common in said real property, each being equally entitled to share in possession of the whole"; that "complete legal title is held by neither, nor does either hold a sufficient equitable title to compel the other to surrender his right as a tenant in common. * * * Hence, the contract of sale between plaintiffs and defendant * * * is incapable of specific performance and unenforcable Thus plaintiffs' remedy for breach of the contract is for damages alone and not to order specific performance thereof compelling defendant to convey to plaintiffs such interest as defendant has in said property, with compensation to plaintiffs for such interest as defendant is unable to convey to plaintiffs". It also concluded that plaintiffs had been damaged in the sum of $250. Plaintiffs appeal from the judgment which followed.

[1] Appellants seek to enforce specific performance of the contract to the extent of defendant's interest in the property. It is settled that the respective interests of parties in the same property acquired by one at a sale for delinquent city and county taxes and another at a sale for delinquent special assessments levied by a city is that of tenants in common. Each owns an undivided half interest, subject to a lien in favor of each tenant against the entire property in the amount which he paid for his interest. Monheit v. Cigna, 28 Cal.2d 19, 27, 168 P.2d 965, 167 A.L.R. 995. This rule of law is conceded.

When it was disclosed at the trial that Douglas and respondent were tenants in common of the property appellants requested the court "(1) to compel the respondent to convey to appellants all his interest as a tenant in common, and (2) to determine the abatement in the purchase price to which appellants were entitled by reason of respondent's inability to convey the whole of the property as he had agreed to do." The trial court refused to grant this relief to appellants.

[2] The relief which appellants seek is within the power of the defendant to give and is not the relief which is barred by subsections (4) and (5) of section 3390, Civil Code. This section, in part, reads: "The following obligations cannot be specifically enforced: * * * 4. An agreement to perform an act which the party has not power lawfully to perform when required to so; 5. An agreement to procure the act or consent of the wife of the contracting party, or of any other third person; * * *."

[3, 4] It is well-settled that where a vendor has no title or interest in the land he contracts to convey he cannot be required specifically to perform. The decree would be of no avail for equity will not compel him to obtain title. Miller v. Dyer, 20 Cal.2d 526, 528–529, 127 P.2d 901, 141 A.L.R. 1428; Title Guarantee etc. Co. v. Henry, 208 Cal. 185, 280 P. 959; Smith v. Bangham, 156 Cal. 359, 104 P. 689, 28 L.R.A.,N.S., 522; 25 R.C.L. 245, sec. 48. Where the vendor is, however, the equitable owner of the property and has the right to call for the legal title, he may be compelled by the vendee to specifically perform the contract of sale. Miller v. Dyer, 20 Cal.2d 526, 529, 127 P.2d 901, 141 A.L.R. 1428; Farnum v. Clarke, 148 Cal. 610, 84 P. 166; Easton v. Montgomery, 90 Cal. 307, 315, 27 P. 280, 25 Am.St.Rep. 123; Hansen v. Hevener, 69 Cal.App. 337, 231 P. 361; McDonald v. Yungbluth, C.C., 46 F. 836; Miedema v. Wormhoudt, 288 Ill. 537, 123 N.E. 596; Cutler v. Lovinger, 212 Mich. 272, 180 N.W. 462; Pomeroy, Specific Performance of Contracts, 3d Ed., p. 667; Annotation 141 A.L.R. 1433.

[5] It is likewise well-settled that if a vendor has any interest in the property he has contracted to convey, the vendee at his option may enforce the contract with respect to whatever interest the vendor possesses, and may also receive compensation for the deficiency in performance. Miller v. Dyer, 20 Cal.2d 526, 529, 127 P.2d 901, 141 A.L.R. 1428 [vendor equitable owner of property]; Smiddy v. Grafton, 163 Cal. 16, 18, 124 P. 433, Ann.Cas.1913E, 921 [property subject to a lien]; Smith v. Bangham, 156 Cal. 359, 104 P. 689, 28 L.R.A.,N.S., 522 [property subject to homestead]; Farnum v. Clarke, 148 Cal. 610, 617–618, 84 P. 166, 169 [vendor had an "inchoate equitable right"]; McCowen v. Pew, 147 Cal. 299, 81 P. 958 and McCowen v. Pew, 18 Cal.App. 302, 123 P. 191 [vendor removed timber]; Quarg v. Scher, 136 Cal. 406, 411, 69 P. 96 [deficiency in quantity]; Marshall v. Caldwell, 41 Cal. 611 [vendor owner of undivided half of property]; Anderson v. Willson, 48 Cal.App. 289, 294, 191 P. 1016 [deficiency in quantity; Twisselmann v. Cohn, 57 Cal.App.2d 987, 990, 136 P.2d 33 [defect in title]; Pomeroy, Specific Performance of Contracts, 3d Ed. p. 900, et seq.; Rest. Contracts, sec. 365; 49 Am.Jur. secs. 102, 105, pp. 119, 123; Annotation 148 A.L.R. 563; see, also, King v. Stanley, 32 Cal.2d 584, 590, 197 P.2d 321. Any conflict that may be said to have existed in the decisions as to the law in this state was composed by Miller v. Dyer, supra, 20 Cal.2d 526, 127

P.2d 901, 141 A.L.R. 1428. See, 28 Cal. L.Rev. 492, 503–504. The principle is stated in 49 Am.Jur. sec. 105, p. 123, as follows: "In actions by a vendee for the specific performance of a contract for the sale of real estate, where it appears that the vendor is unable to make a complete or perfect title, or that there is a deficiency in the quantity of land contracted to be sold the general rule is that the vendee, if he so elects, is not only entitled to have the contract specifically performed to the extent of the vendor's ability to comply therewith by requiring him to give the best title he can or convey what he has, but he may compel the vendor to convey his defective title or deficient estate, and at the same time have a just abatement out of the purchase price for the deficiency of title, quantity, or quality of the estate to compensate for the vendor's failure to perform the contract in full. The vendee, in other words, may waive full performance and accept such title as the vendor is able to give, and if he chooses to do so, he has a right to that and to an abatement, and the court will not hear the objection, by the vendor, that the purchaser cannot have the whole."

The foregoing doctrine has been applied in numerous instances. For examples, see collection of cases in 49 Am.Jur. sec. 105, p. 124, and Pomeroy, Specific Performance of Contracts, 3d Ed. secs. 439, 440, 441, pp. 906, 908, 911. This right of election on the part of the vendee to compel a partial specific performance of a contract has been applied in those cases where the vendor is the owner of only an undivided or partial interest in the property. The principle is enunciated in Pomeroy, Specific Performance of Contracts, 3d Ed., 906, sec. 439, thus: "When a person who owns only an undivided share of a tract of land enters into an agreement to sell the whole, as though he was the owner of the entirety, to a purchaser who is ignorant of any defect in the title, such vendee may compel a conveyance of the share which the vendor actually owns, and have compensation for the residue, or he may rescind the agreement at his election."

One of the earliest cases in California applying the foregoing principle is that of Marshall v. Caldwell, 41 Cal. 611, where the vendor agreed to sell the whole of a certain tract. It subsequently developed he had only an undivided half interest in the land. The court said, 41 Cal. at page 614: "Upon the discovery by the vendee, that the plaintiff [vendor] held only the undivided half of the land, he was entitled to proceed at once to rescind the contract; but he was not obliged to adopt that course. He was entitled to proceed, as he has done in this case, to have the contract specifically enforced to the extent of the plaintiff's interest in the land. * * * The cross-complaint of defendant Forrest [vendee] is sufficient to entitle him to a judgment for a specific performance of the agreement, and in this respect it is sustained by the findings. The plaintiff does not controvert the position—and there is no doubt of its soundness—that if he is unable to perform the entire agreement, and can convey only an undivided half of the land, he may be compelled to convey that interest." For cases in other jurisdictions following this principle, see Moore v. Gariglietti, 228 Ill. 143, 81 N.E. 826, 10 Ann. Cas. 560; Melin v. Woolley, 103 Minn. 498, 115 N.W. 654, 946, 22 L.R.A.,N.S., 595; McFarlane v. Dixon, 176 Wis. 652, 187 N.W. 671, 48 A.L.R. 1; Wright v Young, 6 Wis. 127, 70 Am.Dec. 453; Triplett v. Ivins, 93 N.J.Eq. 202, 112 A. 509, 115 A. 927; Bartee v. Matthews et al., 212 Ala. 667, 103 So. 874; Keator v. Brown, 57 N.J.Eq. 600, 42 A. 278; Annotation 154 A. L.R. 768; 10 Ann.Cas. 562.

The judgment is reversed with directions to determine the abatement to which the plaintiffs are entitled by reason of defendant's inability to convey the complete title and to decree specific performance of defendant's interest in the property.

SHINN, P. J., and WOOD, J., concur.

91 Cal.App.2d 93

MUSIC et ux. v. SOUTHERN PAC. CO. et al.

Civ. 7514.

District Court of Appeal, Third District, California.

April 2, 1949.

1. Railroads 🔑327(1), 350(24)

Under "stop, look, and listen" rule, motorist approaching railroad crossing had duty to use only that care which a reasonably cautious man would have used under similar circumstances and was not contributorily negligent as a matter of law, because place at which he elected to stop and look was not best possible place under circumstances.

2. Railroads 🔑327(1)

Under "stop, look and listen" rule, where a motorist has exercised the care of a reasonably cautious man under similar circumstances in selecting place of view, whether he is thereafter negligent in proceeding up grade and across track depends upon whether a reasonable man would have so proceeded under circumstances then existing.

3. Railroads 🔑350(22, 24)

In action for damages from collision between automobile and passenger train at rural crossing, where testimony concerning condition of surface of crossing, and concerning obstructed view of tracks was conflicting, whether motorist was contributorily negligent in selection of spot at which to stop, look, and listen, and in thereafter proceeding up grade and across track, was for the jury.

4. Appeal and error 🔑1002

In action for damages from collision between automobile and passenger train at rural crossing, evidence sustained determination that motorist was not contributorily negligent in selection of spot at which to stop, look, and listen, and in thereafter proceeding up grade and across track, and the jury having reached its verdict upon substantial though conflicting evidence, court of appeals could not interfere therewith.

5. Appeal and error 🔑978(3)

Trial judge who has witnessed all of circumstances surrounding alleged misconduct of counsel is in better position than appellate court to determine whether jury was prejudicially influenced, and conclusion of trial judge in the matter will not be disturbed unless under all the circumstances it is plainly wrong.

6. Appeal and error 🔑1060(1)

Where argument of counsel in personal injury action was acrimonious, intemperate and unnecessary, but in the only instances in which misconduct was assigned, jury was properly instructed, failure to declare mistrial or grant new trial was not prejudicial error, particularly in view of ample evidence supporting verdict.

7. Appeal and error 🔑1004(1)

Judgment for personal injuries need not be set aside as excessive because medical testimony is predicated solely upon subjective symptoms, particularly in case of injury to brain or nervous system.

8. Appeal and error 🔑1004(1)
Damages 🔑208(1)

Assessment of damages is for the jury, subject to review by the court, and determination of the jury will not be disturbed unless amount is obviously so disproportionate to injury proved as to justify conclusion that verdict is not result of cool and dispassionate consideration.

9. Damages 🔑1

Object of personal injury action is to obtain reasonable and just compensation for the injury sustained, comprehending both the present and the future.

10. Damages 🔑132(3)

$20,000 damages for injuries sustained by married woman with life expectancy of 20.20 years, requiring confinement to hospital for 35 days, and resulting in condition which, two years after accident, still caused pain in shoulders and arms, nervousness, periodic fainting spells, and severe headaches, such injuries consisting also of rib fractures and fractures of vertebra with resulting injury to spinal nervous system, was not excessive.

11. Damages ⚷132(3)

$25,000 damages for injuries sustained by married man with life expectancy of 16.72 years, consisting of brain and other injuries which were so severe that he was unconscious for 21 days after accident, that right leg was tender and weak, and ankles were stiffened, and which resulted in curvature of the spine, headaches, and inability to concentrate, was not excessive.

◆

Appeal from Superior Court, Shasta County; Albert F. Ross, Judge.

Action by J. E. Music and Mariah Music, husband and wife, against the Southern Pacific Company and others for damages from collision between an automobile and a train. Judgment for plaintiffs and defendants appeal.

Affirmed.

Glenn D. Newton and Frank W. Shuman, both of Redding, for appellants.

L. C. Smith and John A. Spann, both of Redding, for respondents.

PEEK, Justice.

J. E. Music and Mariah Music, husband and wife, brought this action to recover damages for personal injuries sustained in a collision between an automobile driven by the husband Mr. Music, in which his wife was riding, and a passenger train of the defendant Southern Pacific Company. Defendants C. B. Frizelle and George Belsky were, respectively, the engineer and fireman on the train involved.

The collision, as alleged in the complaint, occurred on January 24, 1946, at a place referred to as Black Lane Crossing, located approximately one mile north of the town of Cottonwood in Shasta County. It was further alleged that defendants were negligent in that they had permitted trees and brush to grow along the portion of the right of way immediately north and south of the crossing so as to obstruct the vision of persons crossing the track; that defendants permitted the road and road bed at the crossing to become full of holes and otherwise in a state of disrepair; that defendants failed to provide a signalman or automatic signaling device, and that defendants negligently operated the train. The complaint concluded with the allegation that the collision occurred as the proximate result of such negligence and that the plaintiffs thereby sustained the injuries for which this action was brought to recover damages.

Defendants' answer denied the allegations as to their negligence and affirmatively alleged that plaintiffs' injuries were the proximate result of their own contributory negligence. The case was tried before a jury on the issues so raised and resulted in verdicts in favor of the plaintiffs upon which judgment was entered and from which defendants have taken this appeal. Defendants' motion for a new trial was denied as was their previous motion for a directed verdict.

Appellants raise three points on this appeal; (1) that plaintiffs were guilty of contributory negligence as a matter of law and the trial court erred in denying defendants' motion for a directed verdict, (2) that plaintiffs' counsel were guilty of persistent, wilful and highly prejudicial misconduct, and (3) that the verdicts were given under the influence of passion and prejudice.

The evidence in regard to the alleged contributory negligence of the respondents discloses that Black Lane is a county road running in a general east-west direction and is between 12 to 13 feet wide. The railroad track runs approximately north and south and the main track is straight for more than a mile north of the crossing. A siding track parallels the main track at the crossing some 14 feet to the east of the main track. Both tracks are elevated on a fill approximately 4 feet high necessitating an incline in the road crossing the tracks which amounted to a 6.67% grade to the fill from a point 32 feet to the east of the center line of the siding track. There is no wig wag or other warning device at the crossing except the customary railroad crossing sign. The testimony concerning the condition of the surface of the crossing was conflicting as was the testimony concerning the obstructed view of the tracks by reason of trees, poles, and brush along the right of way.

Mr. Music testified that he approached the crossing from the east; that he stopped his truck at the bottom of the incline leading to the fill on which the tracks were located and looked to the north and south but that he could only see some 150 feet because of obstructions to his vision consisting of trees and brush along the right of way; that he then shifted into low gear and proceeded up the incline at a speed of approximately five miles per hour and again looked to the north for approaching trains but still could only see approximately 150 feet. He further testified that he did not look again after he reached the easternmost or siding track; that his attention was directed to the operation of his truck across the track so as to avoid the holes and rough spots in the pavement and that at no time did he see or hear the train approaching from the north with which he collided. The testimony of Mrs. Music which was in substantial accord with that of her husband was that she neither saw nor heard the train although she looked and listened.

Appellants contend that respondents failed to comply with the requirements of the "stop, look, and listen" rule as stated in Koster v. Southern Pacific Co., 207 Cal. 753, 279 P. 788, 793. In so contending, appellants rely upon the testimony of other witnesses that they could see 500 feet to the north from the bottom of the grade, to certain photographs introduced into evidence which appellants contend show that the view of the tracks to the north was unobstructed west of the right of way fence, and further show, according to appellants, that respondents could have observed the approaching train through the trees along the right of way as they proceeded up the grade to the track. Appellants in addition refer to other photographs depicting the condition of the road in order to prove that the road was not as rough as respondents testified. From the foregoing evidence they conclude that respondents failed to take reasonable precautions to determine whether a train was approaching the crossing while in a position of safety to do so, and thus failed to live up to the standard of care imposed by the requirements of the "stop, look, and listen" rule, which failure amounts to contributory negligence as a matter of law.

[1-4] Such argument not only wholly ignores the obvious conflict in the testimony but also the fact that respondents did stop, did look, and did listen. Whether the place selected by respondents to stop and look was the best possible place under the circumstances is immaterial. The operator of an automobile is under a duty to use only that care which a reasonably cautious man would have used under similar circumstances in selecting the place of view. Nelson v. Southern Pacific Co., 8 Cal.2d 648, 652, 67 P.2d 682; Pietrofitta v. Southern Pacific Co., 107 Cal.App. 575, 290 P. 597. After having so conducted himself, whether or not it was negligent for him to have then proceeded up the grade and across the track, likewise must depend upon whether a reasonable man would have so proceeded under the circumstances then existing. Nelson v. Southern Pacific Co., supra. We are unable to say as a matter of law that reasonable men would not have done as respondent husband did and therefore the question was properly left to the jury. In this respect the present case is analogous to Emmolo v. Southern Pacific Co., Cal. App., 204 P.2d 427, and the statements made therein are equally applicable to the instant case. Therefore it necessarily follows that since the jury, upon substantial, though conflicting evidence, reached its conclusion that respondents were not contributorily negligent as the verdict implies, we cannot interfere with such verdict. Crawford v. Southern Pacific Co., 3 Cal. 2d 427, 45 P.2d 183.

[5, 6] Appellants next urge that the judgment must be reversed by reason of the alleged misconduct on the part of respondents' counsel. Because appellants have devoted a major portion of their briefs to a discussion of such alleged misconduct we have carefully examined the entire record in this regard. From such examination it is readily apparent that while certain comments of respondents' counsel may well be termed acrimonious, intemperate and whol-

ly unnecessary, the same observation applies with equal force to some of the comments of defense counsel. The entire case appears to have been tried in an atmosphere of decidedly heated advocacy, which quite probably formed the basis of the trial court's comment that he might well declare a mistrial. However, that is not to say that under all of the circumstances the attacked comments of plaintiffs' counsel were so prejudicial as to warrant this court in reversing the judgment. In any event in all but two instances defendants' counsel made no assignment of misconduct nor did he request the court to admonish and instruct the jury to disregard the same. And in each of the two instances mentioned, neither of which appears to be necessarily prejudicial to defendants, the jury was properly instructed by the court. We cannot say that this is such an extreme case that the admonition and instruction by the court did not sufficiently remove the prejudicial effect, if any, of the attacked comments, which are properly before us. Aydlott v. Key System Transit Co., 104 Cal.App. 621, 286 P. 456. Furthermore, all of these matters were considered by the trial court on defendants' motion for a new trial, which was denied. It is the well established rule that a trial judge, who has witnessed all of the circumstances surrounding the alleged misconduct, is in a better position than an appellate court to determine whether or not the jury was prejudicially influenced, and its verdict the result of the asserted misconduct of counsel, and "his conclusion in the matter will not be disturbed unless, under all the circumstances, it is plainly wrong." Cope v. Davison, 30 Cal.2d 193, 203, 180 P.2d 873, 879, 171 A.L.R. 667. Applying this rule to the present case we cannot say that "under all of the circumstances", particularly in view of the ample evidence supporting the verdict, that the order of the trial court denying defendants' motion for a new trial was so "plainly wrong" as to warrant a different conclusion by this court.

Appellants' final contention that the verdicts of $20,000.00 in favor of Mrs. Music and $25,000.00 in favor of Mr. Music were excessive and the result of passion and prejudice induced by the alleged misconduct of plaintiffs' counsel, likewise is without merit. The record discloses that following the accident Mrs. Music was confined to a hospital for a period of thirty-five days. There is testimony that at the time of trial, nearly two years after the accident, she still suffered pain in her shoulders and arms, extreme nervousness, spasmodic shock, periodic fainting spells, severe headaches, extreme pain in her right leg necessitating rest periods of at least thirty minutes three times daily during which time the leg was required to be elevated, abdominal pains necessitating mechanical support, fractures of the right third, fourth, fifth, sixth and seventh ribs, fracture of the seventh left rib, and compound fractures of the last, second, third, fourth, fifth, sixth, and seventh vertebra, with resulting injury to her spinal nervous system. Mrs. Music testified that the result of such injuries made it impossible for her to carry on her normal household work or to assist in the milking of cows as she had previously done, or to otherwise assist her husband in the operation of their dairy farm. This testimony was corroborated by two of the physicians called by plaintiffs, who testified that her injuries were "definitely permanent". At the time of the trial she had a life expectancy of 20.20 years.

Prior to the accident Mr. Music was a man in good health, operating a dairy farm on which he and his wife did most of the general work. He had been a schoolteacher having a lifetime teaching certificate, and for several years prior to the accident had an average annual income of approximately $4,000.00. At the time of the trial his right leg was tender and weak, his ankle was stiffened, the thumb on his right hand had been amputated, his right shoulder was weak and painful, his right arm would continually go to sleep, he was suffering from curvature of the spine, his back pained whenever he bent over; as a further result of his skull fracture he had persistent headaches, could not remember, could not concentrate or read, and the hearing in his left ear had been impaired. The severity of his injuries left him unconscious for a period of twenty-one days after the accident, and he was released from the hospital after a total period of twenty-eight days.

Testimony of the two doctors previously mentioned was that in their opinion he had suffered permanent injury to his brain; that he would get no better and that it would be impossible for him to operate his farm as before; that he might do "a little puttering around" but that he could do no farming as such; that he would never be able to follow a gainful occupation because it would be impossible for him to concentrate for any length of time. Taking the mortality tables as shown by the record it appears that at the time of the trial he had a life expectancy of 16.72 years.

Appellants' final contention attacks the alleged excessive damages on two grounds, (1) that the testimony of the doctors called by plaintiffs was predicated wholly upon subjective symptoms and therefore the verdict was necessarily the result of speculation, and (2) that the "shocking amounts" of the verdict were the result of passion and prejudice incited by the deliberately calculated and highly prejudicial misconduct of plaintiffs' counsel.

[7] In regard to the first portion of such contention it appears from the record that counsel for defendants interrogated the doctors at length upon the same question. Their answers disclose that their testimony was based upon objective as well as subjective symptoms. However, even if it be assumed for this discussion that the doctors' testimony was predicated solely upon subjective symptoms, "it does not follow that the judgment should be set aside as excessive. Medical science and human experience teach us that the extent of personal injuries cannot be measured solely by objective signs. Injuries of traumatic origin may leave few, if any, outward signs, and yet a severe concussion of the brain or injury to the nervous system may result in far greater and more lasting pain and disability than do many types of injuries which are plainly visible." Coleman v. Galvin, 66 Cal.App.2d 303, 305, 306, 152 P.2d 39, 40; See also Johnson v. Pearson, 100 Cal. App. 503, 507, 280 P. 394.

[8-11] We turn then to the remaining portion of defendants' final contention. As stated in the early case of Aldrich v. Palmer, 1864, 24 Cal. 513, 516, "* * * the law does not attempt to fix any precise rules for the admeasurement of damages, but, from the necessity of the case, leaves their assessment to the good sense and unbiased judgment of the jury. * * * subject to review by the court, but it will never be disturbed unless the amount of the damages is obviously so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate consideration of the jury. The leading object of such actions is to obtain reasonable and just compensation for the injury sustained, comprehending both the present and the future. But to ascertain what is a fair and just compensation in such cases, is a judicial problem of difficult, if not impossible solution. None, however, are more competent to its proper solution than the jury." Although the foregoing rule has been stated numerous times and in varying language nevertheless the essence thereof has remained the same. See Brown v. Boehm, 78 Cal.App.2d 595, 178 P.2d 49, and cases therein cited. Applying the foregoing rule to the facts and circumstances of the present case it appears that considering "both the present and the future" the verdict of the jury was not "disproportionate" to the extensive and permanent injuries suffered by the respondents. Moreover, the same contentions as are made in this appeal were previously before the trial court upon defendants' motion for a new trial and were decided adversely to appellants. In view of the foregoing and our own examination of the record we cannot say that the judgment is without support in the evidence or that it is so outrageously excessive as to justify a conclusion that it was impelled by passion, prejudice or corruption. Brown v. Boehm, supra.

The judgment appealed from is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

91 Cal.App.2d 87

EMMOLO v. SOUTHERN PAC. CO. et al.

Civ. 7468.

District Court of Appeal, Third District, California.

April 2, 1949.

1. Railroads ⟹327(8)

One must be vigilant in crossing railroad track, and duty is not fulfilled by carelessly glancing up track and then blindly proceeding to cross in face of danger, but test of vigilance under particular circumstances will be determined by what reasonably cautious person would do under similar circumstances.

2. Negligence ⟹1, 136(14)

Conduct must be gauged in relation to all other material circumstances surrounding it and if such other circumstances admit of reasonable doubt as to whether questioned conduct falls within bounds of ordinary care, doubt must be resolved as matter of fact rather than of law.

3. Railroads ⟹350(19)

In action for injuries sustained in collision between truck and train at rural crossing, whether driver's choice of spot at which to stop, look and listen was that of a reasonably prudent man, exercising reasonable precautions for his own safety, was for the jury.

4. Statutes ⟹181(2), 188, 206

A reasonable construction of a statute is to be preferred, and effect is to be given to all its parts, including all the words therein contained, and the words are to be interpreted according to their common acceptation. Civ.Code, § 3542.

5. Railroads ⟹312(7)

Statute providing for sounding of certain warning devices for distance of at least 80 rods from place where railroad crosses "any street, road or highway," applies not only to public roads but applies also to private roads such as rural crossings leading to farms. Civ.Code, § 486.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Any Street, Road or Highway".

Appeal from Superior Court, Napa County; W. T. Belieu, Judge.

Action by Salvatore Emmolo, against the Southern Pacific Company and others to recover damages for injuries sustained in collision between truck and train. Judgment for plaintiff and defendants appeal.

Affirmed.

Coombs & Dunlap, of Napa, and David Dunlap, of San Francisco, for appellants.

Palmer & York and Francis H. Frisch, all of Napa, for respondent.

PEEK, Justice.

This is an appeal by defendants from a judgment in favor of the plaintiff in an action to recover damages for injuries sustained by him as the result of a collision between plaintiff's truck and defendants' train. Defendants' answer denied plaintiff's allegations of negligence and affirmatively alleged that he was guilty of contributory negligence. There were two trials. The first jury was unable to agree and was discharged. The second returned a verdict for plaintiff. Defendants' motion for a new trial was denied and the judgment which was entered pursuant to the verdict forms the basis of the present appeal.

Two issues are presented by appellants, (1) that plaintiff was guilty of contributory negligence as a matter of law and (2) that the provisions of section 486 of the Civil Code relative to the sounding of warning devices do not apply to the crossing here involved, and therefore the trial court erred in instructing the jury that the failure of defendants to give any warning signal constituted negligence on their part. Our examination of the record leads to the conclusion that neither contention can be sustained and that the verdict and judgment should be affirmed.

A summary of the evidence disclosed by the record shows that immediately prior to the accident plaintiff was driving a one and one-half ton truck to a farm leased by him and located approximately six miles north of the city of Napa. The truck, which was comparatively new and in good mechanical condition was loaded with farm equipment as was the trailer attached to it. The overall length of the truck and trailer was approximately forty-nine feet. Access to the farm is by a lane, which also serves an adjacent farm and runs at a right angle from a state highway which parallels a branch line of the defendants' tracks. To reach the farm it was necessary to cross a rather narrow bridge before crossing defendants' tracks, which tracks are about fifty feet westerly of the highway. No gates or other obstruction were maintained at any point between the highway and the farms. There was no warning device or sign at the crossing. However the defendants did maintain one of the customary signs at rural crossings advising that permission to pass over the right of way was revocable at any time. The road or lane was open at all times. Apparently because of the length of the equipment and the width of the lane and bridge, plaintiff in order to turn from the highway into the lane, was compelled to make a wide sweeping turn necessitating the use of the entire width of the highway in so doing. Immediately before commencing his turn he stopped approximately fifty feet north of the entrance to the lane to allow an employee to alight from the truck to control traffic while plaintiff maneuvered the equipment. As he waited for the employee to take a position on the highway, plaintiff looked northwesterly through the right front door window and rear window of the truck. His vision, according to his testimony, was obscured to "some" extent by trees and brush along defendants' right of way, approximately 250 to 300 feet from where his truck was stopped. How far he could see past the obstruction does not appear, although the record does disclose that the tracks are straight for a considerable distance, both north and south of the crossing. Neither seeing nor hearing a train he proceeded into the lane and crossed the bridge. The width of the bridge allowed only about a one and one-half foot clearance on either side of the truck. Because of this fact and the length of his equipment his attention was apparently taken up with the operation of the truck in aligning it on the lane. He did not look again until the truck and trailer were almost wholly on the lane. At that time he was approximately fifteen feet from defendants' tracks. Upon seeing the train he immediately applied his brakes but he was unable to stop in time to avoid the collision. The testimony of plaintiff as well as of other witnesses was that from the time he entered the lane until he endeavored to stop, his truck was proceeding at a slow rate of speed.

In support of their first contention, which is primarily predicated upon the so-called stop, look and listen rule as enunciated in cases such as Koster v. Southern Pacific Co., 207 Cal. 753, 279 P. 788, defendants argue that at no time did plaintiff have a "reasonably assuring view of the track", that his first look was in effect no look at all since it was too soon considering the speed of the truck, the speed of the train and the distance which plaintiff had to travel from that point to the point where the collision occurred; that plaintiff's second look likewise amounted to no look for the reason that admittedly he was unable to stop his equipment in time to avoid the collision, and that therefore he was guilty of contributory negligence as a matter of law.

In the case of Pietrofitta v. Southern Pacific Co., 107 Cal.App. 575, 290 P. 597, 599 (hearing in Supreme Court denied), this court was presented with a very similar factual situation, and like contentions were made; that is, the accident occurred at a rural crossing; the driver's view was obstructed; the road was not good, causing him to give more than ordinary attention to his driving, and that no warning was given as required by section 486 of the Civil Code.

[1] The conclusion reached in that case appears to be equally applicable here; that "It is true that one must be vigilant in crossing a railway track, which is itself a warning of danger, and that the duty to exercise care in doing so is not fulfilled by carelessly glancing up the track and then blindly proceeding to cross in the face of danger. But the test of vigilance under particular circumstances will be determined by what a reasonably cautious person would do under similar circumstances."

[2] In a recent case involving the question of the contributory negligence of a motorist at a railroad crossing the Supreme Court stated that "* * * the actor's

conduct must always be gauged in relation to all the other material circumstances surrounding it and if such other circumstances admit of a reasonable doubt as to whether such questioned conduct falls within or without the bounds of ordinary care then such doubt must be resolved as a matter of fact rather than of law * * *". Toschi v. Christian, 24 Cal.2d 354, 360, 149 P.2d 848, 852. While the Toschi case is not entirely analogous since it involved a crossing protected by flagmen, nevertheless such a difference is only one of the "material circumstances" by which the "actor's conduct must always be gauged" and cannot serve to change the question herein involved from one of fact to one of law. In this regard the following language appearing in the Toschi case, supra, 24 Cal.2d at page 360, 149 P.2d at page 851 is apropos:

"Standards of care are typically relative; rules of law are basically absolute. Hence, in regard to negligence, any attempt to screen factual conduct into legal classifications through a sieve of absolute law will be impracticable whenever the related circumstances admit of materially conflicting inferences."

[3] Appellants' contention that plaintiff did not obtain, as they stated, a "reasonably assuring view" of the tracks, is but to argue the weight of the evidence. Furthermore there is testimony to sustain the implied finding of the jury that plaintiff did obtain a view, which to a reasonably prudent man would give reasonable assurance of his safety. Therefore applying the rule as enunciated in the Pietrofitta and Toschi cases, supra, to the facts and circumstances of the present case, we can no more say that plaintiff herein was guilty of contributory negligence as a matter of law than we could in the earlier Pietrofitta case. The plaintiff Emmolo did stop, he did look, and he did listen. Whether or not his choice of view was that of a reasonably prudent man, exercising reasonable precautions for his own safety, was a question properly left to the jury. Nelson v. Southern Pacific Co., 8 Cal.2d 648, 652, 67 P.2d 682; Crawford v. Southern Pacific Co., 3 Cal.2d 427, 45 P.2d 183. Equally applicable to the above question are the views expressed in Music v. Southern Pacific Co., Cal.App., 204 P.2d 422.

[4, 5] Defendants' argument in support of their second contention is that section 486 of the Civil Code applies only to public roads and not private roads such as the one involved in the present case which admittedly only went to the two farms previously mentioned. The pertinent portion of said section provides for the sounding under specified conditions of certain named warning devices for "a distance of at least eighty rods from the place where the railroad crosses *any street, road, or highway* * * *". (Italics ours.) Neither party has cited nor has our own research disclosed any case passing upon the precise contention made. However, a reasonable construction of a statute is to be preferred and effect is to be given to all of its parts, including all the words therein contained which are to be interpreted according to their common acceptation. Civ.Code, sec. 3542; 23 Cal.Jur. 722, 749, 758. Turning to the statute, particularly the above underscored portion thereof, we find that it applies to "any" street, road, or highway. The word "any" is defined in part as "Indicating a person, thing, etc., as one selected without restriction or limitation of choice, with the implication that every one is open to selection without exception; one, no matter what one; all, taken distributively; every; * * *". (Webster's International Dictionary.) Thus the use of the word "any" in the statute negatives the contention that the statute is restricted to public roads. Such an interpretation is consistent with the few cases that bear on the question. See Orcutt v. Pacific Coast Ry. Co., 85 Cal. 291, 24 P. 661; Vance v. Atchison etc. Ry. Co., 9 Cal.App. 20, 98 P. 41; Gregoriev v. Northwestern Pacific R. Co., 95 Cal.App. 428, 273 P. 76.

The judgment and the order denying defendants' motion for judgment notwithstanding the verdict, are both affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

33 Cal.2d 704

SILVA et al. v. MERCIER.

S. F. 17412, 17517.

Supreme Court of California, in Bank.
March 31, 1949.
Rehearing Denied April 28, 1949.

1. Trade unions 🔑8

A collective bargaining agreement between trade union and employer, providing that all nonunion milkers presently employed or subsequently hired by employer should apply for membership in dairy employees' union and become members thereof within specified times, required nonunion employees hired by employer, as well as those in his employment at date of agreement, to apply for membership in and become members of union within prescribed times, and hence required all of employer's employees to become union members, though contract contained no such express provision.

2. Injunction 🔑57

A collective bargaining agreement requiring all nonunion milkers presently employed or subsequently hired by employer to apply for membership in and become members of dairy employees' union within prescribed times, was sufficiently certain to warrant granting of injunctive relief to union members against employer's breach of agreement by retaining employees failing to join union.

3. Injunction 🔑57

A collective bargaining agreement between trade union and employer, requiring all nonunion milkers presently employed or subsequently hired by employer to apply for membership in and become members of dairy employees' union within specified times did not require employer to compel his employees to join union, so that injunction against employer's breach of agreement by retaining nonunion employees was not improper as ordering employer to compel his employees to join union.

4. Injunction 🔑57

Where trade board, organized pursuant to collective bargaining contract between trade union and employer for settlement of parties' disputes, decided that words "cessation of the present war" in provision of contract that it should remain in force until six months after such cessation meant when joint declaration was made by Congress that war was over, employer was barred from maintaining that war ended when Japan surrendered as basis for employer's contention, in union members' action to enjoin employer's breach of agreement, that contract was no longer in effect.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Cessation of Present War".

5. Contracts 🔑284(4)

When agreement provides for determination of some proper matter to be settled by final decision of third person or persons, submission to and determination of matter by him or them is binding on parties, whether arrangement is technically a common-law or statutory arbitration or something akin thereto.

6. Appeal and error 🔑909(5)

On appeal from order granting labor union members a preliminary injunction against employer's breach of collective bargaining agreement on verified complaint alleging that trade board, established under agreement for settlement of parties' disputes, duly and regularly convened and decided meaning of words, "six months after the cessation of the present war," in provision of contract that it should remain in force until such time, Supreme Court must conclude that hearing with notice was given by board and that its action was regular in all respects.

7. Trade unions 🔑8

A determination by trade board, established under collective bargaining agreement between trade union and employer to settle parties' disputes, as to meaning of phrase "cessation of the present war" in contract provision as to duration of contract, was binding on appeal from order granting union members preliminary injunction against employer's breach of agreement.

8. Appeal and error 🔑863

Whether congressional joint resolution, terminating certain emergency and war powers and repealing specified statutory provisions, and President's declaration that hostilities had ceased, were within contemplation of arbitrators' determination that words "cessation of the present war" in provision of collective bargaining agreement as to duration thereof meant that war would not be over until Congress adopted joint declaration that war was terminated, should be decided by trial court on competent evidence, not by Supreme Court on appeal from order granting preliminary injunction against employer's breach of such agreement. Act Cong. July 25, 1947, 61 Stat. 449; Proclamation No. 2714, 50 U.S. C.A.Appendix, § 601 note.

◆

Appeal from Superior Court, Santa Clara County; M. G. Del Mutolo, Judge.

Action by John I. Silva, individually and as a member, representative, and Secretary-Treasurer of Dairy and Creamery Employees Local Union No. 304 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and on behalf of all the members of such union, against Clem Mercier, to recover damages for and enjoin defendant's breach of a collective bargaining agreement between him and the union. From a minute order and a formal written order directing issuance of a preliminary injunction, defendant appeals.

Appeal from minute order dismissed, and formal written order affirmed.

Prior opinion 187 P.2d 60.

Rogers & Clark and Webster V. Clark, all of San Francisco, and Bruce F. Allen, of Cupertino, for appellant.

James F. Galliano and C. Paul Paduck, both of Oakland, for respondent.

CARTER, Justice.

In an action for damages and injunctive relief plaintiff, a representative of a dairy workers' union, on behalf of the union members and himself, obtained a preliminary injunction restraining the breach of a collective bargaining agreement between the union and defendant, the employer.

On August 29, 1946, a minute order was entered in this action directing the issuance of a preliminary injunction, and on January 23, 1947, a formal written order directing the issuance of a preliminary injunction upon the filing of an undertaking by the plaintiff in a specified amount was signed and filed by the trial judge. A separate appeal was taken from each of these orders. A question has been raised as to which order is the final appealable one, but by reason of the record and stipulation of the parties, it is clear that the final appealable order was that of January 23, 1947. Therefore, the appeal from the minute order, No. S.F. 17,412, should be dismissed.

The preliminary injunction granted by the court restrained defendant employer from employing or continuing to employ any workmen unless such workmen make application for and become members of plaintiff union. It was based upon the complaint and supporting affidavits on file. No counter affidavits were filed.

It appears that on June 1, 1943, defendant employer and the union entered into a trade agreement wherein it was provided that:

"Section I. Recognition of the Union: The Employer hereby recognizes the Union as the sole collective bargaining agency for all employees working for the Employer and within the jurisdiction of the Union, who are, at the time of the signing of this agreement, or thereafter become members of the Union.

"Section II. Employment: All non-union milkers presently employed or hereafter hired by the Employer shall make application for membership into the Union within seven (7) days from the date of the signing of this agreement, or from the date of hiring by the Employer (whichever the case may be), and each shall become a member of the Union in good standing within thirty (30) days from the date of said hiring unless the Union's action is delayed beyond said 30-day period. Whenever the Union is unable to furnish a milker in emergencies the Employer shall be free to provide his own emergency milker for the emergency but such milker must be replaced by a Union milker when one is available.

"Any employee suspended or expelled by the Union for violation of the Constitution and By-Laws of the Union shall, upon seven (7) days written notice being given by the Union, be laid off until such time as he shall have become reinstated in the Union." Following the foregoing there are set forth wage schedules, hours, duties of employees, working conditions, and means for settling disputes under the agreement.

Defendant is charged in the complaint with retaining in his employ employees who have failed to join the union.

[1] Clearly the purport of the agreement is that, while the defendant employer may hire non-union employees, such employees as well as those in his employment at the date of the agreement must, within the prescribed time, apply for membership and become members of the union. Any other construction would make meaningless the provisions in section II (above quoted) for application for membership within seven days. Section II is explicit that *all* non-union milkers now or hereafter employed *shall* make application for membership in the union within the specified time and each *shall* become a member within a certain time. The terms are capable of only one construction, namely, that all of defendant's employees must become members of the union.

It is true, as argued by defendant, that there is no provision in the contract that all employees must be members of the union, in those words, but the words used express that meaning. There is a difference between *becoming* a member of the union and being such at the outset, that is, being a member when employed. The latter situation was the case in the contracts involved in such cases as Montaldo v. Hires Bottling Company, 59 Cal.App.2d 642, 139 P.2d 666; Ribner v. Rasco Butter & Egg Company, 135 Misc. 616, 238 N.Y.S. 132; Harper v. Local Union No. 520, I.B. of E.W., Tex. Civ.App., 48 S.W.2d 1033; and Hudson Bus Transportation Drivers' Association v. Hill Bus Company, 121 N.J.Eq. 582, 191 A. 763. In those cases each employee was required to be a member *when employed.* In the instant case that is not required. The employer may hire a non-union personnel but the employee must thereafter become a member of the union. But that does not make the agreement any the less clear that there is a requirement that the employees become members after employment. The agreement as a whole is a collective bargaining arrangement between the employer and the union as representative of the employees. If the employees were not required to become union members, and the union would represent only union members, there might be little left upon which the agreement could operate where the employer decided to have a wholly non-union staff. It is not to be supposed that the parties intended to have their solemn agreement subject to such complete ineffectiveness. It is true, as pointed out by defendant, that the phrase in section I (who would become members of the union) conveys the inference that some of the employees may not be union members, but that means lacking that status when employed. They still must *become* members after employment as required by section II. Nor do the specific provisions relative to emergency employees or employees expelled from the union in the last two sentences of section II change the construction of the agreement. The provision dealing with emergency milkers merely carries out and applies to a specific situation, it being the general purport of the agreement that the employer may hire a non-union worker but that all employees must become union members. The last sentence covers the specific instance of an expelled union member who might not be embraced within the general provision requiring all employees to become members of the union.

[2, 3] The foregoing discussion also disposes of defendant's contention that the agreement is not sufficiently certain to warrant the granting of injunctive relief. The inevitable implication is that defendant must not retain employees who do not become members of the union. Likewise, properly interpreted, the agreement does not require the employer to compel employees he hires to join the union. It means that he cannot retain them unless they join the union. Thus it cannot be said that defendant by the injunction is being ordered to compel a third person to do something—to compel his employees to join the union. He must discharge them if they do not become union members.

[4] It is urged that the contract is no longer in effect by reasons of a clause therein that it shall remain in "full force and effect until six months after the cessation of the present war." It is earnestly argued by plaintiff that the war is not over until there has been a joint congressional or presidential proclamation to that effect or until peace treaties have been signed with the various enemy nations; and by defendant that the war ended when Japan surrendered in August, 1945; that that is the commonly accepted date of the termination of the war and the parties used the words "cessation of the present war" in their common and popular sense. There are cases interpreting such clauses in both statutes and contracts and varying results have been reached. See, cases collected, Hoover v. Sandifur, 25 Wash.2d 791, 171 P.2d 1009, 168 A.L.R. 173; 47 Col.L.Rev. 255.

The foregoing argument need not be settled by this Court inasmuch as on the face of the proceedings defendant is barred from maintaining his position. The contract (section X) provides that the parties desire to settle amicably matters of difference and for that purpose "upon the execution of this agreement a Trade Board shall be organized, to be composed of three representatives of each contracting party. The Trade Board shall elect a Chairman and Secretary and adopt rules of procedure. Meetings of the Trade Board may be called by the Chairman thereof and must be called by him upon request of any two members of said Board. Notice of meetings shall be given in writing at least three days prior to the date thereof. All disputes and questions between employer and employee or between the parties hereto relative to the meaning, *interpretation* or alleged violation of the provisions of this contract shall be referred to said Board, and the decision of the majority of the members of the Board upon any matter referred to it pursuant to the terms of this agreement *shall be final* and shall be enforced by the parties hereto." [Emphasis added.] Following the above, provision is made for settling disputes by first a mediator and then an arbitrator when the "Trade Board" is "unable to arrive at a satisfactory settlement" within four days. On December 26, 1945, the "Trade Board" decided that "cessation of the present war" meant when a joint declaration by Congress was made that the war is over.

[5] When an agreement provides for the determination by a third person or persons of some proper matter to be settled and that the decision shall be final, a submission to and determination by him or them of the matter is binding on the parties. That is true whether the arrangement is technically a common law or statutory arbitration or something akin thereto. See, Cockrill v. Murphis, 68 Cal.App.2d 184, 156 P.2d 265; Rives-Strong Bldg., Inc., v. Bank of America, 50 Cal.App.2d 810, 123 P.2d 942; 3 Cal. Jur. 67–70. As above seen, the contract in the instant case authorizes the "Trade Board" to "interpret" the contract, thus empowering it to give meaning to the phrase "cessation of the present war." There can be no escape from the conclusion that the determination of said board is binding upon the parties to this action.

[6] There is nothing here to impeach or show any irregularity in the determination of the "Trade Board". Defendant's only contention is that he was not accorded a hearing by the Board when it made its determination.

It must be remembered that we have before us an order granting a preliminary injunction based upon the verified complaint of plaintiff and supporting affidavits, and the trial court accepted them as true. It is alleged in the complaint that pursuant to section X of the agreement (the section providing for the settlement of disputes by the "Trade Board") "there has been and is now, * * * a regularly and duly established Trade Board for the purpose of functioning in accordance with said Section X, and particularly for the purpose of deciding disputes and questions between employer and employee or between the parties to said contract relating to the meaning, interpretation or alleged violations of the provisions of said contract.

"That on December 26, 1945, the said Trade Board *duly and regularly convened, pursuant* to said Section X, and then and there *regularly and duly determined and decided* the meaning and interpretation of the words 'six months after the cessation of the present war' appearing in Section XI of said collective bargaining agreement as meaning 'six months after a joint declaration by The Congress of the United States that said war is terminated." [Emphasis added.] Hence we must conclude that, assuming a hearing was necessary, a hearing with notice was given and that the action of the "Trade Board" was regular in all respects. What may develop at the trial with reference to the action of the "Trade Board", or whether its action is binding, or what may be shown to be the intent of the parties as to the meaning of the words, "cessation of the present war", is not now of concern.

[7] It has been held that the issue of whether a contract containing an arbitration clause exists, or is still in effect, is not within the purview of the arbitration clause for the reason that if there is no contract there is no provision for arbitration. Hanes v. Coffee, 212 Cal. 777, 300 P. 963; Stetson v. Orland Oil Syndicate, Ltd., 42 Cal.App.2d 139, 108 P.2d 463; Friedlander v. Stanley Productions, 24 Cal.App.2d 677, 76 P.2d 145; see, Abraham Lehr, Inc., v. Cortez, 57 Cal.App.2d 973, 135 P.2d 684; Johnson v. Atkins, 53 Cal.App.2d 430, 127 P.2d 1027; Williston on Contracts, Rev. Ed., § 1920, Vol. 6, p. 5369. It has also been held that where there has been a submission and an award (in the absence of fraud, at least) the award is binding although the arbitration contract has limitations. See, Rest. Contracts, §§ 445, 550; Williston on Contracts, Rev.Ed., §§ 1920, 1927. Regardless of the interpretation which may be given generally to the phrase, "cessation of the present war", the submission and determination in the instant case was made before the contract would have terminated and was merely to interpret the contract. Under those circumstances we believe the determination was binding insofar as the case now presented is concerned.

[8] It has been suggested that since the determination by the arbitrators that the words used in the contract, "cessation of the present war", meant that the war would not be over until after the adoption of a "joint declaration by The Congress of the United States that said war is terminated", and since the order of the trial court here involved, the Joint Resolution of Congress of July 25, 1947, U.S. Code Cong.Serv., 80th Cong., 1st Session, pp. 453–456, 61 Stat. 449, and the declaration of the President on December 31, 1946 that hostilities had ceased, U.S. Code Cong.Serv. 79th Cong., 2nd Session, 1946, p. 1750, Proclamation No. 2714, 50 U.S.C.A.Appendix, § 601 note, are pertinent. It is doubtful that the Joint Resolution has any bearing on the situation inasmuch as it does not purport to declare the war terminated. It is entitled a resolution to "terminate certain emergency and war powers". It is said therein: "The following *statutory* provisions are hereby repealed", and then lists them. In any event, whether such resolution was within the contemplation of the arbitrators' determination should be decided by the trial court with any competent evidence that will throw light thereon. The same comment is applicable to the President's declaration.

The appeal, No. S.F. 17,412, is dismissed. The order granting the preliminary injunction (appeal No. S.F. 17,517) is affirmed.

GIBSON, C. J., and TRAYNOR and SCHAUER, JJ., concur.

90 Cal.App.2d 608

PEOPLE v. KLINKENBERG.

Cr. 4259.

Supreme Court of California, in Bank.
April 14, 1949.

On petition for rehearing.

Denying rehearing 204 P.2d 47.

PER CURIAM.

Hearing denied by Supreme Court.

Concurring Opinion on Denying Petition for Hearing.

SCHAUER and CARTER, Justices.

In joining our associates in denying appellant's petition for a hearing in the Supreme Court we deem it proper to point out that on the record before us such denial signifies only that we find no miscarriage of justice apparent on the face of the opinion; in particular, such denial does not constitute an approval of the discussion definitive of circumstantial evidence and relative to the failure of the trial court to give the instructions on that subject as requested. (See People v. Bender 1945, 27 Cal.2d 164, 175–176, 163 P.2d 8; People v. Hatchett (1944), 63 Cal.App.2d 144, 155, 146 P.2d 469; People v. Rayol (1944), 65 Cal.App.2d 462, 464, 150 P.2d 812.)

91 Cal.App.2d 189

PEOPLE v. FRANKENTHAL et al.

Civ. 3741.

District Court of Appeal, Fourth District, California.

April 8, 1949.

1. Taxation 🔑**593(1, 3)**

Even though certificate issued by the state is prima facie evidence of payment by employing unit of the amount of wages for employment by employers set forth therein, such prima facie evidence need not be accepted rather than the evidence opposed to it, neither does it preclude the trial court from considering the weakness or uncertainty of the evidence upon which such finding was made and such certificate was issued. Gen.Laws, Act 8780d, § 45.10.

2. Evidence 🔑**588, 594**

The trial judge has the inherent right to disregard the testimony of any witness or the effect of any prima facie showing based thereon when he is satisfied that the witness is not telling the truth or his testimony is inherently improbable due to its inaccuracy or its uncertainty due to lapse of time or otherwise, and all such things may be considered in determining the weight that should be given to the statement of a witness or the certificate based thereon, although there is no adverse verbal testimony adduced.

3. Appeal and error 🔑**994(3)**

An appellate court cannot control a finding or conclusion denying credence unless it appears that there are no matters or circumstances which at all impair the accuracy of the testimony.

4. Taxation 🔑**593(3)**

In action to recover unemployment insurance tax, evidence sustained finding of trial court that defendant had not employed four or more persons for 20 or more weeks during 1938. Gen.Laws, Act 8780d, § 45.10.

5. Appeal and error 🔑**762**

A point raised for the first time in appellant's reply brief will not be considered.

◆

Appeal from Superior Court, Fresno County; Arthur C. Shepard, Judge.

Action by the People of the State of California, successor to California Employment Stabilization Commission, successor to California Employment Commission (formerly Unemployment Reserves Commission) against Hyman Frankenthal, doing business as Frankenthal Company, and others, for tax allegedly due under the California Unemployment Insurance Act. From adverse judgment, the plaintiff appeals.

Judgment affirmed.

Fred N. Howser, Atty. Gen., Chas. W. Johnson, Deputy Atty. Gen. and William L. Shaw, Deputy Atty. Gen., for appellant.

L. Kenneth Say, of Fresno, for respondent.

GRIFFIN, Justice.

Plaintiff and appellant, in 1942, brought this action against defendant and respondent to collect contributions and interest for tax alleged to be due from defendant in 1938, under the provisions of the California Unemployment Insurance Act, Stats. 1935, Chap. 352, p. 1226, as amended, Deering's California General Laws, Vol. 3, Act 8780d, Sec. 45.10. The action was tried and judgment rendered in favor of defendant in 1947. Plaintiff's appeal was perfected in 1948, and it now claims the original tax assessed, plus interest to date.

The only question presented is whether the finding of the court to the effect that defendant was not subject to the act and did not employ, between April 1st, 1938, and December 31, 1938, four or more individuals in 20 weeks, is supported by the evidence. Plaintiff, in its complaint, alleged otherwise.

In 1937, the firm of Richmond-Samuels operated a packing shed at Sanger. Their license to so operate was revoked and they were indicted for some crime. Frankenthal operated the shed during the year 1938. The entire plant was destroyed by fire early in 1939. At the trial plaintiff took the position that the defendant was liable upon either of two theories: (1) That defendant had succeeded to the business of a person who was subject to the act; and (2) That independently of previous operations, defendant had employed, in 1938, four or more persons for 20 or more weeks during that year.

Plaintiff now concedes that the first theory, in the light of the evidence adduced at the trial, cannot be sustained, and it was abandoned. The record indicates and it was practically admitted at the trial that four or more persons were employed for *19* weeks during that year. The basic issue before the trial court was whether there was a *20th week* in which four or more persons were employed.

There is evidence that the first carload of grapes were shipped on July 28, 1938, and within 19 weeks thereafter the last shipments were made, and that the season started ten days before that time, or July 18, 1938. Accompanying defendant's report of employees employed for the quarter ending September 30, 1938, defendant, on October 25, 1938, wrote to plaintiff that the company "only commenced operating July 1, 1938", and therefore "We are not enclosing a check covering the amount of taxes *show* on this report as we have not been operating with four or more employees for 20 weeks * * * Therefore no tax is due * * *"

Upon written demand of plaintiff, defendant, on April 12, 1939, furnished a report as to the number of persons employed by him during the year 1938, and of the particular weeks they were employed. This report shows that there were only 19 weeks when a number in excess of three per week were thus employed and that three were employed for the three weeks immediately preceding that period and two thus employed for the two weeks following that period. Apparently, plaintiff's auditor was not satisfied with this report and he set out to audit defendant's books. A fire had occurred and burnt most all of the records of the defendant. Investigators interviewed the workmen as to the length of time they worked for defendant and they took some statements from a few of them. They examined some of the time cards kept by defendant, which were recovered in his Texas office, but these cards only reflected employees' time after the middle of July and for the 19 weeks admitted. From these "records" and the additional statements of the employees, an audit was made which determined that defendant was subject to the act. The auditor also found that defendant had suceeded to the business of a person or firm (Richmond-Samuels) who was subject to the act, and defendant was therefore also liable for this reason. (This claim has been abandoned on appeal.) Plaintiff billed defendant for the tax it found due from April 1, 1938 to December 31, 1938. Contributions claimed were $960.75, plus interest amounting to $769.56.

On June 3, 1947, plaintiff filed with the court in this action, a certificate to that effect, under sec. 45.1 of the act.

One of the unverified statements, dated February 1, 1940, signed by a former employee (Grass) and received in evidence in support of plaintiff's audit reads:

"I—state that I started to work 2 weeks before the regular packing season started—in 1938—and continued to work at least 1 week after the packing season closed. I further state that at least 3 other men were employed at the time above specified."

Four witnesses were produced by plaintiff who it claims worked during the 20th week. Grass, who signed the statement above mentioned, testified that he had been working for Richmond-Samuels; that he had been working for the defendant "about a week", "when the packing season started" and that he worked "about a week afterwards and that Mr. Stillwell, Mr. Lester, and I think * * * Hovsepian were working with me before the season started"; that as to the period after the close of the season he "imagined" two Lesters were working there; that Stillwell was there and he "thought" Wilbur was there, he was "not positive now"; that to the best of his knowledge Hovsepian was there. On cross-examination he stated he did not know the exact date he started to work or the date he quit; that he was only "giving his best guess"; that outside of Clyde Lester, Stillwell and himself, he was not certain.

Stillwell testified that he worked before the packing season started, he "judged about a week", and he worked about a week after the packing operations shut down, but did not remember the days when he worked; that he remembered Grass and Clyde Lester worked after the close of the season; that three or four of them worked but he didn't know who they were; that he did not know how long the packing season lasted.

E. Lester testified that he "thought he worked a few days" before the packing season started * * * it might be a week, it might be a shorter period"; that he was "pretty positive" Stillwell was there as well as one Jungbauer and also C. Lester; that as to Grass, he didn't know when he started; that whether they started to work after he came, he could not tell "because I just don't remember". On cross-examination he testified he kept the time book but did not know the exact days when he went to work or when he quit, whether he worked 16 weeks or 19 weeks; that his time book burned up; that he knew it didn't take very long to close the shed up after the packing was over; that he subsequently filed a claim for unemployment insurance and was paid by the plaintiff but he did not know if it was for the year 1938; that he remembered he had a deduction "off his check" but did not remember the year.

Jungbauer, the bookkeeper, testified he did not remember whether or not he went to work for defendant on July 1st, 1938, but he did continue on at the plant after the season closed; that a few of the employees were on the pay-roll in Texas and came here to help out for a short period; that boxes were made for packing purposes but he could not say that was done before the season was opened; that he did not know how long the season lasted that year and would not "venture a guess" because he did not remember; that as bookkeeper he made up the report sent to the plaintiff in 1938, showing employment of four or more for 19 weeks only.

Clyde Lester then testified that he worked for defendant company in Texas and came here just before the season started but did not know the date; that the time cards kept by him showed that there were 19 weeks of employment in 1938, in which four or more were employed, i. e. for the packing season, from the time it started until it finished, and that it took into consideration the cleaning up before the packing started "* * * from the time the deal started, the first man on the pay-roll until the deal was finished". He testified that plaintiff's auditor examined these cards and that the auditor told him that they showed 19 weeks and that he told the auditor "It looks like a mistake in trying to hang it onto Frankenthal" and that the auditor said "That is right".

The auditor then testified that he found, from an audit of the books, that Grass did not work before the season started but did work one week afterwards; that he found that F. Stillwell started work on July 1st, 1938, and worked "intermittently" until the season started; that E. Lester started on the week ending July 16th and Clyde Lester went on the pay-roll on June 1st; that the time cards showed Jack Stillwell did not go to work before the beginning of the season; that Hovsepian started with the season; that Jungbauer was not even on the time cards until the season started.

Clyde Lester then testified that Grass was employed by a company making boxes for defendant just before the season opened; that he thought it was in 1938.

Floyd Stillwell testified he began working for defendant just a few days in advance of the fruit season in 1938, as he "recalled it."

One Kuckenbecker testified he worked for defendant and could not remember the exact year but according to his best recollection it was in 1938, and he "supposed" he worked in advance of the regular season but "it would be very hard" to estimate how long before, whether "one day or two days or how long it was".

Plaintiff, in its final audit, determined that there were four employees shown employed prior to the regular fruit season, to wit, one Frisch, Clyde Lester, one Stephens, and Floyd Stillwell. However, he testified his audit was based on the statements of the employees, plus the time cards, and that the time cards did not show that there were four or more people working there for a period in excess of 19 weeks.

Defendant then called Clyde Lester as his witness. He testified there was "very little" advance work done before the season opened, i. e., "a few days", and before the season was over they started cleaning up and it was practically all cleaned up except "a few days maybe". He previously testified that Stephens had been working in Texas and came to Sanger "after the deal started" and "left before the season was over"; that his name first appears on the pay-roll as of July 1st, as "buyer-manager Texas establishment"; that Frisch was a buyer in Texas and Sanger and that he could not say that he came ahead of the season because he "worked on the Texas deal also".

We have given more attention to and have set forth in detail more of the evidence than would ordinarily have been done, to show the uncertainty and confusion in the testimony as to the time when the employees were working and the number who worked during that season, to show the evidence from which plaintiff concluded that defendant came under the act, and to show the evidence the trial court considered in arriving at an opposite conclusion.

[1-3] Even though the finding of plaintiff, as evidenced by its certificate under sec. 45.1, "shall be prima facie evidence of the payment by the employing unit of the amount of wages for employment by employers set forth therein", etc., it cannot be said that such prima facie evidence must be accepted, rather than the evidence opposed to it, or that the trial court may not consider the weakness or uncertainty of the evidence upon which such finding was made and such certificate was issued. The trial judge has the inherent right to disregard the testimony of any witness or the effect of any prima facie showing based thereon, when he is satisfied that the witness is not telling the truth or his testimony is inherently improbable due to its inaccuracy or its uncertainty due to lapse of time or otherwise. All of these things may properly be considered in determining the weight that should be given to the statement of the witness or the certificate based thereon, although there be no adverse verbal testimony adduced. Bellus v. Peters, 165 Cal. 112, 130 P. 1186; Brandt v. Brandt, 85 Cal. App. 720, 260 P. 342; Simon Newman Co. v. Woods, 85 Cal.App. 360, 259 P. 460; Rogers v. Burnham, 140 Cal.App. 336, 35 P.2d 329; Tretheway v. Tretheway, 16 Cal. 2d 133, 104 P.2d 1033; Turman v. Ellison, 37 Cal.App. 204, 174 P. 396; Estate of Stone, 59 Cal.App.2d 263, 138 P.2d 710; Bartholomai v. Owl Drug Co., 42 Cal.App. 2d 38, 108 P.2d 36; 10 Cal.Jur. p. 1140, sec. 360; 10 Cal.Jur. p. 1143, et seq., secs. 362, 363; Sec. 1847 C.C.P. The trial judge was the arbiter of the credibility of the witnesses. An appellate court cannot control a finding or conclusion denying credence, unless it appears there are no matters or circumstances which at all impair the accuracy of the testimony. Davis v. Judson, 159 Cal. 121, 113 P. 147; People v. Bartol, 24 Cal.App. 659, 142 P. 510; 10 Cal.Jur. p. 1146, sec. 364.

[4] The transactions involved in the instant action took place in July and August, 1938. A purported account was made by defendant from time cards kept by him.

These time cards, as kept, fully support the trial court's finding. Based upon interviews with the employees made nearly two years thereafter, whose testimony does not now entirely support these signed statements which were prepared by plaintiff, plaintiff concluded that defendant came within the act. Rather than press that claim within a reasonable time, it waited until after a fire had destroyed many of defendant's records. In March, 1942, nearly four years later, this action was filed and was not brought to trial until five years thereafter. Judgment was entered in November, 1947. Penalties and interest are claimed during all of this period, and two years' additional interest is now being claimed in case of a reversal of the judgment. Judging from the remarks of the trial judge he, no doubt, considered the entire claim on its merits. The issue involved the possible employment of one or two additional employees for a possible day or two before and after the packing season. He remarked in his oral decision: "If Frankenthal does come under the act, he comes under it just by the skin of his teeth." It must be admitted that the testimony of the witnesses in support of plaintiff's claim is quite uncertain as to when the several employees worked. This was no fault of the employees because they, no doubt, gave their best recollection of the facts but due to the long delay, apparently occasioned by plaintiff, defendant was deprived of their early remembrance of the facts. It would be difficult for any fair-minded judge to thus penalize this defendant, on such a close question of fact, at this late date, based upon the uncertainty of the testimony produced. The trial court, from the evidence, was justified in finding that no more than three employees were employed the week before and the week following the fruit-packing season.

[5] In its reply brief plaintiff, for the first time, questions the right of defendant to defend this action, citing Modern Barber Colleges, Inc. v. California Employment Stab. Commission, 31 Cal.2d 720, 192 P.2d 916, 918. That was a mandamus proceeding which was in effect to compel the commission to cancel charges of contributions levied against the petitioner. The case cited merely held that mandamus would not lie to prevent collection of such a tax under Act 8780d, sec. 45.11(d), supra, and in connection therewith stated that "the remedy of suit to recover taxes paid has expressly been made the *exclusive* means of obtaining a judicial review of the legality of the assessment." Italics ours. Since this question was not presented or raised until the filing of the closing brief, we will not consider it. 2 Cal.Jur. p. 734, sec. 424. However, it should be noted that the act provides for cumulative methods of collecting and enforcing collection of contributions, interest and penalties imposed under the act. See secs. 45.8, 45.9 and 45.11. Sec. 45 definitely provides that "If an employer fails to make any payment required of him * * *. Such employer and worker contributions, interest and the penalties * * * shall be collectible by civil action in the name of and by the commission against the defaulting employer, in addition to any other procedures prescribed by this act." While the action filed by plaintiff may be cumulative, it is one definitely provided for by the act for the collection of the amount claimed due. Plaintiff chose to thus proceed and surely defendant would have the inherent right to defend the action. The Supreme Court has entertained appeals from judgments in actions instituted by the Commission for the collection of such contributions. California Emp. Com. v. Kovacevich, 27 Cal.2d 546, 165 P.2d 917; California Employment Stabilization Commission v. Norins Realty Co., 29 Cal.2d 419, 175 P.2d 217; California Employment Stabilization Commission v. Morris, 28 Cal.2d 812, 172 P.2d 497. Appeal from order dismissed. 2 Cal.Jur. 173, Sec. 34. Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

SANTENS v. LOS ANGELES FINANCE CO. et al.

Civ. 3759.

District Court of Appeal, Fourth District, California.

April 8, 1949.

Rehearing Denied April 29, 1949.

Hearing Denied June 2, 1949.

1. Execution 🔑53, 265, 283

Assignment by finance company of note and trust deed to a third party divested finance company of any interest in note and trust deed which could be sold on execution, purchaser at execution sale acquired nothing and holder of note was entitled to have his title quieted as against claim of execution purchaser to be beneficiary and trustee under trust deed.

2. Execution 🔑145

Judgment creditor, seeking to subject property of debtor to payment of his debt, obtains a lien only upon title or interest which debtor has, and when no actual interest is shown, creditor gets nothing by virtue of his levy, since lien of levy attaches to the real, not the apparent, interest of debtor.

3. Garnishment 🔑95

Service of garnishment on judgment debtor after debtor had assigned to a third party a note secured by trust deed, was ineffective as to such secured note for failure to comply with statute, which then required service of a copy of summons and complaint with garnishment, and for failure to serve a person having in his possession or under his control, credits and other personal property of judgment debtor, in absence of any attempt by creditor to levy on note or to cause garnishment to be served on maker. Code Civ.Proc. § 542.

4. Execution 🔑275(3), 345

Where note payable to judgment debtor and trust deed securing note had been assigned to a third party prior to levy of execution and note and trust deed were not in sheriff's possession and were not described or referred to in his return on writ of execution or in certificate of sale, purported sale of trust deed was ineffective for failure to describe sufficiently the property or interest sold.

5. Execution 🔑272(1)

Failure of assignee of note secured by a trust deed to record assignment of trust deed did not make purchaser at subsequent execution sale of certain assets of assignor an innocent purchaser for value of beneficial interest under trust deed, since transfer of note carried with it the security and trust deed was a mere incident of debt and could only be foreclosed by owner of note.

6. Quieting title 🔑34(1)

Complaint to quiet title containing usual allegations in such an action was sufficient as a pleading.

7. Execution 🔑283

In action to quiet title against defendants claimed to be beneficiary and trustee under a trust deed by reason of a levy upon and sale of assets of former owner of note and trust deed where it was stipulated that plaintiff's vendor was common source of right, title or interest either party possessed, plaintiff established a prima facie case.

◆

Appeal from Superior Court, Tulare County; Glenn L. Moran, Judge.

Action by Henry J. Santens against Los Angeles Finance Company and others to quiet title. From a judgment for plaintiff, defendant John E. Miller appeals.

Affirmed.

George W. Rochester, of Los Angeles, for appellant.

Zeutzius & Steffes, of Los Angeles, and Jamison & Jamison, of Porterville, for respondent.

MUSSELL, Justice.

Defendant appeals from a judgment for plaintiff in an action to quiet title.

The complaint contains the conventional allegations in a quiet title action and in addition it is alleged that the defendant, John E. Miller, claims to be the successor trustee to C. W. Goodman, now deceased, under a trust deed executed by Charles

E. Holtzman to C. W. Goodman, as trustee, in favor of the Los Angeles Finance Company, a corporation, as beneficiary, but that John E. Miller is not now, and never has been, a successor trustee under said trust deed and that he has no interest in the trust deed or the promissory note mentioned therein and that defendant is, or claims to be the administrator of the estate of C. W. Goodman, deceased.

In his answer defendant alleged that he is trustee under said trust deed; that he claims title to the real property described in the complaint as beneficiary and trustee under the trust deed; that on December 18, 1929, Charles E. Holtzman executed and delivered his promissory note to Los Angeles Finance Company, a corporation, in the principal sum of $2,500; that the note was secured by a trust deed to C. W. Goodman as trustee, and Los Angeles Finance Company as beneficiary; that the trust deed covered the property described in the complaint; that in April, 1946, defendant recovered a judgment against the Los Angeles Finance Company; that an execution was issued on the judgment under which the sheriff levied upon and sold the trust deed and note to defendant; that on July 12, 1946, defendant was substituted as trustee and on August 15, 1946, defendant executed and recorded a declaration of default and notice of election to sell the property.

It was stipulated at the trial that on December 18, 1929, Charles E. Holtzman was the owner in fee of the real property described in plaintiff's complaint and that he was the common source of whatever right or title the parties or either of them possessed. There was no controversy as to the due execution and recordation of the note and trust deed and it is conceded that plaintiff is the grantee in a deed from Charles E. Holtzman executed on January 31, 1946, conveying the real property involved.

The promissory note and trust deed in question were assigned to Raymond R. Graham by the Los Angeles Finance Company on or about January 30, 1930. The assignment was in writing endorsed on the reverse side of the original note, and was signed Los Angeles Finance Company, by C. W. Goodman, President, by B. E. Bigler, Secretary. The seal of the company was affixed and the note and trust deed were delivered to Graham in whose possession they remained until February 26, 1947. On April 24, 1947, the note and trust deed were assigned by Graham to Max B. Jamison.

Defendant claims title to the note and trust deed by virtue of a levy and sale under the execution on the judgment which he obtained on April 16, 1946, against the Los Angeles Finance Company and John E. Miller, special administrator of the estate of Charles W. Goodman, deceased, for the sum of $34,146.65.

A writ of execution was issued on this judgment on April 18, 1946, and the Sheriff of the County of Los Angeles, pursuant to instructions from defendant, herein, made demand upon the Los Angeles Finance Company on May 20, 1946, for the trust deed in question. In answer to the demand the president of the company stated that she did not have the records of the company. The Sheriff's "return on garnishment", dated May 29, 1946, recites that on May 29th, 1946, he "attached all moneys, goods, credits, effects, debts due or owing or any other personal property belonging to the Los Angeles Finance Company, a corporation, one of the defendants therein named, in possession or under the control of Los Angeles Finance Company by delivering to and leaving with the president of the company a copy of the writ of execution with a notice thereon that such property was attached by virtue of said writ." The answer of the company to this notice was as follows: "Actual records of this corporation are not in the possession of current officers, being the subject of inquiry and demand made upon previous officers." The Sheriff's return on execution dated June 13, 1946, recited that on the 13th day of June, 1946, he offered for sale the property described, to wit: "All right, title and interest of the defendants in and to: After serving garnishment upon the Los Angeles Finance Company by serving its president Veda V. Saxby, I received the following answer: 'Actual records of this corporation are not in the possession of current officers, being the subject of inquiry and demand made upon previous

officers. However, the undersigned is informed and believes that the official book of references set forth on accompanying writ do represent an interest belonging to the said corporation, altho writer is unable to verify exact amount of said interest at this time, as aforesaid' " and sold the whole of the same in one parcel to John E. Miller for the sum of $100. The certificate of sale of personal property issued by the Sheriff on June 13, 1946, described the property sold as set forth in the quoted portion of the return on execution.

The trial court found that the Los Angeles Finance Company at the time of the purported levy of the writ of execution had no right, title and interest in the promissory note and trust deed; that the sheriff did not sell any right, title or interest of the Los Angeles Finance Company in the note or trust deed; that on or about January, 1930, the Los Angeles Finance Company assigned and transferred the note and trust deed to Raymond R. Graham and that he assigned the note and trust deed to Max B. Jamison; that defendant was never a successor trustee under the trust deed and that defendant had no right, title or interest in the real property involved.

[1] We conclude that these findings are sufficiently supported by the evidence. The assignment of the note and trust deed to Graham in 1930 divested the Finance Company of any interest in the note and trust deed which could be sold on execution, and there is nothing in the record indicating that the Finance Company re-acquired the note and trust deed after the assignment to Graham in 1930. Since the Finance Company had no interest in the note or trust deed on the date of the purported levy of the execution the defendant could not acquire any interest therein by the proceedings under the writ.

[2] It is a well settled rule that an attaching creditor, seeking to subject the property of a debtor to the payment of his debt, obtains a lien only upon the title or interest which the debtor has, and when no actual interest is shown the attaching creditor gets nothing by virtue of his levy. The lien attaches to the real and not the apparent interest of the other. Henry v. General Forming, Ltd., 33 Cal.2d 223, 200 P.2d 785.

The transfer of the note carried with it the security, Adler v. Sargent, 109 Cal. 42, 48, 41 P. 799; Pacific States Savings & Loan Co. v. North American etc. Co., 37 Cal.App.2d 307, 309, 99 P.2d 355, and no attempt was made by defendant to levy execution on the note or to cause a garnishment to be served on the maker to attach the money, if any, payable under its terms.

[3] The attempted service of garnishment on the debtor, Finance Company, was not in compliance with the provisions of section 542 of the Code of Civil Procedure, in effect at the time, which required a service of a copy of the summons and complaint together with a copy of the writ, and the service of the writ was not made upon "the persons owing such debts, or having in his possession, or under his control, such credits and other personal property * * *". Jubelt v. Sketers, 84 Cal.App.2d 653, 656, 191 P.2d 460, 462.

[4] The sheriff's return on the writ of execution fails to describe the property, if any, which he sold. If he in fact sold an interest in the trust deed such fact does not appear in the return on the writ or in the certificate of sale. The note and trust deed were not in his possession and were not described or referred to in the return. The purported sale did not sufficiently describe the property or interest sold. Baar v. Smith, 97 Cal.App. 398, 401, 275 P. 861.

[5] Defendant argues that since the assignment of the note and trust deed to Graham was not recorded that defendant was a bona fide purchaser at the execution sale and is not bound by the assignment. He relies on the provision of section 2934 of the Civil Code that "any assignment of the beneficial interest under a deed of trust may be recorded, and from the time the same is filed for record operates as constructive notice of the contents thereof to all persons." We see nothing in the wording of the section which would operate to defeat the title to Graham of the note and trust deed as the transfer of the note carried with it the security and the trust

deed is a mere incident of the debt and could only be foreclosed by the owner of the note. Adler v. Sargent, supra.

Defendant contends that the trial court erred in denying his motions for judgment on the pleadings and nonsuit.

[6, 7] The complaint to quiet title contained the usual allegations in such an action and was sufficient as a pleading. Hyatt v. Colkins, 174 Cal. 580, 163 P. 1007; Thompson v. Moore, 8 Cal.2d 367, 372, 65 P.2d 800, 109 A.L.R. 1027. Plaintiff made out a prima facie case, since it was stipulated that Charles E. Holtzman was the owner in fee of the real property described in the complaint, and that he was the common source of whatever right, title or interest the parties or either of them possessed. Kroeker v. Hurlbert, 38 Cal.App.2d 261, 267, 101 P.2d 101; Phillips v. Menotti, 167 Cal. 328, 329, 330, 139 P. 796. We find no error in the court's ruling on the motions.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

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91 Cal.App.2d 139

HENSON v. PLANKA et al.

No. 13997.

District Court of Appeal, First District, Division 1, California.

April 4, 1949.

1. Appeal and error 🔑930(1)

Reviewing court must assume in favor of verdict the existence of every fact which jury could have reasonably deduced from evidence, and then determine whether such facts are sufficient to support verdict.

2. Assault and battery 🔑35

In action by patron against tavern keeper and bartender for personal injuries sustained when patron was forcibly ejected from tavern, evidence authorized verdict for patron.

3. Damages 🔑132(1)

Award of $1,000, to one who was earning $70 a week, for a broken jaw, loss of two teeth, and other injuries resulting in absence from work for six weeks, was reasonable.

4. Assault and battery 🔑30

Where an intoxicated patron of a tavern molests women patrons and, when told to leave, refuses to do so and starts to fight, tavern keeper and bartender are justified in using reasonable force to eject such intoxicated patron.

5. Appeal and error 🔑994(2)

In patron's action against tavern keeper and bartender for injuries sustained when patron was ejected from tavern, patron's testimony that he was wrongfully accused of molesting women patrons in tavern, that when asked to leave he agreed to do so as soon as he received change from his last purchase, whereupon he was held by several men while defendant bartender struck him, and that patron was then thrown into street, was not inherently improbable so as to require reviewing court to disregard such testimony.

Appeal from Superior Court, City and County of San Francisco; Thomas M. Foley, Judge.

Action by Robert H. Henson against Manuela N. Planka and Apolinio Planka to recover for injuries sustained when plaintiff was ejected from defendants' tavern. Judgment for plaintiff, and defendants appeal.

Affirmed.

Alfred J. Hennessy, of San Francisco, for appellants.

Thomas L. Berkeley & Associates, Thomas L. Berkeley, and Clinton Wayne White, all of Berkeley, for respondent.

BRAY, Justice.

Appeal by defendants from a judgment of the superior court, after jury verdict, awarding plaintiff damages in the sum of

$1000 for personal injuries received by plaintiff. A motion for new trial was denied automatically by expiration of time. Defendants contend: (1) That the evidence is insufficient to justify the verdict; and (2) that the verdict is against the law.

[1, 2] Having in mind the rule as set forth in People v. McKnight, 87 Cal.App.2d 89, 196 P.2d 104, 109— "The duty of this court is expressed in People v. Pratt, 77 Cal. App.2d 571, at page 576, 175 P.2d 888, at page 890, where the court quotes from People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, as follows: ' "We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict" ' "—there is sufficient substantial evidence to justify the verdict. Defendants' briefs do not discuss the testimony of plaintiff, but assume that we must accept as true the evidence of defendants, and their propositions of law are based upon that assumption.

Plaintiff, on Christmas Eve, 1946, was ejected from a tavern owned by defendant Manuela Planka in the International Settlement in San Francisco. Defendant Apolinio Planka was bartender and manager at the time of the ejection. There is a direct contradiction between plaintiff's story of what happened and the story as given by the defendant Apolinio and his witnesses.

It is not necessary to go into the full details of plaintiff's ejection from defendants' tavern. According to plaintiff's testimony, he was minding his own business consuming "a few beers," but at no time intoxicated, when he was unjustly accused by Apolinio of bothering two of the feminine patrons. In spite of his denials, shortly thereafter, defendant Apolinio requested plaintiff to leave the place. Plaintiff was waiting for change from his last purchase of a bottle of beer and said that as soon as he received the change he would leave. Thereupon, without any cause or warning, defendant Apolinio seized and struck plaintiff. Some of the men in the tavern held plaintiff while Apolinio punched plaintiff in the face with both hands. Apolinio and others dragged plaintiff out and threw him into the street. His purse was lost in the scuffle. Police arrived shortly thereafter, and as plaintiff had no means of identification, they took him to jail. A misdemeanor charge was filed against him, but on the next regular day of business, December 26th, the charge was dismissed and plaintiff released from custody.

[3] The same day plaintiff called a doctor to his home and discovered that his jaw was broken. He had lost two teeth. Thereafter he was under treatment by a dentist who wired plaintiff's jawbone to hold it in place. At the time of the trial the dentist testified plaintiff could not be cured for another six weeks. The lost teeth had to be replaced. He was off work for six weeks during the time that his mouth was wired. He had been earning $70 per week at that time. Defendants concede that the award was reasonable if plaintiff received the injuries which he testified he received.

[4] Under the story told by defendants and their witnesses, defendant Apolinio would have been justified in using reasonable force to eject plaintiff from the premises. They contended that plaintiff, highly intoxicated, was molesting the women patrons; that when told to leave he refused to do so but started to fight; that Apolinio put him out on to the sidewalk; that as he sat there cursing and challenging bystanders to fight, an automobile drove up to the curb, four men emerged from it, and proceeded to beat up the plaintiff; that plaintiff's injuries came from that beating and not from any actions of Apolinio or anyone else in ejecting plaintiff from the premises.

[5] Defendants have completely disregarded the rule that where there is a conflict of evidence, this court cannot disturb the findings of the jury. At argument, defendants contended that plaintiff's story is inherently improbable. However, there is nothing inherently improbable in it. Nor is the fact that a police officer testified that when he arrived in front of defendants' tavern, plaintiff was belligerent, intoxicated, and refused to get in the patrol wagon, requiring several officers to put him in it, so inconsistent with plaintiff's story of what happened before the police officer arrived as

to compel a finding that plaintiff's story in the main is inherently improbable.

The jury believed plaintiff. Hence, it is unnecessary to discuss what would be the legal rule had the jury found, as contended by defendants, that plaintiff was injuring defendants' property, attacking defendant Apolinio, and molesting customers in the tavern.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concur.

WEST KEY NUMBER SYSTEM

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91 Cal.App.2d 253

PEOPLE v. MURRAY.

Cr. 2110.

District Court of Appeal, Third District, California.

April 14, 1949.

1. Rape 🔑57(1)

In prosecution for statutory rape on defendant's stepdaughter, whether child born to stepdaughter was result of intercourse on date testified to by prosecutrix was for the jury. Pen.Code, § 261.

2. Rape 🔑52(1)

Evidence supported conviction of statutory rape on defendant's stepdaughter. Pen.Code, § 261.

3. Criminal law 🔑741(1), 742(1)

Credibility of witnesses and weight to be accorded their testimony are for the jury.

4. Rape 🔑54(1)

In prosecution for statutory rape testimony of complaining witness who was under age of consent did not require corroboration. Pen.Code, § 261.

5. Criminal law 🔑1036(1)
Witnesses 🔑372(2)

In prosecution for statutory rape by defendant on his stepdaughter, where defendant called his wife as witness, cross-examination as to whether she was married to defendant and whether she had a marriage license was proper as tending to show interest and was not reviewable in any event where testimony was given without objection.

6. Criminal law 🔑572

In prosecution for statutory rape, where defendant claimed an alibi, fact that defendant worked all day on date of alleged intercourse did not render testimony of prosecutrix unbelievable that the offense was committed "on or about" that date.

7. Indictment and Information 🔑176

Variation from allegations of an information within period of limitations is not fatal except where commission of the act charged does not constitute a crime unless committed on a specific date

8. Rape 🔑52(4)

In prosecution for statutory rape by defendant on his stepdaughter, evidence established that the stepdaughter was under the age of consent when the offenses were committed. Pen.Code, § 261.

9. Criminal law 🔑421(3)

In prosecution for statutory rape on stepdaughter of defendant where daughter was allegedly under the age of consent, the stepdaughter was competent to testify as to her age.

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Appeal from Superior Court, Mendocino County; Lilburn Gibson, Judge.

William S. Murray was convicted of statutory rape and he appeals.

Affirmed.

William S. Murray, pro se.

Fred N. Howser, Atty. Gen. and Doris H. Maier and G. A. Strader, Dep. Attys. Gen., for respondent.

ADAMS, Presiding Justice.

Defendant was charged with statutory rape of his stepdaughter in violation of section 261 of the Penal Code. The information contained six counts. Defendant was acquitted on four and convicted on two, to wit, counts one and six. Count one charged a commission of the offense "on or about" the 10th day of February, 1947, when the stepdaughter was 16 years old; and count six a commission of same "on or about" the 14th day of April, 1948, when the girl was 17 years of age. Sentences were ordered to run concurrently.

On this appeal defendant, appearing as his own counsel, states in his opening brief:

"I was convicted on perjured testimony, uncorroborated testimony, and without one point or piece of visible evidence; further, the district attorney in this case violated all existing laws, rules and regulations governing the conduct, behavior and procedure of any attorney in any court in the State of California, to wit: intimidating the witnesses, by coaching and leading same into testimony that was untrue to his own personal knowledge; further, by conduct unbecoming a district attorney by questioning defendant's wife, Mrs. Patricia Murray, in regards to immaterial, irrelevant, unnecessary and personal marital affairs above and beyond any scope or bearing whatsoever upon the alleged charges with the sole intent of prejudicing the jury."

[1] Without enlarging upon these generalities appellant attacks the testimony of the prosecutrix that as a result of intercourse on February 10, 1947, she became pregnant, as being inconsistent with her admission that she gave birth to a full-time baby on October 11, 1947. We do not attach particular significance to this asserted inconsistency, since the girl testified that she had sex relations with defendant before February 10, 1947, and she could have been mistaken as to when conception occurred. Whether it was or was not the result of intercourse on February 10th or thereabouts was for the jury to determine; and earlier conception would not prove that defendant did not commit the offense charged to have been committed on or about February 10, 1947.

Appellant also relies upon testimony given on his behalf, that the girl's testimony regarding intercourse on February 10th was false because defendant showed that he was working all day February 10th at a place 33 miles distant from the girl's home, the asserted place where the offense was committed. Also, regarding the alleged offense on April 14, 1948, he asserts that he was away from the place where the intercourse is claimed to have taken place at nine o'clock in the morning, as he had left that morning for Eureka on a fishing trip. He asserts, therefore, that the girl's testimony was impeached, and that she "is a liar."

[2] There is ample evidence to support the verdicts of the jury. It shows that the complaining witness lived with her mother and stepfather for about eight years, their place of residence at the times of the offenses charged being Bell Glen in Mendocino County. She worked as a waitress in the Bell Glen Cafe, operated by her mother, and defendant took her back and forth between their home and the cafe. The girl testified that she had sexual intercourse with defendant prior to and on February 10, 1947, and thereafter during 1948, including the morning of April 14th of that year; that on the latter date defendant, during intercourse, used a "rubber" which he then placed in a match box which, on their way to Bell Glen, he gave to her telling her to throw it into the woods. This she did, and a few days later she took a deputy sheriff to the spot where the box and its contents were recovered. She further testified that on numerous occasions defendant had hugged and kissed her in public, and this testimony was corroborated.

Regarding the act of intercourse on or about April 14, 1948, she said that it occurred in her bedroom about nine o'clock in the morning, after which defendant took her to the Bell Glen Cafe. Defendant endeavored to prove that this testimony was untrue by testifying that he left for Eureka about eight o'clock that morning; but there was testimony by two men who accompanied him to Eureka, and by others, that defendant did not leave until later than he claims, and that he was in the Bell Glen Cafe with the girl about noon that day.

[3, 4] As for appellant's assertion that he was convicted on perjured and uncorroborated testimony, it is elementary that the credibility of witnesses and the weight to be accorded their testimony, are matters solely for the determination of a jury.

People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778; People v. Von Perhacs, 20 Cal. App. 48, 51, 127 P. 1048; People v. Jackson, 63 Cal.App.2d 586, 147 P.2d 94, and cases there cited; People v. Barnett, 77 Cal.App. 2d 299, 302, 175 P.2d 237. Also, that the testimony of the complaining witness, who was under the age of consent, did not require corroboration is well established. People v. Lachuk, 5 Cal.App.2d 729, 730, 43 P.2d 579; People v. Meraviglia, 73 Cal.App. 402, 411, 238 P. 794; People v. Scott, 24 Cal.App. 440, 443, 141 P. 945; People v. Crawford, 24 Cal.App. 396, 403, 141 P. 824; People v. Britt, 62 Cal.App. 674, 217 P. 767.

[5] As for the claimed misbehavior of the prosecuting attorney there is no evidence that he intimidated or coached any witness, or led any witness to testify to anything known by him to be untrue; and regarding the assertion that he questioned defendant's wife regarding immaterial matters with the intent to prejudice the jury, the particular questioning objected to was whether or not this witness was married to defendant and whether or not she had a marriage license or certificate. In view of the testimony of this witness who was called for defendant, we cannot say that her cross-examination on the foregoing matters was improper, as it tended to show interest. Furthermore, it was given without objection. Compare People v. Showers, 90 Cal.App.2d 248, 202 P.2d 814.

[6, 7] As for defendant's alibis, the fact that defendant worked all day on February 10, 1947, did not necessarily render unbelievable the girl's testimony as to the offense committed "on or about" that date. She stated that it might have been on the 11th or the 12th, and the evidence shows that defendant worked but four and one-half hours on the 11th and not at all on the 12th. Variation from the allegations of an information within the period of limitations is not fatal except where it appears that commission of the act charged does not constitute a crime unless committed on a specific date. People v. Hoosier, 24 Cal.App. 746, 756, 142 P. 514; People v. Stangler, 18 Cal.2d 688, 692, 117 P.2d 321; People v. Britt, supra, 62 Cal.App. at page 678, 217 P. 767.

[8, 9] In his closing brief appellant complains that the age of the complaining witness was not shown by anything but her own testimony, and he asserts that on July 25, 1948, when she applied for a marriage license she stated that she was then 18 years old, though her testimony was that she was born on November 9, 1930. Evidence regarding the statement made by the girl on July 25th is not in the record; and her own testimony given in court was sufficient to show that she was under the age of consent when the alleged offenses were committed. She was competent to testify as to her age. People v. Gourdin, 26 Cal.App.2d 494, 495, 79 P.2d 782, and cases there cited.

The judgment is affirmed.

PEEK and THOMPSON, JJ., concur.

PEOPLE v. HENDERSON.

Cr. 4305.

District Court of Appeal, Second District,
Division 2, California.
April 5, 1949.

Hearing Granted May 5, 1949.*

1. Criminal law 🔑511(1)

Testimony of other witnesses sufficiently corroborated testimony of accomplice to sustain conviction of attempted armed robbery and assault with intent to murder two persons injured when shotgun was unintentionally discharged. Pen.Code, § 1111.

2. Criminal law 🔑511(2)

Evidence is sufficient to corroborate testimony of an accomplice, even though circumstantial and slight, if it tends to connect accused with commission of offense, and corroborating evidence need not go so far as to establish by itself and without aid of testimony of the accomplice that defendant committed the offense charged. Pen.Code, § 1111.

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* Subsequent opinion 209 P.2d 785.

3. Criminal law ⚿511(4)

Possession of a weapon similar to the one used in commission of a robbery is substantial evidence connecting defendant with the crime so as to sufficiently corroborate testimony of accomplice. Pen. Code, § 1111.

4. Criminal law ⚿511(4)

Testimony of accomplice that defendant's wife prepared masks, that barrel of shotgun was sawed off at home of defendant's father, and that defendant's father and uncle took accomplice to distant town for medical aid, was corroborated by failure of defendant to call wife or father as witnesses and refusal of defendant's uncle to testify on ground of self-incrimination. Pen.Code, § 1111.

5. Criminal law ⚿661

Testimony as to existence and character of gun used in attempted robbery and assault with intent to murder was sufficient without producing the gun and offering it in evidence. Code Civ.Proc. § 1954.

6. Assault and battery ⚿71

Where defendant's shotgun was unintentionally discharged during attempted robbery injuring his associate, fact that associate was engaged jointly with defendant in attempted robbery did not make him a principal in the assault with a deadly weapon thus committed upon associate so as to preclude conviction of defendant for such offense. Pen.Code, § 31.

7. Criminal law ⚿59(1)

Statute making all persons, concerned in commission of a crime, principals, applies only to acts against third persons, and not to criminal offenses committed by one of the principals in a crime against his partner or associate. Pen.Code, § 31.

8. Criminal law ⚿507(1)

Defendant's associate, who was injured when defendant's shotgun was unintentionally discharged during attempted robbery, was not an "accomplice" in the assault with a deadly weapon thus committed on associate, and his testimony concerning such offense did not require corroboration. Pen.Code, § 1111.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Accomplice".

Appeal from Superior Court, Los Angeles County; R. R. Sischo, Judge.

Clyde Lester Henderson was convicted of attempted robbery, while armed with a deadly weapon, assault with intent to commit murder, and assault with a deadly weapon, and from the judgment of conviction and order denying his motion for a new trial, he appeals.

Judgment and order affirmed.

Saul J. Bernard, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Dan Kaufman, Deputy Atty. Gen., for respondent.

WILSON, Justice.

Defendant was charged with felonies in four counts: (1) Attempted robbery of Noel Johnson while defendant was armed with a deadly weapon, a .410 sawed-off shotgun; (2) assault with intent to commit murder on Barton Williams; (3) assault with intent to commit murder on Richard Berry; (4) assault with a deadly weapon on William Lewis Roberts. He was charged also with a prior conviction of receiving stolen property, a felony.

Defendant admitted the prior conviction, pleaded not guilty to each of the four charges, and waived a trial by jury. The court found him guilty as charged in each count. His motion for a new trial was denied. He appeals from the judgment and from the order denying a new trial.

The sole question presented by defendant on the appeal from his conviction under counts 1, 2 and 3 is that the evidence is insufficient to sustain the judgment in that the testimony of William Lewis Roberts, defendant's accomplice, was not corroborated as required by section 1111[1] of the

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[1] Sec. 1111: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances

Penal Code. The ground advanced for reversal of his conviction under count 4 is that since Roberts, the person upon whom the assault with a deadly weapon is alleged to have been committed, was jointly engaged with defendant in the attempted robbery, defendant cannot be guilty of the assault on Roberts by reason of section 31 of the Penal Code.

About 1:30 A.M., on December 29, 1947, defendant and William Lewis Roberts attempted to rob a cafe in Altadena; defendant was armed with a shotgun and Roberts had a toy pistol; they entered the cafe and ordered the employees and customers to face the bar and put their hands up; both men wore flesh-colored masks with eyeholes cut in them; the shotgun was unintentionally discharged by defendant, resulting in the wounding of Williams, Berry and Roberts. Defendant and Roberts immediately departed.

Roberts testified as follows: He is defendant's cousin; they were together almost all of the day preceding the crime and had discussed the robbery of the cafe several weeks previously; defendant had seen shotguns in Roberts' room where he resided at his sister's home and inquired whether they could obtain one; they agreed that they would get a "little .410" from Roberts' sister; when they went to her home she refused to sell the gun to Roberts but agreed to sell it to defendant; when they left the house defendant was carrying the gun and it was placed in the trunk of his car; about 11:00 o'clock in the evening they visited the home of defendant's father; the barrel of the shotgun was sawed off and the gun was returned to the trunk of the car; the two men then went to defendant's home where the latter's wife produced some stockings which they put on over their heads and faces and she cut eyeholes in them; as they were leaving defendant's house the latter gave Roberts a black toy pistol resembling a .38; the shotgun was transferred to another car and they went to the cafe; when the unexpected discharge of the shotgun terminated their attempt at robbery they returned to defendant's home where Roberts "passed out"; subsequently defendant's father and uncle took Roberts to Colton, about 50 miles distant from their respective homes, where he received medical attention; Roberts' right eye was blinded by the wound which he received.

Lester Henderson, called as a witness by the prosecution, testified that he was defendant's uncle but refused, on the ground that his answers might incriminate him, to respond to any questions concerning the happenings during the evening and early morning of the night of the robbery, as well as questions as to whether he had heard of any attempt to rob the cafe or of any plans for the commission of the crime.

Inez Bustos testified that she was defendant's cousin and Roberts' sister; they came to her home on December 28; she refused to sell the .410 gun to her brother but did sell it to defendant; her last recollection of the gun was when defendant and Roberts went into the bedroom for it; defendant picked it up and had it in his hands when they walked through the house.

Johnson, Williams and Berry, named as the victims in counts 1, 2 and 3, each testified that the men who attempted to rob the cafe wore flesh-colored masks with holes cut in them for their eyes. One witness described the weapon as a sawed-off shotgun, and another, who testified as to his familiarity with guns, said the sound made when the gun was discharged was like that of a .410 shotgun. Witnesses also testified that one of the men had a toy pistol in his hand at the time of the attempted robbery.

Defendant did not testify. Neither his wife nor his father, who was designated by Roberts as the "finger man," was called by defendant as a witness in his behalf. No explanation was made as to what became of the gun after the attempted robbery.

[1-4] The testimony of Roberts was sufficiently corroborated by the other witnesses mentioned with reference to defendant's purchase of the gun, the character of the masks worn by him and Roberts, their presence in the cafe, their possession of a

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thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

sawed-off shotgun and a toy pistol, and the identification of the sound made by the gun as being a .410 shotgun. Evidence is sufficient to corroborate that of an accomplice, even though circumstantial and slight, if it tends to connect the accused with the commission of the offense, and the corroborating evidence need not go so far as to establish by itself, and without the aid of the testimony of the accomplice, that the defendant committed the offense charged. People v. Negra, 208 Cal. 64, 69–70, 280 P. 354; People v. Trujillo, 32 Cal.2d 105, 111, 194 P.2d 681; People v. Tinnin, 136 Cal. App. 301, 305, 28 P.2d 951. Possession of a weapon similar to the one used in the commission of a robbery is substantial evidence connecting the defendant with the crime. People v. Elliott, 104 Cal.App. 107, 110, 285 P. 401; People v. Stoerkel, 87 Cal.App. 336, 339, 262 P. 825. Corroboration of Roberts' testimony that defendant's wife produced stockings and prepared them to be used as masks, that the barrel of the shotgun was sawed off at the home of defendant's father, and that the latter and defendant's uncle took Roberts to Colton for medical aid, is found in the failure of defendant to call his wife and father as witnesses and in the action of the uncle in assigning self-incrimination as the reason for his refusal to testify.

[5] The evidence of witnesses to the existence and character of the gun was sufficient. Code Civ.Proc. sec. 1954; People v. Anderson, 87 Cal.App.2d 857, 197 P.2d 839. It was not necessary for the prosecution to produce the gun and offer it in evidence.

Defendant contends that his conviction under count 4, assault with a deadly weapon on Roberts, his accomplice, cannot be sustained since at the time of the assault they were jointly engaged as principals in the commission of a felony and the act of defendant in perpetrating the assault was therefore the act of Roberts insofar as criminal liability is concerned, citing section 31 [2] of the Penal Code.

Defendant's argument seems to be that since (1) Roberts aided and abetted defendant and was a principal in the commission of the attempted robbery, and (2) Roberts was wounded by defendant while they were engaged in the joint enterprise, Roberts, by reason of the provisions of section 31, was a principal in the assault upon himself, and therefore defendant is not guilty of the charge. Following such argument to its ultimate, if Roberts had been killed defendant could not have been prosecuted for murder because Roberts' participation as principal in his own killing would have amounted to suicide. The law does not recognize such an absurdity.

[6-8] Although Roberts and defendant engaged jointly in the commission of the crime charged in count 1, neither of them planned or intended an assault upon the other. Section 31 of the Penal Code is applicable only to acts against third persons and not to criminal offenses committed by one of the participants in a crime against his partner or associate. People v. Caballero, 31 Cal.App.2d 52, 57–58, 87 P.2d 364. Since Roberts was not liable for prosecution for the assault committed upon himself he was not an accomplice, Penal Code, sec. 1111, supra, and his evidence concerning count 4 did not require corroboration. People v. Suter, 43 Cal.App.2d 444, 456, 111 P.2d 23.

The judgment and the order denying defendant's motion for a new trial are affirmed.

MOORE, P. J., and McCOMB, J., concur.

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[2] Sec. 31: "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, and all persons counseling, advising, or encouraging children under the age of fourteen years, lunatics or idiots, to commit any crime, or who, by fraud, contrivance, or force, occasion the drunkenness of another for the purpose of causing him to commit any crime, or who, by threats, menaces, command, or coercion, compel another to commit any crime, are principals in any crime so committed."

91 Cal.App.2d 118

MOONEY v. MOONEY et al.

Civ. 16420.

District Court of Appeal, Second District, Division 2, California.

April 5, 1949.

Hearing Denied June 2, 1949.

1. Husband and wife ⚿270(9)

Finding that community property consisted of dwelling, malt shop, furniture and fixtures was specific, and therefore controlling, if in conflict with general findings as to the pleadings.

2. Husband and wife ⚿262(1)

Presumption that malt shop constructed during marriage belonged to the community estate was sufficient to support a finding to that effect in divorce suit, notwithstanding conflicting evidence as to source of money with which it was built. Civ.Code, § 164.

3. Appeal and error ⚿1011(1)

Trial court's finding of fact from conflicting evidence was conclusive on appeal.

4. Husband and wife ⚿250

Payments made by future husband before marriage on purchase price of realty which fiancee had contracted to purchase would constitute gifts or contributions to separate property of fiancee, in absence of marriage contract or agreement to the contrary.

5. Husband and wife ⚿264

Husband's testimony that before marriage he furnished money to make payments for realty which fiancee had contracted to purchase with understanding that when they were married it would be transferred into their joint names supported implied finding that parties had agreed to treat the realty as community property, and such evidence, together with acts of parties in purchasing, improving and dealing with the realty during marriage, sustained finding in divorce suit that the realty was community property.

6. Husband and wife ⚿266

The status of property may be changed from that of separate to community property as a result of executed oral agreement between the parties to treat it as such.

7. Husband and wife ⚿264

Finding in divorce suit that furniture purchased and paid for by wife before marriage was community property was unsupported by the evidence and contrary to statute. Civ.Code, § 162.

McCOMB, J., dissenting in part.

◆

Appeal from Superior Court, Los Angeles County; Joseph M. Maltby, Presiding as Judge of the Superior Court, under designation of the Chief Justice.

On rehearing.

Judgment reversed with directions.

Prior opinion 202 P.2d 352.

Allan L. Leonard, of Los Angeles, for appellant.

John E. McCall, of Los Angeles, for respondent.

MOORE, Presiding Judge.

Appellant takes exception to that portion of the interlocutory decree of divorce awarding plaintiff, as his share of the community property, an undivided one-half interest (1) certain real property, (2) an undivided one-half interest in the furniture in the dwelling thereon, and (3) an undivided one-half interest in a malt shop and its fixtures.

From August, 1940, until July 8, 1944, appellant rented from the owners and conducted a boarding house in the dwelling situate on the real property. On the latter date and while yet a single woman, she executed an agreement to purchase the same realty. On October 7, 1944, she married respondent. Thereafter, a building known as "the malt shop" was constructed upon the realty, equipped and operated as a going business.

In September, 1946, respondent filed a complaint for divorce on the ground of mental cruelty and alleged:

"That there is community property of the parties hereto consisting of and inclusive of his separate property:

"(1) A seven-room dwelling house and Malt Shop business. * * *

"(3) Furniture in dwelling house and fixtures in Malt Shop. * * *"

Appellant's answer denied the above quoted allegations and alleged "that all the property listed * * * is the separate property of defendant, she having acquired and owned same prior to the marriage. * * *"

Appellant also filed her amended cross complaint for divorce which alleged: "That there is no community property belonging to the parties hereto. * * * That all the property which cross complainant owns is her separate property having acquired same prior to her marriage. * * *"

The answer to the cross complaint alleged that the property mentioned in the complaint is community property.

After trial the court made nine findings of fact as to the veracity of the pleadings, and a tenth finding as follows: "The Court further finds that the community property of the parties consists of the dwelling and Malt Shop* located at No. 11977 Inglewood Avenue, Hawthorne, California, and the furniture in the house and the fixtures in said Malt Shop."

[1] The quoted finding is specific and will control if in conflict with general findings as to the pleadings. Staub v. Muller, 7 Cal.2d 221, 226, 60 P.2d 283; Turner v. Turner, 187 Cal. 632, 635, 203 P. 109.

[2] Appellant concedes that the fixtures in the malt shop are community property, but contends that the evidence does not support that portion of finding ten as to the shop itself. While the evidence is in conflict as to the source of the moneys with which the malt shop was acquired, since it was constructed after marriage, the presumption that it belongs to the community estate is sufficient evidence to support the finding that the shop as well as the fixtures therein is the community property of the parties. Civil Code, section 164.

[3, 4] Appellant next contends that finding the realty to be community property is unsupported by the evidence. The agreement for its purchase shows on its face that a down payment of $500 and three installments of $50 each were made prior to the marriage of the parties. The testimony as to the source of all the payments made on the contract price was in conflict, each party claiming to be the source of the moneys. Inasmuch as the court adopted respondent's testimony we must assume that all payments were made with his money. But this factor alone would not convert into community property all of the parties' rights in the realty. When the down payment and the first three installments were made there was as yet no community interest because there was then no marriage relationship between them. These payments, in the absence of a marriage contract or agreement to the contrary would therefore constitute gifts or contributions to the separate property of appellant.

[5, 6] But as to the purchase of the real property respondent testified as follows: "I suggested that the payment be made out of the savings account which we had accumulated and authorized her and suggested that she do it and do it as soon as possible. The understanding that we had was that when we were married that inasmuch as all of the money I furnished to buy the property and the payments thereon had been furnished by me, that it would then be transferred into our joint names." This testimony is sufficient to support an implied finding that the parties had agreed to treat the property as community. That such agreement not only existed between the parties but was in fact consummated during their marriage is established and affirmed by their acts and conduct in purchasing, improving and dealing with the property during their marriage. It is well settled that such an executed oral agreement serves to change the status of property from that of separate to community. Kenney v. Kenney, 220 Cal. 134, 136, 30 P.2d 398; Rogers v. Rogers, 86 Cal.App.2d 817, 821, 195 P.2d 890. It must therefore be concluded that the finding of the trial court as to the dwelling is correct and supported by the evidence.

Appellant's final contention is that the evidence does not support that part of Finding X that the furniture is community property. The only evidence in support of the finding is the testimony of Mr. Mooney as follows:

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* Both structures are on the real property which appellant contracted to buy.

"Q. You didn't know anything about Mrs. Mooney's possessions then [before marriage], did you? A. Only what she told me.

"Q. What did she tell you? A. That she had rented this place and run a boarding house and had been able to pay for an automobile, and told me about a year or so before that she had gone to Barker Bros. and had bought some furniture on credit, a couple of hundred dollars worth of furniture, and all of her friends had advised her not to do it and they laughed at her for doing it and she bragged about how she had paid it off and showed me receipts from the various people that she had bought stuff from that her credit was good, that she had paid it off, and I thought that was darned nice. * * *

"Q. You testified yesterday that we—I suppose meaning you and Mrs. Mooney—bought other furniture, that she had certain household furniture at the time of the marriage. What did you buy after the marriage, you and she together? A. Well, I don't know that I bought anything particularly. I remember we went downtown shopping for a set of dishes and I remember one night we were in Sears Roebuck's store over here and she came running up. She had seen a rug she wanted and we went over and got it. And as I stated yesterday, testified yesterday, Mrs. Mooney ran the house and she had the money to buy anything I could afford. There were little things that I brought her like any husband would. I know that I had the kitchen floor—she was crazy to have a nice tile floor in the kitchen and the bathroom. I bought all that stuff and hired the man to put it down. I bought her things like that that I could afford as we went along."

[7] It is apparent that not only does the above quoted testimony not support the finding, but also that the finding is completely contrary to the testimony of the witness. Except for the rug referred to, all other furniture in the house had been bought and paid for by appellant prior to her marriage in order to run her boarding house. Although as appears in Mr. Mooney's testimony "we went shopping for a set of dishes," there is no showing that the dishes were purchased at that time or subsequently. Such evidence is all too tenuous to support a finding that the furniture in a seven-room house is community property. Indeed, such a finding is refuted by the very testimony upon which it depends and is contrary to Civil Code, section 162: "All property of the wife, owned by her before marriage * * * is her separate property." Nor is there any evidence in the record tending to show an agreement to treat the furniture as community property such as that with reference to the real property.

In view of this state of the evidence it is ordered that Finding X is hereby stricken and in lieu thereof the following is substituted: The court finds (a) that the community property of the parties consists of lots 1, 2, 3, 4, 37 and 38 of tract 2704 according to Map Book 27, page 52, Los Angeles County records, the dwelling and the malt shop situate thereon, the fixtures in the malt shop, and the rug purchased by the parties from Sears Roebuck; (b) that the separate property of defendant consists of the furniture and other movables situate in said dwelling at the time of her marriage to plaintiff.

It is ordered that the judgment here on appeal be and it is reversed and the court below is instructed to enter a new judgment in accordance with Finding X as made by this court.

WILSON, J., concurs.

McCOMB, Justice.

I adhere to the views expressed by this court in Mooney v. Mooney, — Cal.App. 2d —, 202 P.2d 352.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.

91 Cal.App.2d 233

RICE et al. v. NAVARRO et al.

NAVARRO v. RICE et al.

Civ. 16592, 16593.

District Court of Appeal, Second District, Division 3, California.

April 14, 1949.

1. Sales ⚷52(7)

In action for balance due on conditional sale agreement for sale of "juke boxes" and cross-action for rescission, evidence sustained finding that seller had not made false representations concerning condition of the machines or their earnings.

2. Sales ⚷92

Where conditional sales contract gave seller right, on buyer's default, to repossess machines and to resell them, but did not obligate him to resell machines, and there was evidence that seller was obliged to take possession of them for their protection after buyer gave notice of rescission, seller's action in taking possession did not establish as a matter of law mutual rescission of conditional sales agreement.

3. New trial ⚷26

In action for balance due on conditional sales agreement for sale of "juke boxes" and cross-action for rescission, contention that seller should account for profits between time he took possession of machines and trial, could not be raised for first time on motion for new trial.

Appeals from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Frank B. Navarro, doing business under the fictitious firm name of Navarro Distributing Company, against Paul R. Rice, and Eileen B. Rice, for balance due on a conditional sales contract, which was consolidated with an action by Paul R. Rice and another against Frank B. Navarro doing business under fictitious firm name and style of Navarro Distributing Company and others for rescission of conditional sales contract. From adverse judgment, Paul R. Rice and another appeal.

Affirmed.

Carroll M. Dunnum, of Los Angeles, for appellants.

Oral R. Finch and Donald Kolts, both of Los Angeles, for respondents.

SHINN, Presiding Justice.

Frank B. Navarro, to be referred to as defendant, entered into a conditional sales agreement for the sale to Paul R. Rice and Eileen B. Rice, to be referred to as plaintiffs, of 20 automatic phonographs ("juke boxes") for the sum of $19,885, payable $5,500 down and the balance in monthly installments of $680. Title to the property remained in the seller, who had the right upon default in payment to declare the whole unpaid amount immediately due, or to declare the purchasers' rights terminated, take possession of the property, "and hold the same, together with the title thereto." It was provided that if the seller should take possession all rights of the purchaser under the contract should immediately terminate and all payments theretofore made should belong to the seller, "purchaser remaining liable for the unpaid balance" etc. It was also provided that the seller could but was not obligated to, sell the property and apply the proceeds first to the expenses of retaking, reconditioning and selling the property, including attorney's fees; if the unpaid balance exceeded the net proceeds of the sale, the purchasers were obligated to pay the difference, with interest from date of the sale at seven percent per annum. The purchasers paid down $3,500, and gave their promissory note for $2,000, made one payment of $20, and 30 days after date of purchase gave notice of rescission upon the ground of alleged fraud and surrendered the machines to defendant. Defendant took possession of the machines, left some of them where they were then located, and stored others. He sued for the balance due on the contract in the amount of $16,311.65 and attorney's fees. On the following day the purchasers instituted an action for rescission, alleging fraud of defendant and his agents, consisting of alleged false representations and promises with respect to the property sold. They also answered Navarro's complaint. The two actions were consolidated for trial and were tried on the same evidence. The court found that neither Navarro nor his agents made any false representations or promises, denied relief to Paul R. and Eileen B. Rice, and rendered judgment in favor of Navarro for the sum of $16,291.65, plus attorney's fees of $750 and the costs in each action. The court made separate findings, conclusions and judgments in the consolidated actions. Paul R. Rice and Eileen B. Rice appeal from each judgment. The appeals are presented on a single set of briefs.

The allegations of fraud were the following: That all the machines were new; that each was producing an average weekly income of $15 for the owner and would continue to produce that amount; that all the machines were located in Hollywood and defendant would, at plaintiffs' request, substitute other locations; that one machine had a guaranteed weekly return of $15 to the owner; that Paul R. Rice would be able to service the machines in two half days per week and that plaintiffs would earn enough from the machines to meet the installments of the purchase price and have an additional profit of $500 per month. It was alleged that each machine had not been producing a net income of $15 per week but there was no allegation as to the amount they had been producing. It was alleged that during the time plaintiffs operated the machines, some six or seven weeks, the average weekly return to the plaintiffs was the sum of $6.88 or approximately $555 per month. It was alleged that all the machines were not located in Hollywood but six were located elsewhere and defendant refused to substitute other locations. It was also alleged that no machine had a guaranteed weekly return to the owner of $15 or any other amount; also, that it was necessary for Paul R. Rice to devote full time each day to servicing the machines.

[1] The court found all the allegations of fraud to be untrue. Appellants' briefs contain a discussion of the evidence in an attempt to point out its insufficiency to support the findings, but a specification of the findings which it is claimed are unsupported by the evidence appears only in the conclusion of appellants' closing brief. We have nevertheless made a study of the reporter's transcript. We find there was testimony that all of the machines sold plaintiffs were new; that defendants informed plaintiffs that the servicing of the machines was exacting work and especially important in order to keep them constantly in operating condition; that complaints with respect to the machines must have immediate attention. Many of the machines had been recently installed and it was explained to plaintiffs that the locations of some machines would have to be changed when it was found that the returns from them were unsatisfactory. Two of Navarro's agents testified that they told plaintiffs that the machines, if kept in the locations where they were then installed, or in other good locations, and if properly serviced, should produce an average net income to plaintiffs of $15 per week. It was also explained to plaintiffs that there were substantial fluctuations in the returns from individual machines from time to time. There was evidence that the defendants did not represent that the machines had been netting an average of $15 per week, or any other sum, and there was but slight evidence as to what the machines had been averaging for the short time they had been installed in the various locations prior to plaintiffs' purchase. It appears also that at the time of the negotiations one machine was under a guarantee of $15 per week to the owner, but that it had to be moved before plaintiffs took possession. There was testimony that an important feature of the operation was the frequent inspection and changing of records and needles and the supplying of records for which there was the largest demand from time to time, and that this feature of the business also was explained to plaintiffs. There was substantial evidence that Paul R. Rice in numerous instances did not furnish the type of service which the machines needed, and which was requested by the proprietors of the cafes and other businesses where they were located. It was not denied that the income from the plaintiffs' machines while they were operated by them was only about $555 per month, or less than $7 per week. However, the court received the testimony of

other operators that their machines returned to them an average income of about $15 per week. Defendants testified that they fully cooperated with plaintiffs in an effort to make their venture a success. Before the contract was made plaintiffs travelled to many of the locations where they inspected the machines, and in several instances the machines were emptied and the contents counted in the presence of plaintiffs. There was, in short, testimony which, if believed, was sufficient to disprove all of plaintiffs' allegations of fraud. It does appear, however, that plaintiffs were wholly inexperienced in the business and were apparently over-sold into making an unfortunate investment.

The charges of fraud presented a pure question of fact, and the evidence as to the alleged misrepresentations was sharply conflicting. The most that can be said in plaintiffs' favor is that their evidence would probably have sustained judgment for rescission. The trial court was fully justified in finding that the representations as to what the machines should or would earn under proper management were mere expressions of opinion and not statements of fact. It could have been inferred, reasonably, that under skillful management the machines could have been made to earn substantially more than they did earn. It will be clear from what we have said that the findings upon the fraud issues are supported by substantial evidence. This conclusion ends the jurisdiction of this court to review the evidence.

[2] Appellants make the further claim that the evidence proved a mutual rescission of the agreement. The argument is based upon the fact that defendant Navarro took possession of the machines after plaintiffs gave notice of rescission.

The contract provided, however, that the seller had a right, upon default, to repossess the machines, and the right to resell them, although he was not obliged to resell them. There was evidence that he was obliged to take possession of them for their protection. His act in so doing did not establish as a matter of law a mutual rescission of the agreement. Phillips v. Stark, 186 Cal. 369, 199 P. 509; Lord v. Smith, 92 Cal. App. 747, 268 P. 929. The conclusion that there was no mutual rescission is well supported.

[3] It was developed in the evidence that Navarro received income from some of the machines between the time he took possession of them and the trial of the actions. It was argued upon the motion for new trial that he should have been compelled to account for his profits during this interval. We do not find in the record that this contention was made at the trial, and we find only fragmentary evidence as to how many machines were kept in operation, and practically no evidence as to Navarro's income therefrom. Whether he made an overall profit from them was not shown. It would have been a proper issue to raise at the trial, but it was too late to raise it upon a motion for new trial. The record furnishes no ground for a reversal of the judgment for the mere purpose of a trial of the question whether Navarro received sums which should have been deducted from the amount of his claim.

We find in the record amended findings and conclusions and an amendment to judgment made in the action of Navarro v. Rice which were made in ruling on the motion for new trial. The finding was that Navarro had stored the machines and was holding them for defendants Rice; the conclusion was that defendants Rice were entitled to possession and to a conveyance of good and sufficient title to the machines. The amendment to judgment was that the machines should be delivered to defendants Rice and that they be given good title thereto by bill of sale. Appellants did not deny that the judgment was a proper one to be made on the findings.

Appellants raise other points of a minor nature which do not require decision or merit discussion.

The judgments are affirmed.

WOOD and VALLÉE, JJ., concur.

91 Cal.App.2d 107

MURRAY v. SOUTHERN PAC. CO. et al.

Civ. 13813.

District Court of Appeal, First District, Division 2, California.

April 5, 1949.

Hearing Denied June 3, 1949.

1. Trial ⚷295(1)

Instructions must all be considered together.

2. Trial ⚷253(4)

In pedestrian's action against railroad, engineer and fireman for injuries sustained when struck by switch engine at grade crossing, instruction that if employees were not negligent railroad could not be held, which obviously referred to operation of engine, and instruction presenting issue of absence of flagman, which went to asserted negligence of railroad alone, were not objectionable as eliminating question of railroad's negligence because of failure to maintain a flagman.

3. Appeal and error ⚷1064(1)

In pedestrian's action against railroad, engineer and fireman for injuries sustained when struck by switch engine at grade crossing, instruction that, if employees were not negligent, railroad could not be held, and instruction given at request of pedestrian stating case as to liability of railroad company based on presence or absence of flagman, if conflicting, were not prejudicially erroneous in view of evidence. Const. art. 6, § 4½.

4. Appeal and error ⚷1170(9)

Errors in instructions do not call for a reversal unless appellate court after review of the evidence and consideration of the entire case concludes they resulted in a miscarriage of justice. Code Civ. Proc. § 475; Const. art. 6, § 4½.

5. Appeal and error ⚷1170(9)

In pedestrian's action for injuries sustained when struck by switch engine at grade crossing, giving of instructions which possibly appeared argumentative in stating rules of law or repetitious in desire to make rules clear was not reversible error in absence of showing of miscarriage of justice. Code Civ.Proc. § 475; Const. art. 6, § 4½.

6. Railroads ⚷348(4, 8)

Evidence that there was no negligence on part of fireman and engineer of switch engine which struck pedestrian at grade crossing and that pedestrian was injured as result of failure to detect approach of engine through failure to look at congested crossing with which he was familiar rather than through failure of flagman to warn him of presence of engine supported verdict exonerating railroad and employees of liability.

◆

Appeal from Superior Court, City and County of San Francisco; Edw P. Murphy, Judge.

Action by John W. Murray against the Southern Pacific Company and others, for personal injuries sustained when plaintiff as a pedestrian, was struck by an engine on a grade crossing. From the judgment, plaintiff appeals.

Affirmed.

Melvin M. Belli, of San Francisco, for appellant.

Arthur B. Dunne, Louis L. Phelps and Dunne & Dunne, all of San Francisco, for respondent.

NOURSE, Presiding Justice.

On March 23, 1945, at about 6:50 P.M., appellant was severely injured when he was struck by a slow-moving switch engine as he was walking along Fourth Street across the Southern Pacific tracks in San Francisco. Fourth Street runs north and south, and crosses the tracks at right angles. The tracks lie between King Street on the south and Townsend on the north, terminate in the Southern Pacific station located at Third and Townsend Streets and are numbered from 15 to 1, track 15 being nearest King Street.

Appellant, a member of the San Francisco Fire Department, had on many occasions used this route in the course of his duties and at the time the accident occurred was proceeding on foot from his regularly assigned station to another, the most direct route being across the tracks by way of Fourth Street. He walked north on the west side of Fourth Street to the railroad tracks where he found the street blocked by the "Daylight" on track 14 and the "Lark" on track 8. He walked through the vestibules of these trains and continued up Fourth toward Townsend Street until he was struck on track 5 by a switch engine moving west and away from the station.

Appellant based his case on two theories of negligence, one the negligent operation of the engine, the other the failure of the presence of a flagman to warn him of the approaching engine. An ordinance pertaining to flagmen was introduced into evidence reading as follows: "Fourth Street and all other public streets mentioned herein shall remain open public streets subject to public use, except that Fourth Street may be temporarily closed to permit the arrival and departure of trains at the depot at Third and Townsend Streets when trains are too long to be accommodated in the space between such depot and Fourth Street. A flagman shall always be stationed at Fourth and Townsend Streets and at Fourth and King Streets. * * *"

The grounds upon which appellant seeks a reversal of the judgment are: (1) Insufficient evidence to sustain the verdict and (2) prejudicial error in the instructions. Most of the argument is devoted to the latter ground. Appellant claims that the case was tried on the two theories of negligence but that the court through its instructions presented only one theory to the jury and eliminated the question of respondents' negligence because of failure to maintain a flagman, to the great detriment of appellant.

The chief objection was to the following instruction: "There are before you in this case three defendants, Southern Pacific Company, Edmund Carey, and Herbert Hambaugh. The charges made against each one of these defendants are the same. * * * Each defendant is entitled to the individual judgment of each and every juror as to his case, and to have his case determined on its merits, irrespective of what determination may be made as to any other defendant, except in the one particular to which I shall call your attention. * * * If there is no negligence on the part of Defendant Edmund Carey, the engineer, or on the part of Herbert Hambaugh, the fireman, and if you so find, it will be unnecessary for you to consider any other question in the case, and you will then return your verdict in favor of all the defendants."

However, at the request of appellant the court also instructed the jury: "* * * the Defendant Southern Pacific Company, in return for the privilege of running its tracks across Fourth Street, have the absolute duty to maintain a watchman or flagman at Fourth and Townsend Streets when said Fourth Street is blocked by its trains. If you find that defendants were blocking said Fourth Street by their trains at the time of the accident here in question, and if you further find that they did not maintain a watchman or flagman at said crossing, in violation of said ordinance, you may consider said violation * * * in determining whether or not defendants were negligent, and if you find that the Defendant Southern Pacific Company did so violate said ordinance by failing at the time and place in question herein to maintain a watchman or flagman, and said violation of said ordinance was the sole and proximate cause of Plaintiff John Murray's injuries herein, then you shall return a verdict in favor of Plaintiff John Murray and against the Defendant Southern Pacific Company. * * *"

[1,2] Appellant cites cases to the effect that "the giving of an erroneous instruction is not cured by the giving of other correct instructions, where the effect is simply to produce a clear conflict in the instructions and it is not possible to know which instruction was followed by the jury in arriving at a verdict." Goodwin v. Foley, 75 Cal.App.2d 195, 200, 170 P.2d 503, 506. The jury was instructed by the court not to select single instructions but to consider all of them in determining any issue of the case. Instructions must all be read and considered together. McFaul v. Madera Flume and Trading Co., 134 Cal. 313, 314, 66 P. 308. Thus when this question is raised the vital inquiry is whether the instructions produce such a conflict as would confuse the jury.

The ordinance provides that a flagman shall be stationed at Fourth and Townsend Streets and at Fourth and King. Under the cirumstances of this case even if flagmen had been stationed at these two locations it is difficult to understand how they could have effectively warned plaintiff. The evidence as to the presence of the flagman was conflicting. With the exception of the appellant, the witnesses who testified they saw no flagman arrived on the scene after the accident. The flagman on duty at that time had died prior to the trial and his death certificate was introduced at the trial. Other witnesses who testified to having seen the flagman stationed at Fourth Street somewhere near tracks 3 and 4 saw him there prior to the accident with the exception of the engineer of the switch engine who testified he noticed the flagman just after appellant was struck. Just before the accident, at 6:45, train No. 147 pulled into the station on track 4. The fireman of this train, stationed on the left side of the cab—the side nearest Townsend—saw the flagman. The engineer of that train who was on the right side of the cab did not see the flagman but testified he noticed the switch engine pulling out on track 5 as his train pulled in on track 4. There was a question as to whether train No. 147 extended over Fourth Street blocking the view looking toward Townsend. Whether it did for any length of time or not it must necessarily have blocked it when coming into the station which was at the time the switch engine was pulling out—the time when a warning by the flagman would have been of benefit to plaintiff. The ordinance does not provide that a flagman must be stationed at each track when trains are in movement, but only at King and Fourth and Townsend and Fourth. Yet the view of King Street was blocked by the "Lark" and the "Daylight" on tracks 8 and 14, and the view of Townsend shut off by train No. 147.

Appellant accepts the testimony of the fireman on the engine involved in the accident who testified he saw the appellant walking along Fourth Street and kept him in sight as he walked a distance of 26 feet while the engine was slowly pulling away from the station. Appellant complained that when the fireman saw him walking toward the track upon which the engine was proceeding he should have stopped the engine instead of waiting until it was too late to avoid the accident. It seems logical to assume that if a fireman from the cab of an engine could keep a pedestrian in plain view for that length of time and space the pedestrian, if he had exercised that degree of caution incumbent upon all persons crossing railroad tracks, could have seen the engine. That he did not was substantial evidence of appellant's contributory negligence, and the jury could have so found.

These are the circumstances before the jury relating to the criticized instruction. Taking this instruction with that proposed by appellant there would appear to be some conflict, but reading the two together we can not say that they caused any confusion. The first told the jury that if the employees of the railroad company were not negligent then the company could not be held. But this obviously referred to the operation of the switch engine alone. The issue of the absence of the flagman was one that went to the asserted negligence of the company alone and did not in any way affect the charge of negligence against the engineer and fireman. The instruction given at the request of appellant correctly stated the case as to liability of the railroad company based on the presence or absence of a flagman.

Thus the jury could have followed both instructions and found that there was no negligence of the employees in the operation of the engine, and also that either the flagman was present, or that he was not present, and his absence was or was not "the sole and proximate cause" of the injuries.

[3] However, if under the rule of Goodwin v. Foley, supra, these instructions produced error as conflicting, we are compelled to hold that the error was not prejudicial and hence not reversible under section 4½ of article VI of the Constitution.

[4–6] Appellant also complains that certain instructions were argumentative and repetitious as ground for reversal. However, it is a well settled rule that errors of the trial court in instructions do not call for a reversal unless the appellate court after a review of the evidence and consideration of the entire case concludes it resulted in a miscarriage of justice. Code of Civil Procedure, sec. 475; art. VI of the Constitution, sec. 4½; Caminetti v. Imperial Mut. Life Ins. Co., 59 Cal.App.2d 476, 488, 139 P.2d 681. Appellant's complaint is really a hypercritical analysis of these instructions rather than an assignment of prejudicial error. A statement of a rule of law may appear argumentative, and such statements may be repetitious because of a desire to make them clear. But that alone is not reversible error. We find no miscarriage of justice.

As to the first point pertaining to the insufficiency of the evidence, upon a review of the case we find sufficient evidence to uphold the verdict.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

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91 Cal.App.2d 158

PEOPLE v. FOUNTAIN et al.

Cr. 4306.

District Court of Appeal, Second District, Division 3, California.

April 7, 1949.

1. Criminal law 🔑1130(2)

Where defendant had been sentenced to imprisonment for grand theft, District Court of Appeal would consider appeal notwithstanding counsel's failure to submit brief stating each point separately and under appropriate heading as required by court rule. Rules on Appeal, rule 15(a).

2. Larceny 🔑65

Evidence that defendant took meat worth $400 from packing plant locker at one o'clock at night without paying therefor after having been permitted to enter by night watchman without authority to sell supported conviction for grand theft.

3. Larceny 🔑56

"Corpus delicti" of grand theft is established when there is proof of a person from whom property may be taken, an intent to take such property against will of owner, and an act performed tending to accomplish the foregoing.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Corpus Delicti".

4. Criminal law 🔑406(1)

Where corpus delicti was established by competent evidence during trial of defendant for grand theft, defendant's admission before trial tending to indicate that property was taken without intent to pay therefor was properly admitted.

5. Criminal law 🔑511(2)

It is only necessary to supply corroboration of testimony of an accomplice which satisfactorily tends to prove the offense, and to connect defendant with commission of that offense; and corroboration is sufficient if considered by itself it tends in some way to connect defendant with offense charged.

6. Criminal law 🔑511(7)

In prosecution for grand theft, defendant's admissions constituted sufficient corroboration of testimony of accomplice.

◆

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Matthew Fountain and Clarence Henry Joss were prosecuted together, and Clarence Henry Joss was convicted of grand theft, and from the judgment and from an order denying his motion for a new trial, Clarence Henry Joss appeals.

Judgment and order affirmed.

Ray L. Smith, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Henry A. Dietz, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

Defendant was tried by a jury and convicted of grand theft. He appeals from the judgment and from the order denying his motion for a new trial.

[1] The appeal should be dismissed because of the failure of counsel for defendant to comply with Rule 15(a) of the Rules on Appeal, which in part reads: "Each point in a brief shall appear separately under an appropriate heading, with subheadings if desired. Such headings need not be technical 'assignments of errors' but should be concise headings which are generally descriptive of the subject matter covered. * * *" 22 Cal.2d 1, 12. Defendant's brief not only does not state each point separately and under an appropriate heading but no points at all are stated. The Rules on Appeal have been in force nearly six years and it would seem that the profession by now should have some slight knowledge of their content. Notwithstanding, but solely because defendant has been sentenced to imprisonment and a client should not suffer because of the omissions of his counsel, we have examined the entire record to determine whether error was committed below. We find none.

As we cull defendant's briefs we gather that he wanted to claim that the corpus delicti was not established, that the evidence does not support the verdict, and that the testimony of an accomplice was not corroborated.

One Mueller operated a meat packing plant at Vernon. The yard of the plant was enclosed by a high wire fence with one gate which was kept locked at night. Fountain, the accomplice, was in the employ of Mueller as a sort of janitor and night watchman. He had no authority to sell meat. Defendant, a wholesale meat dealer, supplying hotels, restaurants, cafes and markets, had worked for Mueller about 1924 and apparently had been discharged for defalcations. He had purchased meat from Mueller's Vernon plant prior to 1947, but always in the daytime and from a salesman.

In the two months prior to May 30, 1948, between $7,000 and $8,000 worth of meat was stolen from the Mueller plant. In an effort to apprehend the thief, deputy sheriffs were stationed at the plant. On the morning of Friday, May 28, 1948, Fountain met defendant at a market in Los Angeles. They had not known each other prior to this time. He asked defendant if he wanted to buy some meat, saying that he needed money to make a payment on his car; that he was working at a packing house at night. He told defendant where it was located and to come out to it (the packing house). Defendant gave Fountain a card with defendant's telephone number on it. There was no talk as to the price of the meat. Immediately thereafter defendant went to the Mueller plant and looked it over.

On May 31, 1948, about 1:00 a. m., Fountain telephoned defendant and told him to come over. Defendant asked, "Is everything ready?" Fountain replied, "Yes, come right over." Almost immediately Fountain telephoned defendant again and told him that instead of going into the parking lot, he should come in the front gate with his lights out; that he, Fountain, was alone. Two deputy sheriffs were stationed at the plant at the time. One of them heard and testified to these telephone conversations. Fountain then moved an automobile to make a place for defendant to park his car backed against a loading dock, unlocked and opened the gate and turned out the lights in the yard. Shortly thereafter defendant arrived at the plant with a pickup truck. Upon reaching the gate he turned off the lights on the truck, drove into the yard and backed his truck against the loading dock. Fountain met him. The two went into the locker, took out three hindquarters and five loins of beef and put them on defendant's truck. Defendant then closed the door of the truck. Fountain did not receive any money from defendant that night, saying he would see him the next day. All movements of defendant and Fountain were witnessed by the deputy sheriffs and testified to. As defendant was about to get into the truck to leave, he and Fountain were arrested. The value of the meat was about $400.

While defendant was being searched, he said to the deputy, "You don't have to worry about me. This is my first time." Later that night defendant told the officers that he had met Fountain at the market on Friday and had there "made arrangements for tonight," that he was angry at Fountain for getting him into a mess and that "If he had known that he couldn't get away with it, he wouldn't have done it at all." On June 2, 1948, defendant went to Mueller's office, told Mueller that he did not want him to testify against him and that he wanted to pay for the meat. Defendant told Mueller that he intended to buy the meat. Mueller said, "Clarence, you know you couldn't buy meat from the janitor at one o'clock at night." Defendant replied, "Yes, I did, but how are you going to prove it, that it was hot meat?" During the trial defendant told Mueller, "I want you to believe me that this is the first time I ever hauled meat out of there at night."

Defendant in his testimony admitted meeting Fountain on May 28, being at the plant on that day, the telephone calls, going to the plant about 1:00 a. m., taking the meat out of the cooler, and loading it on his truck. His defense was that he was buying the meat from Fountain; that he was about to pay for it when arrested with $455 which he had on his person at the time.

[2-4] Proof of the facts related established the corpus delicti and is sufficient to support the verdict. Personal property was taken from the possession of the owner without his consent and with intent to deprive him permanently thereof. This was larceny. Larceny in the amount of the value of the meat is grand theft. People v. Savage, 66 Cal.App.2d 237, 242, 152 P.2d 240; People v. Lathrop, 37 Cal.App.2d 341, 345, 99 P.2d 330; People v. Siderius, 29 Cal.App.2d 361, 366, 84 P.2d 545. The corpus delicti is established when there is proof of (1) a person from whom the property may be taken, (2) an intent to take such property against the will of the owner, and (3) an act performed tending to accomplish the foregoing. People v. Harvey, 25 Cal.App.2d 368, 371, 77 P.2d 487. The corpus delicti having been established by competent evidence during the trial, the admissions of the defendant were properly admissible. People v. Housman, 44 Cal. App.2d 619, 627, 112 P.2d 944; People v. Taylor, 40 Cal.App.2d 324, 326, 104 P.2d 846.

[5, 6] The testimony of the accomplice Fountain was sufficiently corroborated. In fact, if the testimony of Fountain is entirely eliminated, the evidence amply supports the verdict. Of the facts which we have recited, the only ones proven by the testimony of the accomplice were the conversations had in the market Friday, May 28, 1948. As we said in People v. Malone, 82 Cal.App.2d 54, at page 61, 185 P.2d 870, 874: "It is only necessary to supply corroboration which satisfactorily tends to prove the offense and to connect the defendant with the commission of that offense. People v. Lorraine, supra, 28 Cal.App.2d 50, 53, 81 P.2d 1004; People v. Smitherman, supra, 58 Cal.App.2d 121, 123, 135 P.2d 674; Commonwealth v. Drake, 124 Mass. 21; Reg. v. Boyes, 121 Reprint 730; 1 C.J. 332, § 112. The corroboration is sufficient if considered by itself it tends, in some way, to connect the defendant with the offense charged. People v. Negra, supra, 208 Cal. 64, 280 P. 354; People v. Thompson, supra, 16 Cal.App. 748, 117 P. 1033; People v. Watson, 21 Cal.App. 692, 132 P. 836; People v. Lee, supra, 81 Cal.App. 49, 252 P. 763; People v. Tinnin, 136 Cal.App. 301, 28 P.2d 951; People v. Lorraine, supra; People v. Hickok, 28 Cal.App.2d 574, 83 P.2d 39; 1 Cal.Jur. 114, sec. 12." See, also, People v. Trujillo, 32 Cal.2d 105, 110, 194 P.2d 681. Defendant's admissions alone constitute sufficient corroboration. People v. Malone, supra, 82 Cal.App.2d 54, 63, 185 P.2d 870.

The appeal is without merit.

The judgment and the order denying a new trial are, and each is, affirmed.

SHINN, P. J., and WOOD, J., concur.

91 Cal.App.2d 179

BEALMEAR et al. v. SMITH et al.

Civ. 16584.

District Court of Appeal, Second District, Division 2, California.

April 8, 1949.

1. Appeal and error ⚿1010(1)

Where there was substantial evidence to support findings, District Court of Appeal would not review evidence to determine whether preponderance thereof supported trial court's findings.

2. Trial ⚿395(5)

In action to impress constructive trust upon realty on ground conveyance was made upon grantees' oral promise to reconvey upon demand, finding that grantors deeded realty to grantees was a sufficient finding on material issue of whether grantors delivered deed to grantees.

3. Trial ⚿395(5)

In action to impress constructive trust upon realty on ground conveyance was made on grantees' oral promise to reconvey to grantors upon demand, finding that it was not understanding or agreement between parties that at any time grantors desired to have property reconveyed, grantees would reconvey on demand, and that grantees did not promise so to do, was a sufficient finding on material issue of whether grantees agreed to reconvey upon demand.

4. Appeal and error ⚿1071(6)

In action to impress constructive trust upon realty on ground conveyance was made on grantees' oral promise to reconvey to grantors on demand, court's findings, which in effect determined that property was conveyed to grantees as a gift and not subject to a trust agreement, determined the cause, and failure to make findings upon issues of whether there was a demand for reconveyance, or any consideration for deed, or whether grantees had authority to sell the property without consent of grantors, became immaterial and was not prejudicial error.

◆

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by William C. Bealmear and another against Virgil Earl Smith, Jr., and others, to impress a constructive trust upon certain realty. From the judgment and from an order denying a motion for a new trial, plaintiffs appeal.

Purported appeal from order dismissed, and judgment affirmed.

Elbert E. Hensley, by P. T. Howe, both of Los Angeles, for appellants.

Rowland H. Graham, of Alhambra, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants after trial before the court without a jury in an action to impress a constructive trust upon certain real property, plaintiffs appeal.

Pleadings: In the complaint plaintiffs allege that they conveyed a described parcel of real property to defendants upon defendants' oral promise to reconvey the property to plaintiffs upon demand; that plaintiffs had demanded the property be reconveyed to them but that defendants refused to do so and were threatening to sell the property.

Evidence: At the trial defendant Virgil Smith testified that plaintiffs executed and delivered to him a deed covering the property in question wherein he and his codefendant were named as grantees, and that such deed was delivered to him as a Christmas present. Both defendants denied that they or either of them had ever made any agreement whereby they promised to reconvey the property to plaintiffs.

Findings: The trial court found (a) that on the 19th day of November, 1945, plaintiffs "deeded the real property" here involved to defendants,[1] and (b) that it was not true that plaintiffs agreed to reconvey the property to defendants upon demand.[2]

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[1] Finding I read in part as follows: "It is true that on the 19th day of November, 1945 the plaintiffs, William C. Bealmear and Katherine C. Bealmear, deeded the real property described as (description of property) * * * to defendants, Virgil Earl Smith, Jr., and his wife, Rosella Smith."

[2] Finding II was as follows: "It is not true that shortly after the acquisition of

Contentions of Plaintiffs: First: *The preponderance of the evidence does not support the findings of the court.*

[1] This proposition is not properly before this court and will not be considered since it is the established rule that courts of review will not pass upon the weight or preponderance of evidence, and whereas in the instant case there is substantial evidence (see above) to support the findings, the reviewing court will not look further into the evidence. (Washko v. Stewart, 20 Cal.App.2d 347, 348, 67 P.2d 144; Crain v. Security Title Ins. etc. Co., 6 Cal.App.2d 343, 345, 44 P.2d 632; Waen v. Ohio Farmers Ins. Co., 4 Cal.App.2d 513, 516, 41 P.2d 168; Bowman v. Carrol, 120 Cal.App. 309, 311, 7 P.2d 734.)

In 1909 Mr. Presiding Justice Allen in Berger v. Horlock, 10 Cal.App. 352, at page 357, 101 P. 918, 920, made this pertinent remark relative to the proposition here presented: "The Supreme Court, and this court in conformity therewith, has so repeatedly said that where the evidence is conflicting, and there is any evidence tending to support the finding of the trial court the same will be sustained, that a time should arise when the bar will recognize the force and extent of this rule, and cease to burden appellate courts with appeals involving only the right of the trial court to give such weight and effect to the evidence, as, in its judgment, is proper under the circumstances of the case."

Second: *The court failed to find on the following material issues: (a) Whether or not plaintiffs delivered the deed to defendants; (b) whether or not defendants agreed to reconvey upon demand; (c) whether or not there was a demand upon the part of plaintiffs to defendants to reconvey; (d) whether or not any consideration was given by defendants to plaintiffs for the deed; and (e) whether or not defendants had authority to sell the property without the consent of plaintiffs.*

[2, 3] This proposition is devoid of merit. The trial court made a finding relative to issue (a) when it found that plaintiffs "deeded the real property" in question to defendants. Such a finding was a finding of an ultimate fact which in popular acceptation signifies a transfer of title to real property by a deed. (Dunham v. Marsh, 52 N.J.Eq. 256, 30 A. 473, 474; see also Hitchcock v. Roomey, 171 Cal. 285, 288, 152 P. 913.) Also the trial court found as to issue (b) when it found that "it was not the understanding or agreement between plaintiff and defendants * * * that at any time the plaintiffs desired to have the said property reconveyed to them that said defendants would reconvey the same to plaintiffs on demand and said defendants did not promise so to do."

[4] In view of the trial court's findings on issues (a) and (b) that the property was conveyed to defendants as a gift and not subject to a trust agreement, issues (c), (d), and (e) became immaterial. If findings are made upon issues which determine a cause, other issues become immaterial and a failure to find thereon does not constitute prejudicial error. (Jones v. Wilton, 42 Cal.App.2d 45, 48, 108 P.2d 25.)

The purported appeal from the order denying the motion for a new trial is dismissed.

Affirmed.

MOORE, P. J., and WILSON, J., concur.

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title to said premises by plaintiffs the defendant Virgil Earl Smith, Jr. suggested to the plaintiffs that said property be deeded to himself and his wife for any reason. It was not the understanding or agreement between plaintiffs and defendants Smith that if said property was so deeded to them that in lieu of rent to plaintiffs defendants Smith would pay the monthly instalments of $50.00 on the encumbrances then upon said property, and amounting to $5,200, as said instalments matured, and the general taxes to become due on said property, and that at any time the plaintiffs desired to have the title to said property reconveyed to them that said defendants would reconvey the same to plaintiffs on demand and said defendants did not promise so to do. There were no understandings, agreements or promises to reconvey made by said defendants to said plaintiffs, either orally or in writing."

91 Cal.App.2d 112

SHERIDAN v. RAVN.

Civ. 13823.

District Court of Appeal, First District,
Division 2, California.
April 5, 1949.

1. Negligence ⇔32(2.3)

An "invitee" is one who goes on premises of another at the other's invitation, either express or implied, and whose presence there is in their mutual interests.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Invitee".

2. Negligence ⇔32(2.8)

A person who enters a store as a patron is an "invitee".

3. Negligence ⇔32(2.1)

A person who goes onto the premises of another solely on his own affair and for his own benefit and convenience, without any invitation of the proprietor, is a "licensee", and is not an "invitee", even though the proprietor may consent to his coming on the premises.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Licensee".

4. Negligence ⇔32(1)

Proprietor of premises owes invitee the duty of reasonable and ordinary care to protect invitee from injury.

5. Negligence ⇔32(1)

Proprietor of premises owes licensee no duty of care except to refrain from doing licensee a willful injury.

6. Negligence ⇔32(2.1)

A person may be an invitee in part of premises and a mere licensee in others.

7. Negligence ⇔32(3)

A patron of restaurant or lunch room, who goes behind counter, becomes a "licensee" rather than an "invitee", even though permitted to go behind counter by proprietor to see what is going on, and proprietor would owe patron no duty of care while patron is behind counter, except to refrain from doing patron a willful injury.

8. Negligence ⇔139(1)

In action for damages resulting when plaintiff patron of defendant's lunch counter was struck by electric fan which was on floor when plaintiff, with defendant's permission, was walking to employees' washroom down a hall not open to use by general public, instructions on subject of licensees and invitees and the duty of care proprietor was required to exercise toward each were proper.

9. Negligence ⇔32(3)

A patron may become a licensee by leaving that portion of the premises to which he has been invited.

10. Negligence ⇔136(15)

In action for damages resulting when plaintiff patron of defendant's lunch counter was struck by electric fan which was on floor when plaintiff, with defendant's permission, was walking to employees' washroom down a hall not open to use by general public, whether plaintiff was an invitee to whom defendant owed a duty of reasonable and ordinary care, or was a mere licensee to whom defendant owed no duty except to refrain from doing a willful injury, was for jury under the evidence.

11. Negligence ⇔138(2)

Instruction, requiring it to appear from entire case that no negligence existed on plaintiff's part contributing proximately to plaintiff's accident, was error as indicating that plaintiff had burden of proving that plaintiff was not contributorily negligent.

12. Appeal and error ⇔1068(3)

The giving of an instruction indicating that plaintiff had burden of proving that he was not contributorily negligent is reversible error unless reviewing court can say that plaintiff was contributorily negligent as a matter of law.

13. Appeal and error ⇔1068(3)

In action for damages resulting when plaintiff patron of defendant's lunch counter was struck by electric fan which was on floor when plaintiff was walking to employees' washroom down a hall not open to use by general public, plaintiff's admissions of frequent visits to hallway and full knowledge of the circumstances did not disclose contributory negligence as a matter of law, so as to preclude the giving of an instruction indicating that plaintiff had burden of proving that he was not contributorily negligent from being reversible error.

◆

Appeal from Superior Court, Santa Clara County; Wm. F. James, Judge.

Action by James T. Sheridan against Axel Ravn, an individual, doing business under the firm name and style of Garden City Creamery, for injuries sustained when plaintiff was struck by an electric fan on defendant's premises. From an adverse judgment, plaintiff appeals.

Judgment reversed.

Edward M. Fellows, of San Jose, and Melvin, Faulkner, Sheehan & Wiseman and A. J. Zirpoli, all of San Francisco, for appellant.

Campbell, Hayes & Custer, of San Jose (Edward J. Niland, of Santa Clara, of counsel), for respondent.

NOURSE, Presiding Justice.

Plaintiff entered the creamery and lunch counter of defendant, ordered a sandwich, and then went behind the counter and into the kitchen in back where he asked of the defendant and was given permission to use the employees' washroom. This room was located at the extreme rear of the building and defendant testified that it was not open to use by the general public. It was located at the end of a darkened hall which led off the kitchen, which was shut off by a counter from the portion of the premises open to use of the patrons. As plaintiff walked through the hallway he was struck by an electric fan which had been placed on the floor and was then operating for what purpose the evidence does not show since it was a cold rainy day in the month of December.

The cause was tried with a jury which gave its verdict for defendant. The appeal is founded on a criticism of instructions given and refused.

[1-7] The pivotal question before the jury was whether, at the time of the accident, appellant was an invitee or a licensee in the portion of the building where the accident occurred. The trial court instructed the jury:

"An invitee is one who goes on the premises of another at the other's invitation, either express or implied, and whose presence there is in their mutual interests. If you go into a store as a patron you are an invitee, presumably the store-keeper invited you there to patronize him.

"A person who goes onto the premises of another on his own affair and for his own benefit and his own convenience, without any invitation of the proprietor, even though the proprietor may consent to his coming on the premises, if it is solely for his own benefit and his own convenience, then he is not an invitee but a licensee.

"The reason I am explaining this to you is because if a person is an invitee on the premises, then the proprietor owes to his guest, the invitee, the duty of reasonable and ordinary care to protect him from injury. Whereas, if he is only a licensee, then the proprietor owes him no duty except to refrain from doing him a willful injury, and in this case there is no evidence of anything that would even hint at a willful injury, so it follows that if the Plaintiff at the time of this injury was there where he was as a licensee, that is on his own affair, for his own convenience, then the Plaintiff could not recover because there would be no duty owed by the properietor to him. On the other hand, if the Plaintiff were there as an invitee, then the Defendant would owe him a duty to have the premises reasonably safe for the purposes for which he was invited there. Now, a person may be an invitee in part of the premises, and a mere licensee in others. For instance, to illustrate, a restaurant or a lunch room has a place for the public to come in, has a counter at which they may sit, a place where they may give their order, or pay their bills as the case may be, or any other part of the premises to which the public is invited, either directly or by implication, or because of the position or character of the place, but if a person went behind the counter, for instance, he would cease being an invitee. That is not where he belongs; he would then be a licensee, even though the proprietor said, 'You may come back of the counter and see how I slice the bacon,' or whatever is going on. It would be a matter in which the proprietor wouldn't have any interest, merely for the accommodation of the customer. In that case the proprietor would owe him no duty, and if he were injured it would be too bad, physically he would have no cause of action.

"In this case the question as to whether the Plaintiff, when he went down this passage in back there toward this washroom, whatever it was, whether he was an invitee or a licensee, I am submitting to the jury as a matter of fact, and I am leaving that for you to determine from all of the circumstances and conditions as disclosed by the evidence and the testimony given by the witnesses. You have also some photographs here which you can examine. You will examine the photographs and consider whether or not from the appearance of the thing is it a place that would ordinarily be expected to have the public go, and is it a place where, under all of the circumstances and testimony introduced, the public had been invited either directly or by implication. A consent of the proprietor to a person going into a place not generally for the use of the public does not create that person an invitee at all or with the consent of the proprietor."

[8] This was a correct statement of the law and appellant cites no authority and offers no argument other than the mere statement that it is "erroneous, inadequate and prejudicial." The instructions follow the rules of law found in Demmer v. City of Eureka, 78 Cal.App.2d 708, 711, 712, 178 P. 2d 472, where numerous cases are cited. And see 19 Cal.Jur. p. 616.

[9, 10] Under these instructions the trial court left to the jury the determination of the question of fact whether, at the particular portion of the premises where the injury occurred, the appellant was an invitee or a mere licensee. That a patron may become a licensee by leaving that portion of the premises to which he has been invited is conceded by all the authorities. Demmer v. City of Eureka, supra, and cases there cited. Here the evidence is that the washroom was not a part of the premises to which the public was generally invited—it was maintained primarily for the use and benefit of the employees.

Parallel cases are found in this and other jurisdictions all concurring in the rule announced in Schmidt v. Bauer, 80 Cal. 565, 567, 22 P. 256, 5 L.R.A. 580, where the court held that the standard of care of an innkeeper toward his patrons "only applies to such parts of the building as are a part of, or used to gain access to, or constitute a passage-way to and from, the business portion of the building, and not to such parts of the building as are used for the private purposes of the owner, unless the party injured has been induced by the invitation or allurement of the owner, express or implied, to enter therein." This rule, on similar facts, is found in Corbett v. Spanos, 37 Cal.App. 200, 173 P. 769; Herzog v. Hemphill, 7 Cal.App. 116, 93 P. 899; McMullen v. M. & M. Hotel Co., 227 Iowa 1061, 290 N.W. 3; McNamara v. MacLean, 302 Mass. 428, 19 N.E.2d 544; Collins v. Sprague's Benson Pharmacy, 124 Neb. 210, 245 N.W. 602; Hudson v. Church, etc., 250 N.Y. 513, 166 N.E. 306; Napier v. First Congregational Church, 157 Or. 110, 70 P.2d 43; Lerman Bros. v. Lewis, 277 Ky. 334, 126 S.W.2d 461; Garthe v. Ruppert, 264 N.Y. 290, 190 N.E. 643.

Here the jury could find that this particular washroom was not maintained for the benefit of the customers of the restaurant and was not a portion of the premises to which the customers generally were invited; that it was maintained solely for the benefit of the employees and could not be used by a customer without special permission, and could not then be used unless one departed from the public portion of the premises and passed through a private hallway which was kept for the exclusive use of the employees. The reason for the distinction of the status of the customer under these circumstances is found in Collins v. Sprague's Benson Pharmacy, supra, where the court said, 245 N.W. page 605: "Mere permission of an owner, allowing customers to enter and use a certain portion of his premises, is indicative of a license merely, and not of an invitation. The law does not penalize good nature, or indifference, nor does permission ripen into right."

However the evidence would support a finding by the jury that appellant was an invitee. The evidence shows that respondent had only the one washroom on the premises, that appellant over a period of ten years had used the washroom many times with respondent's permission, and when respondent was asked if the washroom was not there for other customers to use if they wanted to he answered cryptically: "Usually ask." The jury might from this have inferred that it was respondent's common practice to allow his patrons the use of this washroom and whether or not there was an implied invitation for them to do so would be a jury question. Stewart v. Lido Cafe, 13 Cal.App.2d 46, 50–52, 56 P.2d 553; Johnston v. De La Guerra Properties, Inc., 28 Cal.2d 394, 170 P.2d 5; Gastine v. Ewing, 65 Cal.App.2d 131, 150 P.2d 266.

[11-13] Though the jury was properly instructed on the invitee-licensee status of appellant and may have rendered its verdict on that issue alone, we cannot overlook the error in the instruction on the issue of contributory negligence. This instruction reads: "The Plaintiff must not only prove he was injured through negligence of the Defendant, but it must also appear from the consideration of the entire case that there was no negligence of any kind or any degree on the Plaintiff's part which contributed proximately to the accident of Plaintiff." The instruction is the same as that condemned in Rush v. Lagomarsino, 196 Cal. 308–314, 237 P. 1066, as indicating to the jury that the burden of proof was on a plaintiff to show he was not guilty of contributory negligence. Unless the reviewing court can say that the plaintiff was guilty of contributory negligence as matter of law such an instruction calls for a reversal. In Rush v. Lagomarsino the question of contributory negligence was tried extensively and the evidence was in conflict. Respondent here argues that appellant's admissions of frequent visits to the hallway and full knowledge of the circumstances discloses contributory negligence as matter of law, but we must hold that that was a question for the jury.

Judgment reversed.

GOODELL and DOOLING, JJ., concur.

91 Cal.App.2d 129

AIR TRANSPORT MFG. CO., Limited, et al. v. EMPLOYERS' LIABILITY ASSUR. CORPORATION, Limited, et al.

Civ. 16915.

District Court of Appeal, Second District, Division 2, California.

April 5, 1949.

Hearing Denied June 2, 1949.

1. Insurance 🔑512½

The phrase "other valid insurance", as used in public liability policy providing that, if "other valid insurance" exists protecting insured, policy shall be void with respect to such specific hazard otherwise covered, means insurance providing an unconditional coverage of the loss, even though limited as to amount.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Other Valid Insurance".

2. Insurance 🔑512½

Public liability policy which was issued to transportation company, and which provided only pro rata coverage if company had other insurance, was not "other valid insurance" within meaning of public liability policy issued to truck rental company, and providing that, if "other valid insurance" exists, policy shall be void with respect to such specific hazard otherwise covered, and therefore insurer which issued policy to truck rental company was required to defend actions for damage resulting from operation of truck rented by transportation company from truck rental company, and was liable for one half of any recovery against transportation company.

◆

Appeal from Superior Court, Los Angeles County; Philip H. Richards, Judge.

Action by the Air Transport Manufacturing Company, Limited, a corporation, and L. O. Swerdlow, against the Employers' Liability Assurance Corporation, Limited, a corporation, and the Pacific Indemnity Company, a corporation, to determine which of the defendants, if either, was liable to plaintiffs for claims for damages arising out of an automobile accident. From a judgment exonerating the Pacific Indemnity Company, a corporation, and holding that the Employers' Liability Assurance Company, Limited, a corporation, was liable for claims not to exceed $25,000, the Employers' Liability Assurance Corporation, Limited, a corporation, appeals.

Judgment affirmed.

Crider, Runkle & Tilson, of Los Angeles, for appellant.

Vernon Bettin and Jennings & Belcher, all of Los Angeles, for respondents.

WILSON, Justice.

This is an action for declaratory relief to determine which, if either, of two insurers against public liability is liable to plaintiffs on claims for damages arising out of an automobile accident.

The trial court adjudged that (1) defendant Pacific Indemnity Company is exonerated from liability by reason of the fact that plaintiff Air Transport Mfg. Co., Ltd., failed to comply with the provisions of a condition of the policy covering notice to the insurer, and (2) defendant The Employers' Liability Assurance Corporation, Limited, is obligated under its policy of insurance to defend plaintiffs and to pay on their behalf one half of all sums which the plaintiffs shall become obligated to pay arising out of the claims, not exceeding the sum of $25,000.

Plaintiffs have not appealed from that portion of the judgment exonerating Pacific Indemnity Company from liability. Employers' have appealed from the judgment holding it liable on its policy.

On December 5, 1944, Employers' issued a public liability policy to American U-Drive Truck Rentals Co. with a limit of $25,000 as to the claim of one injured person. The policy contained what is commonly called an "Omnibus Clause" which extended the coverage of the policy with respect to the use of automobiles to any person using a car owned by U-Drive with its permission. The policy also contained the following clause: "8. Other Insurance. If other valid insurance exists protecting the Insured from liability for such bodily injury, sickness, disease or death or such injury to or destruction of property, this policy shall be null and void with respect to such specific hazard otherwise covered, whether the Insured is specifically named in such other policy or not; provided, however, that if the applicable limit of liability of this policy exceeds the applicable limit of liability of such other valid insurance, then this policy shall apply as excess insurance against such hazard in an amount equal to the applicable limit of liability of this policy minus the applicable limit of liability of such other valid insurance."

On October 1, 1944, Pacific Indemnity Company issued a comprehensive liability policy to Air Transport covering all of its operations, with a limit of $25,000 with respect to injuries of one person. One of the conditions of that policy is as follows: "12. Other Insurance. If the insured has other insurance against a loss covered by this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss."

On July 18, 1945, Air Transport rented a Dodge truck from American U-Drive and on the same day, plaintiff L. O. Swerdlow, an employee of Air Transport, while driving the truck was involved in an accident resulting in personal injuries to one Morales.

It is the contention of appellant that its policy never covered respondents because they had "other valid insurance" which consisted of the Pacific Indemnity policy and that under clause 8 of appellant's policy the omnibus clause became void as to respondents. This contention is correctly and ably answered in the memorandum decision of the trial judge, the Honorable Philip H. Richards, and so much of that decision as is applicable to this appeal, reading as follows, is hereby adopted as the opinion of this court:

"To determine the liability of Employers' at this time, if any, we must first determine the respective liabilities, if any, of Employers' and Pacific Indemnity at the date of the accident.

"In Kearns Coal Corp. v. United States Fidelity & Guaranty Co., 118 F.2d 33, the Second Circuit Court points out that these 'concurrent insurance' clauses afford an excellent opportunity for circular reasoning, which proceeds like this: That if or since A is not bound, B is; and vice versa. In Zurich General Accident & Liability Ins. Co. v. Clamor, 124 F.2d 717, 719, the Seventh Circuit Court says: 'The old controversy as to which came first, the hen or the egg, would be almost as easy of solution as the instant problem', referring to the effect of such concurrent insurance clauses. The court in the Zurich case further points out that such clauses in both policies cannot be used to make neither carrier liable.

"There is considerable confusion in the relatively few cases where the problem has arisen. There is one line of authorities which fixes liability upon the insurer which first covered the risk. New Amsterdam Casualty Co. v. Hartford Accident & Ind. Co., 6 Cir., 108 F.2d 653; Michigan Alkali Co. v. Bankers Indemnity Co., 2d Cir., 103 F.2d 345. It seems to the Court that this is more a rule of convenience than of reason. As pointed out in Zurich General Accident & Liability Ins. Co. v. Clamor, 7 Cir., 124 F.2d 717, in case of a policy issued to a car owner carrying an omnibus clause giving protection to the operator of the car with the owner's consent, the consummation of the risk as to the third person arises only when such third person operates the car with the owner's consent. In the case of a policy covering the named assured in the operation of a car of another, the consummation of the risk arises only when the assured operates the third person's car with consent. Applied to the instant case, Employers' risk as to the operation of the Dodge by Air Transport attached when U-Drive permitted plaintiff to hire and operate it. Pacific Indemnity's risk as to the operation of the Dodge attached when plaintiff commenced to operate it with the consent of U-Drive. Liability for Swerdlow's negligence, if any, under each policy having attached by reason of the performance of the same act, neither insurer can claim the other had first assumed the risk.

"Another line of authorities holds that each insurer is primarily liable for the losses of its named assured and secondarily liable as an excess carrier for other losses. Gutner v. Switzerland General Ins. Co., 2 Cir., 32 F.2d 700; Maryland Casualty Co. v. Bankers' Indemnity Co., 51 Ohio App. 323, 200 N.E. 849; Commercial Casualty Ins. Co. v. Hartford Accident & Indemnity Co., 190 Minn. 528, 252 N.W. 434 [253 N.W. 888]. This principle cannot apply in California for the reason that there is no such thing as primary and secondary liability as between a vehicle owner and the operator thereof with permission. Consolidated Shippers, Inc., v. Pacific Employers Ins. Co., 45 Cal.App.2d 288 [114 P.2d 34].

"The Court believes that the liability of Employers', if any, must be determined from a proper construction of the language of the escape clauses or conditions of both policies. Employers' Condition 8 provides that if the insured has 'other valid insurance', its policy shall become null and void, but that if the liability limit of the policy exceeds the liability limit of other valid insurance, then its policy applies as excess insurance. By Condition 12, the Pacific Indemnity policy provides only pro rata coverage if Air Transport had 'other insurance'. Under certain conditions, not here applicable, such policy provides for excess insurance.

"Is the pro rata insurance afforded by the Pacific Indemnity policy 'other valid insurance' so as to totally void Employers' liability? 'Valid' is defined in Webster's New International Dictionary, second editon, as 'efficient; effective; accomplishing what is claimed or intended.' In Zurich General etc. v. Clamor, supra, it was held that excess insurance provided by one policy was not 'other valid and collectible insurance' so as to release liability under another policy.

[1, 2] "The Court concludes that under the terms of Employers' Condition 8 the only other insurance which would have completely released Employers' from liability would have been an unconditional coverage of the loss even though limited as to amount. But the Pacific Indemnity policy afforded only a pro rata coverage and this was not an effective coverage, i.e., it was not 'other valid insurance' within the meaning of the terms of Condition 8. Therefore, Employers' policy did not become 'null and void.'

"The remaining question is the extent of Employers' liability. At the time the loss occurred, Pacific Indemnity had a pro rata liability. The limit of liability of each policy for the death or injury to one person being in the same amount, Pacific Indemnity was therefore liable for one half the coverage. To this extent and to this extent only, Air Transport had 'other valid insurance'. To give effect to the differences in the two conditions it is logical to conclude that Employers' is liable for such coverage as was not afforded by Pacific Indemnity at the time of the accident, viz., one half.

"In Zurich General, etc., v. Clamor, supra, in a well-reasoned opinion, the court held that where the policy of company Z afforded no protection where there was 'other valid and collectible insurance' and the policy of company C afforded only excess insurance over other insurance, such excess insurance was not 'other valid and collectible insurance' required by the policy condition of company Z, and concluded that company Z was liable to the limit of its policy and company C was liable for any excess. At page 720 [of 124 F.2d] the court said: 'There is no case, so far as we are aware, where the precise question has been decided. There are cases which have held or indicated, under somewhat similar circumstances, that the specific language is controlling over the general. We think that construction should be applied in the instant situation. Any other construction would ignore the specific language employed by Car & General. The "excess insurance" provided by the latter is not "other insurance" required by Zurich. We think the logic of this reasoning is made apparent by assuming that neither of the policies contained an "other insurance" provision, or that both policies contained an "other insurance" provision in exactly the same language. It could not be seriously argued, in our opinion, but that under either of such situations the two insurers would be liable in proportion to the amount of insurance provided by their respective policies. Here, however, as pointed out, the "other insurance" provision of the two policies is different. In order to give effect to such difference, it is logical to conclude that Zurich is liable to the extent named in its policy, and that Car & General is liable only for any excess over that provided by Zurich.' To the same effect, upon substantially the same policy conditions, is the case of Michigan Alkali Co. v. Bankers Indemnity [Ins.] Co., 2 Cir., 103 F.2d 345.

"While the conditions of the policies were different in the above cases, the reasoning therein appears to be inescapable, and when applied to the instant case results in the placing on Employers' such liability as was not supplied by the coverage of the Pacific Indemnity policy, which because of equal liability limits is one half."

We conclude, as did the trial court, that Employers' is obligated to defend plaintiffs on the claims of Morales and to pay on behalf of plaintiffs one half of all sums which they shall become obligated to pay on account of such claims, not exceeding one half of the applicable limit of liability.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

91 Cal.App.2d 152

PEOPLE v. PORT.

Cr. 4303.

District Court of Appeal, Second District,
Division 3, California.
April 7, 1949.

1. Criminal law ⟾1158(4)

Whether defendant's confession was freely and voluntarily made was a question of fact for the determination of the trial judge whose finding that confession was freely and voluntarily made would not be disturbed if supported by substantial evidence.

2. Criminal law ⟾517(1)

Where trial judge after a full hearing determined that defendant's confession had been freely and voluntarily made and such determination was supported by substantial evidence, admission of the confession in evidence was not error.

3. Larceny ⟾65

Conviction of grand theft from the person was sustained by the evidence irrespective of defendant's confession.

◆

Appeal from Superior Court, Los Angeles County. William R. McKay, Judge.

Charles Ernest Port was convicted of grand theft from the person, and he appeals.

Judgment affirmed.

Charles Ernest Port in pro. per.

Fred N. Howser, Atty. Gen. and Dan Kaufman, Deputy Atty. Gen., for respondent.

WOOD, Justice.

Defendant was charged in Count I of an information with grand theft from the person, and in Count II thereof with grand theft. Trial by jury was waived. He was adjudged guilty as charged in Count I and not guilty as charged in Count II. His motion for a new trial was denied. He appeals from the judgment.

The substance of appellant's contentions is that the evidence was insufficient to support the judgment, and that his alleged confession was not made voluntarily.

On December 8, 1947, Mrs. Whitelock went in a taxicab to a hotel for dinner. Upon leaving the hotel about 8 p. m., a taxicab driver who was standing by a taxicab in front of the hotel said, "Are you ready to go back?" and she replied, "Yes." He opened the cab door for her, and as she approached the cab two men came from a side street and entered the cab ahead of her. Then appellant, after saying something to them, told her that they were going in the direction she was going, and asked her if she would share the cab with them. She replied in the affirmative, and then entered the cab. After the cab had proceeded a few blocks, one of the men said that he belonged to the Merchant Marine, he had been gone about two years, and he would like to stop and buy a drink for every one. Thereupon the driver asked her if she would mind if he stopped and let him get a drink. When she replied that she would not mind, the cab was soon stopped and she, the two men, and the driver went into a bar. After answering their question as to the kind of drink she wanted, she went into the rest room. When she returned she drank the liquor that was there for her. She testified that after she drank it she did not know exactly what happened; that she thought she went back to the cab, but she did not have "any recollection after that"; the next thing she remembered was that she was in Elysian Park, flat on the ground in a ditch at the side of a dirt road, and a park attendant was shining a flashlight in her eyes and was shaking her.

Mrs. Whitelock also testified that when she went to dinner, and when she went into the bar, she was wearing a wedding ring with 6 diamonds on it of the value of $60; an engagement ring with a diamond on it of the value of $300; another ring with 4 diamonds on it of the value of $1,500; a "Girard Perego" watch with 12 diamonds on it of the value of $250; a seal jacket of the value of $500; and a hat and gloves. When she was awakened at the park she did not have the articles just mentioned, and also her purse was missing. She did not give any one permission to take any of said property. She reported the theft to the police the night the theft occurred. Two days thereafter she identified the appellant at the police station as the person who drove the cab. She had 2 drinks of liquor at noon, and at dinner, on the day of the theft. She also testified that appellant was the taxicab driver referred to.

An employee of a cafe on Main Street testified as follows: He had known appellant as a customer of the cafe about 6 months prior to December 8, 1947. On said date, between 9 and 10 p. m., appellant came to the cafe, called him aside and showed him 3 rings and a watch and asked him if he wanted to buy them for $300. The watch was a French make with some diamonds on it. One ring had 4 stones on it, another ring had quite a few stones, and one was a wedding ring. The witness told appellant that he could not buy them but he would see if there was any one in the cafe who would buy them. He (witness) then showed them to Officer Bingham who was in the cafe, then returned them to appellant, and told him that no one wanted them.

Officer Bingham testified that on December 8th, about 9:30 p. m., he was in said cafe and the cafe employee showed him a "Girard" watch, a wedding ring with 5 or 6 diamonds on it, an engagement ring with 1 or 2 stones, and a dinner ring with 4 fairly large stones; that the jewelry was platinum or white gold; that he returned the jewelry to the employee; and that about 10:30 p. m. he (officer) received a report from Mrs. Whitelock.

An employee of a newspaper testified that on said December 8th, about 11:30 p. m., as he was walking on the west side of Figueroa Street between 5th and 6th Streets, he saw a woman's hat and gloves on the sidewalk in front of the Carlton Hotel. He took them to his home and later turned them over to the police. They were identified as property of Mrs. Whitelock.

Officer Burns testified that he and Officer Prewitt had a conversation with appellant on December 10th and that appellant's statements were free and voluntary; that no threat, force, or violence, was used against the defendant, and that no promise of immunity or hope of reward was extended to him. Appellant objected to the conversation, upon the ground that no foundation was laid for it. Thereupon, and prior to receiving the testimony as to the conversation, the appellant was permitted to ask questions on voir dire examination and to testify regarding the circumstances under which the statements were made. He was also permitted to call witnesses to testify regarding his physical appearance soon after the conversation. He testified that Officer Burns struck him in the stomach several times and kneed him in the testicles, causing his testicles to swell; that Officer Prewitt struck him in the stomach twice; that the officers said they were going to get a confession out of him or half kill him; that after they had stopped beating him and when he was about "ready to pass out" he told them that he would cooperate with them; and that he then said everything they wanted him to say. Two men, who were confined in the county jail, were called as witnesses by appellant. They testified that they saw the appellant in the jail soon after he entered it, and that they observed bruises on his stomach and that his testicles were swollen. At the request of the court, two officers referred to by appellant as persons to whom he had complained about the beatings, were called as witnesses. One of them said that no such complaint was made to him. The other officer, who worked in the bathroom of the jail, said that appellant told him that the officers who arrested him had beaten him. He also testified that he did not recall seeing bruises on appellant's stomach or seeing that his testicles were swollen. The chief nurse at the jail, called as a witness at the request of the judge, testified that the medical records of the jail did not show any such physical disturbances. Officers Burns and Prewitt denied that they or either of them struck or beat or threatened appellant. The court overruled appellant's objection to the testimony regarding the conversation had by Officers Burns and Prewitt with appellant on December 10th. Officer Burns then testified as follows: Appellant stated that he had picked up the two men on Main Street and had driven them "out on the west side." Their names were Jess and Jimmie but he did not know their last names. He had picked up this woman (Mrs. Whitelock) at the Town House (the place where she went to dinner). They drove around the block and stopped at a small bar where they had some drinks, and then the two men and the woman got back into the rear seat of the cab and he drove the cab into Elysian Park. The two men in the back seat took the woman's jewelry, pocketbook and furs, put her out of the cab, and left her lying on a bank near the road. She was screaming when they drove away. They went to Main Street and stopped near a cafe. He (appellant) took the jewelry into the cafe and asked a fellow in there if he could sell it for him. Appellant was unable to sell it, and he returned to the cab and gave the jewelry back to his companions. He let the two men "out down the street from there," and then went to the Carlton Hotel to get his wife and another man and the other man's wife. When he "drove up to the Carlton Hotel he cleaned his cab out," and the hat and glove were left on the curb where he had "swept out" the cab. He then took his wife and the two other persons to a cafe on 7th Street where they had dinner. He returned his cab to the company about 11:30 p.m.

Officer Prewitt testified in substance, concerning the conversation, the same as Officer Burns had testified.

Appellant denied that he took Mrs. Whitelock to or from the Town House (where she had dinner). He testified that he took his cab from the company garage at 6:10 p.m. on December 10th and at that time one Al Williams, who lived at the Carlton Hotel, was with him; that he took Williams to the Union Station and then took him to the Carlton Hotel; then he hid his cab in a parking lot so the cab superintendent would not see it; then he and his wife, and Mr. and Mrs. Williams, walked to the Gates Hotel, where he lived, and they had some drinks there; then he made a few trips down town with his cab and was gone about 1 and ½ hours; then he and his wife, and Mr. and Mrs. Williams, went to a cafe on 7th Street for dinner and they stayed there until about 11 p.m. He checked his cab in at 11:30 p.m. He denied that he took any jewelry into the cafe on Main Street; denied that he took any property from Mrs. Whitelock; denied that he had two men by the names of Jess and Jimmie, or any other names, at the Town House on said day. He testified that he answered the officers questions "according to their story" and according to "what they was telling to answer to."

Appellant's wife testified that she and Mr. and Mrs. Williams arrived in Los Angeles from Stockton on the morning of December 8th; that the first time they saw appellant that day was about 3 p.m. at the Gates Hotel; that appellant and Mr. Williams left the hotel about 5:30 p.m. and were gone about ½ hour; that appellant then left again to make a few trips in the cab; that he returned in the early evening, and then the four of them went to dinner together and were together the remainder of the evening.

[1, 2] The question as to whether the confession of appellant was freely and voluntarily made was one of fact for determination of the trial judge. If the finding of a trial judge that a confession was freely and voluntarily made is supported by substantial evidence, the finding will not be disturbed on appeal. People v. Cucco, 85 Cal.App.2d 448, 452, 193 P.2d 86. The record shows that the trial judge, before receiving the alleged statements of appellant in evidence, required an extensive investigation regarding the charges made by appellant that his statements to the officers were not free and voluntary. A statement in the case of People v. Mehaffey, 32 Cal.2d 535, at page 553, 197 P.2d 12, at page 22, is appropriate here: "* * * it is manifest that the matter [referring to alleged confessions] was fully developed in the trial court, with defendant having every opportunity to present his position, and that the question whether the * * * confessions were freely and voluntarily made became one of fact for the trial court to determine in the first instance from considerations of evidence which sharply differed * * *." It was not error to receive the evidence as to the conversation.

[3] Irrespective of the statements allegedly made by appellant to the investigating officers, the evidence was sufficient

to support the judgment. The victim of the theft identified the appellant as the driver of the taxicab. There was testimony by the employee of the Main Street cafe to the effect that appellant, soon after the theft, was in the cafe exhibiting, and attempting to sell, jewelry of the same description as the stolen jewelry. The testimony of Officer Bingham, as to the description of the jewelry which was shown to him in that cafe on the night of December 10th, was corroborative of the testimony of the cafe employee. The contentions of appellant are not sustained.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

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91 Cal.App.2d 176

PALPAR, Inc. v. THAYER et al.

MILLER v. MORTON (PALPAR, Inc., et al., Interveners).

Civ. 13900.

District Court of Appeal, First District, Division 2, California.

April 8, 1949.

Rehearing Denied May 7, 1949.

Hearing Denied June 2, 1949.

1. Appeal and error 🔑1208(1)

Collateral issue awarding assignee of one who claimed an interest in tractor against chattel mortgagee, who purchased tractor at foreclosure sale, after judgment of foreclosure was reversed, was improperly decided in supplemental proceedings to main action for partition of tractor by sale, where, even if assignee succeeded in main action for partition, he would be entitled to only one-half rental value and chattel mortgagee would be entitled to other one-half.

2. Appeal and error 🔑1208(6)

Collateral issues dependent upon issues not yet decided in main action should not be adjudicated in a summary proceeding for restitution.

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action by Palpar, Inc., against W. H. Thayer, Jr., and others for partition by sale of a certain tractor and for other relief, wherein Edward Miller intervened to foreclose a chattel mortgage and named H. Morton, Palpar, Inc., W. A. Thayer, Jr., also known as W. H. Thayer, Jr., as defendants in intervention. From an adverse judgment contained in an order of restitution for use of tractor, Edward Miller appeals.

Judgment reversed in part.

Richard M. Lyman, Jr., of Oakland, for appellant.

Alfred J. Harwood, of San Francisco, for respondent.

DOOLING, Justice.

Out of the original purchase of a tractor in 1941 by Morton and Thayer for $4120 has grown litigation which bids fair to rival the celebrated case of Jarndyce v. Jarndyce with overtones of opera bouffe. The pleadings are summarized and discussed in the opinion of this court in Palpar, Inc., v. Thayer, 82 Cal.App.2d 578, 186 P.2d 748. We need only note here that Palpar, Inc., as successor to Morton filed a complaint alleging that it owns an undivided one-half interest in the tractor, and prayed for a sale in partition and an accounting from Thayer; Thayer answered claiming sole ownership of the tractor; and Miller, the appellant herein, filed a complaint in intervention claiming sole title as successor to Thayer and the rights of assignee of a chattel mortgage of the tractor given by Thayer to a bank. Miller's ownership as successor to Thayer of whatever interest Thayer owned is admitted by Thayer's failure to answer Miller's complaint in intervention.

After trial the court gave judgment to Miller and against Palpar, Inc., Morton and Thayer determining that Palpar, Inc., and Morton had no interest in the tractor and directing the foreclosure of the chattel mortgage to satisfy Thayer's indebtedness to Miller. This judgment was reversed in Palpar, Inc. v. Thayer, supra. Pending that appeal Miller bought the tractor at a foreclosure sale under the judgment afterwards reversed.

Upon the going down of the remittitur Palpar, Inc. and Morton moved the court for an order of restitution of the tractor asking that Miller be ordered to deliver the tractor to a receiver appointed by the court and to pay to the receiver a sum of money equal to the value of the use or rental of the tractor from April 29, 1946 (the date of the foreclosure sale) to the date of the order asked. In a supporting affidavit it was alleged that the reasonable rental value of the trailer is $725 per month. After a hearing the court ordered the trailer delivered to the receiver and gave judgment in favor of the receiver and against Miller for $7500, "said sum being the reasonable value of the use of the above described personal property." From the money judgment contained in the order of restitution Miller has appealed.

The nature and amount of this money judgment are, to say the least, somewhat startling. For the use of a tractor, which was bought in 1941 for $4120, for a period of less than two years between 1946 and 1948 appellant is ordered to pay the receiver $7500, almost twice its original purchase price, and that in the face of an allegation in the affidavit supporting the motion for restitution "that at the present time said personal property has very little value." However since appellant did not deny in his counter affidavit the alleged rental value of $725 per month the amount of the recovery ordered is probably not open to question on appeal.

[1, 2] The right to the recovery in a summary proceeding of this character is, however, properly before us. We note that if Palpar, Inc. is successful in the litigation it will be adjudged to own an undivided one-half of the tractor and at the very most will be entitled to recover one-half of the rental value of its use from Miller; and that in the state of the pleadings Miller, at the very least, as successor to Thayer, will be entitled to the other undivided one-half. If Miller is successful Palpar, Inc. will be entitled to nothing. Thus a judgment for $7500 has been given to the receiver upon which, if Miller does not voluntarily pay it, execution may issue against him, to one-half of which Miller will ultimately be entitled even if Palpar, Inc. gets the judgment that it is seeking and to all of which Miller will be entitled if he gets the judgment that he asks. The inequitable nature of this order thus clearly appears. The right of Palpar, Inc. to any recovery from Miller for the value of use of its interest in the tractor, if any, depends upon the determination of the merits of the action and properly should await the final judgment. That determination is clearly collateral to the restitution of the tractor and depends upon issues not yet decided. Such collateral issues should not be adjudicated in a summary proceeding for restitution. Buckman v. Tucker, 9 Cal.2d 403, 406, 71 P.2d 69.

The portion of the judgment in favor of the receiver against Miller for the recovery of $7500 is reversed

NOURSE, P. J., and GOODELL, J., concur.

Hearing denied; SHENK, J., dissenting.

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91 Cal.App.2d 142

HUETTER v. ANDREWS et al.

Civ. 16697.

District Court of Appeal, Second District,
Division 1, California.

April 6, 1949.

Hearing Denied June 2, 1949.

1. Appeal and error 🔑987(1)

When there is no substantial conflict in the evidence and when from a review of the record negligence is evident as a matter of law, the appellate court has the power to so declare and determine the related issues accordingly.

2. Automobiles 🔑171(9)

Where the uncontradicted evidence showed that highway for 850 feet preceding the point of impact was straight, that the day was clear and dry, that the defendant drove 850 feet looking straight ahead, that there were no other cars on the highway ahead of him other than the plaintiff's automobile, that there was no obstruction of the defendant's view, and that he did not see the plaintiff's automobile until he was 75 to 100 feet away from it, and that he continued a straight course until the point of impact, the defendant was guilty of negligence as a matter of law.

3. Automobiles ⚿150, 168(1)

The operator of an automobile is bound to anticipate that he may meet persons or vehicles at any point of the street, and he must in order to avoid a charge of negligence keep a proper lookout for them and keep his machine under such control as will enable him to avoid a collision with another automobile driven with caution as reasonably prudent person would do under similar conditions.

4. Automobiles ⚿150

All drivers of vehicles on a public highway are required by law to keep a vigilant lookout ahead so as to avoid if reasonably possible a collision with any other vehicle or person lawfully upon such highway, and failure to keep such lookout or failure to see that which may be readily seen if the driver is looking constitutes negligence as a matter of law.

5. Appeal and error ⚿1178(6)

Where evidence showed that defendant motorist was guilty of negligence as a matter of law, judgment for defendant would be reversed and the cause remanded for trial on issue of damages only.

◆

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Action by Mary E. Huetter against Milton Roy Andrews and Milton D. Andrews for damages resulting from an automobile collision. From a judgment for defendants, the plaintiff appeals.

Judgment reversed and cause remanded for trial on the issue of damages only.

Edward Feldman and James Wolf, both of Los Angeles, for appellant.

Hunter & Liljestrom and Rodney F. Williams, all of Los Angeles, for respondents.

DORAN, Justice.

This is an appeal from the judgment.

The action is for damages resulting from an automobile collision. There appears to be no dispute as to the facts. Appellant's brief recites that, "On March 10th, 1946, the plaintiff, Mary E. Huetter, accompanied her son, Stephen Huetter and his wife, Theresa B. Huetter, for a ride to Palm Springs in his Chevrolet automobile, which we shall refer to as the Huetter car. The plaintiff rode in the rear seat; her son and his wife occupied the front seat. The parties traveled eastbound along Highway 99. This highway, east of Banning, in the vicinity of the accident, is a divided roadway. Each side consists of two lanes and is reserved for one-way traffic and separated from the other side by a parkway. At a point approximately 1.9 miles east of Banning the two roadways are connected by a paved crossover which enables a vehicle to cross from one side of the divided highway to the other. On the north, or westbound, side of the highway, at a point just east of this crossover there is a gasoline station. At about 2:30 in the afternoon the Huetter car was proceeding in an easterly direction on the southerly half of the divided highway. Intending to cross over to the north side of the highway to buy some gasoline, plaintiff's son came to a stop on the asphalt shoulder of the highway, approximately 20 feet beyond the crossover. After waiting while three eastbound cars passed and there being no other eastbound cars in sight, plaintiff's son backed his car in a semicircular curve to a point opposite the crossover, and stopped with the rear wheels on the shoulder and the front wheels in the southerly lane of the south half of the highway, so that the car was facing north and slightly east, ready to proceed across the crossover.

"At this point plaintiff's son again looked to the west, in which direction his vision was unobstructed for approximately 850 feet, at which point there was a small bridge and the road made a slight turn. Upon so looking, plaintiff's son saw the car driven by the defendant, then approximately 800 feet away. Plaintiff's son then looked straight ahead, shifted gears, and proceeded slowly in low gear at not more than 5 miles per hour, across the highway. As the front wheels of his car entered the crossover and the rear wheels were crossing the center line of the southerly half of the highway, the left side of the Huetter car was struck by the front of the car driven by the defendant, causing severe and permanent injuries to the plaintiff.

"The defendant was driving eastbound on Highway 99, en route to El Centro, California, with his fiancee, at a speed of approximately 40 to 50 miles per hour. The distance from the easterly end of the bridge to the point of impact was approximately 850 feet. The highway was level. The day was clear and dry. As defendant drove the said distance of 850 feet there were no cars or other objects of any kind which obstructed his view. During this entire time, the Huetter car was directly in front of the defendant, preparing and commencing to cross the highway to the other side.

"Although he was looking straight ahead the entire time, the defendant did not see the Huetter car until he was approximately 75 to 100 feet away from it, at which time the front end of the Huetter car had passed the center dividing line of the eastbound section of the highway. The defendant's car was still traveling 35 to 40 miles per hour at the time of the impact and its wheels left no skidmarks."

The jury returned a verdict in favor of defendants.

It is contended on appeal in part that, (1) "The evidence is not sufficient to support the verdict of the jury"; (2) "The defendants were guilty of negligence as a matter of law"; (3) The court erred in giving certain instructions, in modifying an instruction requested by plaintiff and in refusing to give certain instructions requested by plaintiff; and in giving certain instructions requested by defendants.

One of the instructions requested by defendants and given as requested related to insurance. Appellant contends that such an instruction, "should not have been given" and argues that, "An instruction that an insurance company is not a party to an action may be proper under certain circumstances, such as when the plaintiff has been guilty of improper questions as to insurance. In the absence of such improper questions, such an instruction should be refused. Bennett v. Chandler, 52 Cal.App.2d 255, 264 [126 P.2d 173]. When, as here, the plaintiff has not injected the subject of insurance into the trial and especially where the only reference to insurance at the trial did not concern liability insurance, it is error to give such an instruction.

"The advantage to the defense of such an instruction cannot be discounted and is borne out by the efforts of all defense counsel to obtain such an instruction whenever possible. In this case, the only reference to insurance came upon the cross examination of the defendant who, when asked as to the damage to his car, stated that 'the insurance company is the one that has the final analysis on that'. Such a voluntary statement by the defendant, with obvious reference to collision insurance and not liability insurance, does not warrant or justify the instruction given.

"The advantage to the defendant is further brought out by the fact that the defendant is an ex-Marine, 22 years of age, who, during the entire trial, wore a discharge button and defendant's counsel also wore a discharge button during the entire trial. Furthermore, defendant's counsel, very pointedly, brought out the war record of defendant. On the other hand, the plaintiff is an elderly woman over sixty years of age."

Appellant's contentions are disputed in connection with which it is urged that, "Respondents are entitled to the benefit of the well established rule that in a case such as this the court should examine the evidence in the light most favorable to the respondent". It is also argued in substance that the jury's conclusion is supported by the evidence and that, "It is therefore respectfully submitted that the jury had a right to impliedly find from the evidence that the failure of defendant Andrews to see the Huetter car prior to the time that he did was not a proximate cause of the accident, * * *".

Respondent submits the "questions involved" are:

"I. Was there any substantial evidence to support the verdict of the jury?

"II. Did the Court commit prejudicial error in the giving, refusing to give, or modifying instructions?

"III. Did the Court abuse its discretion in not submitting a special verdict to the jury?"

[1] It is conceded by appellant that generally "the question of negligence is one of fact for the trial court and that the power of the appellate court is limited to a determination as to whether there is any substantial evidence contradicted or uncontradicted, which will support the conclusion reached by the jury". However, it is also well settled that when there is no substantial conflict in the evidence and when from a review of the record on appeal negligence is evident as a matter of law, the appellate court has the power to so declare and determine the related issue or issues accordingly. Loftus v. Pacific Electric R. Co., 166 Cal. 464, 137 P. 34; Traylen v. Citraro, 112 Cal.App. 172, 297 P. 649.

[2] As recited in appellant's brief, "The claim of appellant that the defendants were negligent as a matter of law is based upon the uncontradicted evidence in the record that the highway for 850 feet preceding the point of impact was straight; that the day was clear and dry; that defendant drove this 850 feet looking straight ahead; that there were no other cars on the highway ahead of him other than the Huetter car; that there was no obstruction of his view; that he did not see the Huetter car until he was 75 to 100 feet away from it; that he continued a straight course until the point of impact."

That appellant's "claim" as above recited is supported by the evidence there can be no question. And that such conduct amounts to negligence as a matter of law is well supported by the authorities. In the circumstances revealed by the record one who does not see that which is clearly visible and would have been seen by one exercising ordinary care, as result of which a collision occurs, is guilty of negligence as a matter of law. The collision obviously was the result of defendant's failure to see plaintiff's car until the collision was unavoidable. In this connection the exhibits, consisting in part of ten or twelve photographs, are practically conclusive.

"All drivers of vehicles on a public highway are required by law to keep a vigilant lookout ahead so as to avoid, if reasonably possible, a collision with any other vehicle or person lawfully upon such highway. Failure to keep such lookout, or failure to see that which may be readily seen, if the driver is looking, would constitute negligence as a matter of law." Holibaugh v. Ito, 21 Cal.App.2d 480, 485, 69 P.2d 871, 873.

[3, 4] The operator of an automobile is bound "to anticipate that he may meet persons or vehicles at any point of the street, and he must in order to avoid a charge of negligence, keep a proper lookout for them and keep his machine under such control as will enable him to avoid a collision with another automobile driven with care and caution as reasonably prudent person would do under similar conditions" and, "All drivers of vehicles on a public highway are required by law to keep a vigilant lookout ahead so as to avoid, if reasonably possible, a collision with any other vehicle or person lawfully upon such highway. Failure to keep such lookout, or failure to see that which may be readily seen, if the driver is looking would constitute negligence as a matter of law." Berlin v. Violett, 129 Cal.App. 337, 340, 18 P.2d 737, 738.

The operation of defendants' car with the obvious disregard for ordinary care revealed by the record constituted negligence as a matter of law and was the proximate cause of plaintiff's injuries.

Although other alleged errors relied on by appellant are not without merit, they require no consideration in the circumstances.

[5] The judgment is reversed and the cause remanded for trial on the issue of damages only.

WHITE, P. J., concurs.

Hearing denied; EDMONDS and SCHAUER, JJ., dissenting.

91 Cal.App.2d 222

PEOPLE v. MONTES.

Cr. 670.

District Court of Appeal, Fourth District, California.

April 13, 1949.

1. Mayhem 🔑5

In prosecution for mayhem, evidence was sufficient to support a finding that amputation of finger of prosecuting witness was necessitated by injury inflicted by defendant in biting finger. Pen.Code, § 203.

2. Mayhem 🔑1

Disfigurement or disablement of member of body are sufficient to constitute the offense of mayhem, and an amputation of a finger necessitated by infection resulting when defendant bit finger of prosecuting witness, was not required to be shown to sustain mayhem conviction. Pen.Code, § 203.

3. Criminal law 🔑742(1)

In mayhem prosecution, credibility of witness is for jury.

4. Mayhem 🔑5

Evidence sustained mayhem conviction. Pen.Code, § 203.

5. Mayhem 🔑6

In prosecution for mayhem, whether failure of prosecuting witness to secure medical aid immediately after injury caused when defendant bit prosecuting witness was cause of infection of wound which necessitated amputation of finger, was for jury. Pen.Code, § 203.

6. Criminal law 🔑1144(13, 14)

On appeal from mayhem conviction, District Court of Appeal would assume that jury was properly instructed as to elements of crime of mayhem, and that jury found from all evidence that a causal relation existed between injury inflicted by defendant and the loss, disfigurement, or disablement of finger of prosecuting witness. Pen.Code, § 203.

7. Criminal law 🔑1023(10)

Where no final judgment of conviction was entered, defendant's attempted appeal from judgment would be dismissed.

Appeal from Superior Court, Riverside County; Russell S. Waite, Judge.

Christine Montes was convicted of mayhem and she appeals from the judgment and from order denying new trial.

Appeal from judgment dismissed and order denying new trial affirmed.

Wing, Wing & Brown, of Banning, for appellant.

Fred N. Howser, Atty. Gen. and Elizabeth Miller, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Defendant was charged by information with the crime of mayhem in that she disabled and rendered useless the little finger of Constance Ortiz. Defendant was tried by jury, found guilty, and, after a motion for new trial was made and denied, the court suspended further proceedings for the purpose of granting probation. Probation was granted, subject to the condition, among others, that defendant serve a term of one year in the county jail.

Constance Ortiz, the complaining witness, was employed as a waitress in the Alta Vista Cafe in the city of Banning. On the evening of June 28, 1948, at about 8 o'clock defendant entered the cafe with a woman companion and sat at the counter for about two hours drinking beer served by Mrs. Ortiz. After defendant had consumed about eight bottles of beer, Mrs. Ortiz went off duty, took a seat at the same counter to eat her dinner, and Mrs. Ford, wife of the proprietor of the place, acted as waitress. Defendant ordered another round of drinks, went to the rest room, and on her way back to the counter began using profane language in the presence of customers and Mrs. Ford. Defendant picked up a jar of peppers, threw it down on the counter and then threw a glass of beer at Mrs. Ford. The glass hit the wall, broke into pieces, and Mrs. Ford was cut on the lip with broken glass. Defendant resumed her seat at the counter near the door and Mrs. Ortiz started to leave the cafe. Defendant arose from her seat, called Mrs. Ortiz a vile name and struck her. Mrs Ortiz returned the blow and in the combat which ensued found that the little finger of her left hand was detained in defendant's mouth and that she, Mrs. Ortiz, was unable to extricate it. Defendant pulled Mrs. Ortiz down onto the floor as they struggled through the door and Mrs. Ortiz began to strike defendant about the face with her right hand in an unsuccessful effort to free the finger. Mrs. Ortiz then twisted defendant's nose, the finger was released and the combat was over.

Mrs. Ortiz testified that her finger was bitten; that it was "shattered and dangling from the skin on top, and was open and flopping". The next afternoon Mrs. Ortiz was ill and visited a Doctor Reeves at about 6 P.M. The doctor testified that he observed a ragged transverse, diagonal, irregular laceration extending across the entire palmar surface of the finger; that on the dorsal surface there was a puncture wound through the middle of the second phalanx, and a hump at the base where the tendon was macerated; that a fragment of the bone protruded into the laceration, the wound was infected and the hand was swollen half way to the elbow; that the wound appeared to have been caused by a human bite; that the finger was disabled and in a useless condition, and because of the infection of the bone, tendons and various tissues he believed it would be necessary to remove it; that he did amputate the finger on July 29, 1948.

Defendant argues that there was no evidence of the cause or reason for the amputation; that the testimony of the prosecuting witness that her finger was not reinjured after the occurrence and before the examination by the doctor was inherently improbable and that the refusal of the prosecuting witness to obtain proffered medical treatment immediately after the injury was the proximate cause of the amputation.

[1-4] The testimony of the prosecuting witness and the doctor was amply sufficient to support a finding that the amputation of the finger was necessary by reason of the injury inflicted by the defendant. Moreover, it was not necessary to show an amputation to constitute the offense of mayhem, as disfigurement or disablement are included within the definition of the offense. Penal Code, sec. 203. The doctor's opinion was that the finger was in a useless condition when he made the examination on the day following the injury. There is no merit in the contention that the testimony of Mrs. Ortiz to the effect that her finger was not reinjured after the occurrence in the cafe is inherently improbable. This contention is apparently based on the testimony of a Dr. Bramcamp who examined the wound four or five hours before Mrs. Ortiz went to Dr. Reeves. Dr. Bramcamp testified that he found a superficial injury with no injured tendons or broken bones. His recollection of the examination was somewhat faulty and at the most created only a conflict in the evidence. It was for the jury to determine the credibility of the various witnesses. People v. Huston, 21 Cal.2d 690, 693, 134 P.2d 758.

[5, 6] Defendant's final argument is that the failure of Mrs. Ortiz to secure medical aid the night the injury occurred was the cause of the infection of the wound, necessitating amputation of the finger. This likewise was a question of fact for the jury and its finding, supported by substantial evidence, will not be disturbed on appeal. People v. Merida, 29 Cal.App. 2d 11, 15, 83 P.2d 964. We must assume that the jury was properly instructed as to the elements of the crime of mayhem and that it found from all the evidence that a causal relation existed between the injury inflicted by the defendant and the loss, disfigurement or disablement of the finger of the prosecuting witness. There is nothing in the record to indicate that had medical attention been given the finger on the night of the injury the infection would have been avoided.

[7] Since no final judgment of conviction was entered herein, the attempted appeal from the judgment is dismissed. In re Phillips, 17 Cal.2d 55, 109 P.2d 344, 132 A.L.R. 644; People v. Ormes, 88 Cal.App. 2d 353, 198 P.2d 690.

The order denying a new trial is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

FINNEGAN v. ROYAL REALTY CO. et al.

MERCHUT v. ROYAL REALTY CO. et al.

Civ. 16158, 16159.

District Court of Appeal, Second District, Division 3, California.

March 25, 1949.

Rehearing Denied April 21, 1949.

Hearing Granted May 23, 1949.*

1. Landlord and tenant 🔑164(6, 7), 165(4, 7), 167(8)

Generally a landlord is not liable for injuries to person or property of a tenant or his invitees or employees caused by defects in the rented premises, unless there is some hidden defect in or danger on the premises, which known to landlord at time of executing lease, which is not apparent to prospective tenant, and landlord does not inform tenant of the existence of defect or danger.

2. Landlord and tenant 🔑164(6, 7), 165(4, 7), 167(8)

Except as to a lease of a public or semipublic building, landlord is liable to tenant's employees or invitees to same extent as landlord would be liable to tenant for injuries sustained as result of existence of a hidden defect in or danger on rented premises, where landlord does not inform prospective tenant of existence of defect or danger which is known to landlord when premises are rented, and defect or danger is not apparent to prospective tenant, and landlord does not inform prospective tenant of existence of defect or danger.

3. Landlord and tenant 🔑165(1)

Landlord would not be liable in tort for injuries sustained in fire by employees of tenant, unless landlord owed some duty of care to tenant's employees.

4. Landlord and tenant 🔑165(1)

Landlord owed no common law duty to prevent injury to employees of tenant by the negligent manner in which tenant conducted business in rented premises.

5. Landlord and tenant 🔑165(1)

In action against landlord for injuries to employees of tenant resulting from a fire, in rented premises where there was no negligence consisting of breach of any common law duty owed by landlord to tenant's employees, recovery could not be had on that theory.

6. Municipal corporations 🔑601(27)

Ordinance of the City of Los Angeles, effective January 1, 1943, which constituted a new building code and expressly amended the old building code, in its entirety, repealed everything that was in the old ordinance and not contained in the new ordinance.

7. Landlord and tenant 🔑169(5)

In action against landlord for injuries to employees of tenant, wherein landlord was charged with negligence by reason of violation of city safety ordinances, ordinances not applicable to buildings in existence on their respective effective dates were not admissible.

8. Landlord and tenant 🔑169(5)

In action against landlord for injuries to employees of tenant, wherein landlord was charged with negligence by reason of violating city safety ordinances, all ordinances alleged to have been violated not by the structure of the building as a building but by the use tenant made of rented premises, were inadmissible.

9. Landlord and tenant 🔑165(1)

An employee of tenant has no different common law right against landlord because of defects in the leased premises than has the tenant.

10. Landlord and tenant 🔑165(1)

Landlord had no duty to prevent tenant from violating safety ordinances, notwithstanding lease gave landlord right to re-enter at all times the right to cancel lease if law was not complied with, and notwithstanding landlord had knowledge of tenant's illegal and negligent activities on the rented premises.

11. Health 🔑32

Building code of City of Los Angeles did not require landlord to obtain a certificate of occupancy where no change in occupancy had been made since ordinance became effective.

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* Subsequent opinion 218 P.2d 17.

12. Landlord and tenant ⚷169(6)

In action by tenant's employees against landlord for injuries sustained in fire on rented premises, resulting from tenant's negligent use of inflammable materials evidence established that failure of landlord to have certificate of occupancy for tenant required by City of Los Angeles building code was not proximate cause of employee's injuries.

13. Municipal corporations ⚷603

Ordinance of City of Los Angeles requiring doors serving as exits from aggregate floor area of more than 1,000 square feet to open only in direction of exit applied to buildings in existence at effective date of ordinance and imposed duty on owner of building to comply therewith.

14. Appeal and error ⚷762

District court of appeal was not required to consider a point made for first time in appellant's closing brief and not made in opening brief.

15. Municipal corporations ⚷603

City of Los Angeles in exercise of police power could pass ordinance requiring doors serving as exits from aggregate floor area of more than 1,000 square feet, to open only in direction of exit. Const. art. 11, § 11.

16. Negligence ⚷6

In the absence of some applicable excuse, the violation of a municipal ordinance is negligence.

17. Municipal corporations ⚷57

A city can make and enforce all laws and regulations in respect to municipal affairs. Const. art. 11, § 8.

18. Municipal corporations ⚷603

Ordinance of City of Los Angeles requiring doors serving as exits from aggregate floor area of more than 1,000 square feet to open only in direction of exit, is within "municipal affairs" as used in constitutional provision authorizing city to make all laws and regulations in respect to municipal affairs. Const. art. 11, § 8.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Municipal Affairs".

19. Municipal corporations ⚷592(1)

Ordinance of City of Los Angeles requiring doors serving as exits from aggregate floor area of more than 1,000 square feet to open only in direction of exit, is not invalid as being repugnant to the general law. Const. art. 11, § 11.

20. Municipal corporations ⚷592(2)

Fact that under general law a landlord is not liable for injuries to tenant or his invitees or employees, caused by defects in leased premises, unless there is some hidden defect known to landlord but not apparent to tenant, and landlord fails to inform tenant thereof, does not prohibit a municipality from enacting supplementary local regulations under constitutional power of city to make and enforce regulations, not in conflict with general laws, since different regulations may exist without a conflict. Const. art. 11, § 11.

21. Landlord and tenant ⚷165(1)

An owner incurs independent liability for injuries suffered by persons lawfully on premises, including employees of a tenant, proximately caused by breach of safety ordinance, in the absence of some established defense.

22. Landlord and tenant ⚷165(1)

Landlord who violated city ordinance requiring doors serving as exits from aggregate floor area of more than 1,000 square feet to open only in direction of exit, would be liable for injuries suffered by employees of tenant proximately caused by violation of ordinance, irrespective of the use for which the premises were rented or used, and regardless of whether landlord knew tenant was negligently using inflammable materials.

23. Landlord and tenant ⚷164(1)

An owner cannot avoid liability for injuries to persons lawfully on premises, and proximately resulting from violation of city ordinance requiring doors serving as exits from aggregate floor area of more than 1,000 square feet to open in direction of exit, by making a lease imposing observance of the ordinance, on the tenant.

24. Landlord and tenant ⇨164(1)

Fact that landlord does not occupy rented premises does not relieve landlord of duty to observe city ordinance requiring doors serving as exits from aggregate floor area of more than 1,000 square feet to open only in direction of exit.

25. Negligence ⇨89(1)

Negligence of a tenant in negligently using inflammable materials in conduct of business, would not be imputed to employees of tenant so as to preclude recovery by employees from landlord for injuries proximately resulting from landlord's breach of city ordinance requiring doors serving as exits from aggregate floor area of more than 1,000 square feet to open only in direction of exit.

26. Municipal corporations ⇨603

Under city ordinance requiring doors serving as exits from aggregate floor area of more than 1,000 square feet to open only in direction of exit, and defining "floor area" to be the area in square feet within the exterior walls of building, but not including the area of inner courts, shaft enclosures, or exterior walls, the area of a stairwell and the portion of floor covered by balustrade or a ledge along inner surface of exterior wall would be included in determining whether aggregate floor area of rented premises exceeded 1,000 square feet.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Floor Area".

27. Landlord and tenant ⇨169(11)

In action by tenant's employees against landlord for injuries sustained in fire on rented premises, whether causal connection existed between injuries and landlord's failure to comply with city ordinance requiring doors serving as exits from aggregate floor area of more than 1,000 square feet to open only in direction of exit, was for jury under the evidence.

28. Landlord and tenant ⇨169(4)

In action by tenant's employees against landlord for injuries sustained in fire on rented premises, landlord was required to show that no inference could reasonably be drawn from the evidence, that plaintiffs' egress from rented premises was retarded because door did not open outward, in order to establish that no causal connection existed between injuries and failure of landlord to comply with city ordinance requirement, that doors serving as exits from aggregate floor area of more than 1,000 square feet, open only in direction of exit.

29. Trial ⇨142

Where different inferences may reasonably be drawn from the same evidence, the decision must be left to the triers of fact.

30. Appeal and error ⇨996, 1001(1)

Conclusion of jury will not be disturbed on appeal if some substantial evidence or reasonable inference lends support thereto.

31. Negligence ⇨136(25)

Want of proximate cause does not exist as a matter of law unless the only reasonable hypothesis is that such want exists and reasonable men could have drawn that conclusion and none other, and where there are different inferences that may be drawn, one for and one against, the one against, will be followed, and before it can be held as a matter of law that want of proximate cause exists, the evidence must point unerringly to that conclusion.

32. Trial ⇨140(1)

Contradictions in the testimony of a witness are for jury.

33. Landlord and tenant ⇨165(1)

Fact that landlord was not responsible for starting a fire on rented premises which injured employees of tenant, did not exclude as being a proximate cause of the injuries the fact that the exit door did not open outward as required by city ordinance.

34. Negligence ⇨61(1)

Liability for injuries may be imposed upon a defendant where defendant's negligence is one of several contributing factors, each of which is a proximate cause of injuries.

35. Negligence ⇨105

The doctrine of assumption of risk is not applicable where the injury for which recovery is sought arises from a violation of a city ordinance.

36. Landlord and tenant ⚷168(1)

The doctrine of assumption of risk was not applicable in action against landlord by employees of tenant resulting from a fire which occurred in rented premises, where liability of landlord was based upon alleged violation of city safety ordinance.

37. Negligence ⚷136(9)

Contributory negligence is not established as matter of law unless the only reasonable hypothesis is that such negligence exists and reasonable men could have drawn that conclusion and none other.

38. Negligence ⚷136(9)

Whether a violation of a statute or ordinance by plaintiff proximately contributed to accident, and whether the violation was excusable or justifiable, are questions of fact for jury except where court must say that from the facts, reasonable men can draw but one inference which points unerringly to negligence of plaintiff contributing to plaintiff's injury.

39. Negligence ⚷121(1, 5), 122(1)

Although violation of an ordinance or statute is not excusable under particular circumstances, liability is also dependent upon proof that a duty was owed to persons in the class of plaintiff, or defendant who is relying upon contributory negligence and that violation was a proximately contributing cause of injury.

40. Landlord and tenant ⚷169(11)

In action by tenant's employees against landlord for injuries sustained in fire on rented premises, whether a proximate cause of injuries was violation by landlord of city ordinance requiring exit doors to open in direction of exit, and whether alleged negligence of employees in violating ordinances contributed to employees' injuries was for jury.

41. Appeal and error ⚷1050(1)

In action by tenant's employees against landlord for injuries sustained in fire on rented premises, wherein liability was based on landlord's failure to comply with city safety ordinance, admission of several inapplicable ordinances, solely as basis from which court could determine what instructions to give jury, was not prejudicial.

42. Appeal and error ⚷930(2)

That jury followed instructions would be assumed on appeal in absence of any showing to the contrary.

43. Torts ⚷22

One who contributes to a damage cannot escape liability because his proportional contribution to the result may not be accurately measured.

44. Landlord and tenant ⚷165(1)

A landlord who contributed to injuries of employees of tenant resulting from fire on rented premises, by failing to comply with requirement of city ordinance that exit door opened toward exit, could not escape liability because landlord's proportionate contribution to the injuries could not be accurately measured.

45. Negligence ⚷15, 61(2)

Where several persons act in concert, and damages result from their joint tort, each person is held for the entire damages unless segregation as to causation can be established, and even though persons are not acting in concert, each person is liable for the whole, if the result produced by their acts are indivisible.

46. Landlord and tenant ⚷169(9)

Landlord was liable for full amount of injuries to employees of tenant caused by landlord's failure to comply with city safety ordinance, regardless of any negligence of tenant, and disposition of judgment as between employees and tenant's compensation carrier under statute giving tenant's compensation insurance carrier rights in recovery of employees against landlord was of no concern of landlord. Labor Code, §§ 3854, 3855.

47. Constitutional law ⚷42

Statute giving tenant's compensation insurance carrier rights in recovery of tenant's employees against landlord for injuries resulting from landlord's failure to comply with city safety ordinance, neither affected nor injured landlord, so that landlord could not urge the unconstitutionality of the statute as being special legislation.

48. Constitutional law ⟹42

One may not urge the unconstitutionality of a statute unless his rights are adversely affected thereby.

49. Appeal and error ⟹1064(1)

Where conflicting instructions are given, the verdict of jury cannot be sustained and a reversal of the judgment is impelled unless court can say that a miscarriage of justice has not occurred.

50. Appeal and error ⟹1064(1)

In action against landlord for injuries to employees of tenant, wherein landlord was charged with violation of city safety ordinances, where instructions could not be harmonized, and it could not be determined whether liability of landlord found by jury was based upon a violation for which landlord would be liable or upon either of two violations for which landlord would not be liable and erroneous instructions cut off substantial defenses on the merits, judgment against landlord would be reversed.

51. Appeal and error ⟹1064(1)

An erroneous instruction which cuts off a substantial defense is prejudicial.

◆

Appeals from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Action by Dorothy Finnegan against Royal Realty Company, a corporation, and others consolidated with action by Sophie Merchut against same defendants for injuries resulting from a fire. From adverse judgments, named defendant appeals.

Judgments reversed.

Gibson, Dunn & Crutcher, Norman S. Sterry and Lasher B. Gallagher, all of Los Angeles (Gerold C. Dunn, of Los Angeles, of counsel), for appellant.

Walker, Meyers, Ingram & Moser, Parker, Stanbury & Reese and Raymond G. Stanbury, all of Los Angeles, for respondents.

VALLÉE, Justice.

The appeals are from judgments for plaintiffs and against Royal Realty Company, a corporation, entered upon verdicts of a jury in two actions for damages for personal injuries. The complaints named as defendants, Royal Realty Company, a corporation, and Herman Helbush, its President. The verdicts were in favor of plaintiffs-respondents and against the defendant-appellant Royal Realty Company and in favor of the defendant Herman Helbush. The actions were consolidated for trial and tried together. The two appeals have been submitted on one set of briefs. The questions presented in each case are identical. They will be decided in one opinion.

The cases arose out of a fire which occurred on January 20, 1944, in a workroom in a building located at the corner of Wilshire Boulevard and Alvarado Street in Los Angeles. Appellant Royal Realty Company was the lessor of a part of the building located on the second floor. Norman Noll, doing business as Noll & Company, was the lessee. The lease was made June 22, 1937, for a term expiring July 22, 1942. The lease provided that the premises were to be used for conducting "* * * the business of manufacturers of and dealers in club furniture and equipment, and for no other purpose * * *" and "That the lessee will not use, or permit to be used, the said premises, or any part thereof, for any purpose or purposes other than the purpose or purposes for which the said premises are leased, demised and let unto the lessee, as hereinbefore specified."

Thereafter Noll held over as a tenant from month to month under the terms of the lease and was in such possession on the day of the fire. Respondents are two of seven employees of Noll who were in the building at the time of the fire. Three met death. The other four, including respondents, were horribly burned.

Appellant's points are: (1) The record disclosed that appellant was not liable to either respondent, hence the court erred, first, in denying appellant's motion for a directed verdict in each case, and second, in denying its later motions for judgments notwithstanding the verdict. This point is based upon these contentions: (a) The record did not disclose the breach of any duty which appellant owed to respondents either under the common law or under any ordinance or statute; (b) the record did not disclose that any of the claimed ordinance violations contributed in any manner to respondents' injuries; (c) it affirmatively appeared as a matter of law that each of the respondents assumed the risk of her injuries; (d) the record showed each respondent to have been guilty of contributory negligence as a matter of law. (2) The court erred in the admission of certain ordinances. (3) There was no evidence from which the jury could find, without indulging in speculation and conjecture, what portion of the respondents' injuries was attributable solely to the acts or omissions of the appellant. (4) The trial court erred in admitting proof of respondents' special damages and in instructing the jury thereon. (5) The court erred in giving and refusing certain instructions.

Many of the facts of these cases are the same as those in Neuber v. Royal Realty Co., 86 Cal.App.2d 596, 195 P.2d 501, hearing denied by the Supreme Court, and are set forth in detail in the learned and exhaustive opinion of Mr. Justice White in that case. The cases at bar arose out of the same fire as did the Neuber case. It will not be necessary to narrate in this opinion the facts which are in common. Reference is made to the opinion in that case for those facts in detail. As we proceed we will state the facts in the cases at bar which did not appear in the Neuber case. The complaints in these cases are essentially different from those in that case. Here the cause went to trial upon one cause of action only—a charge of negligence by reason of the violation of specific ordinances and a provision of the Health and Safety Code.

From the facts which are common to the Neuber case and the cases at bar, the same legal conclusions must be drawn as were decided in that case. We are in full accord with those conclusions. The points of law which were decided in that case, and which are decisive of points made by the parties here, are these:

[1, 2] 1. It is the general rule that a lessor is not liable for injuries to the person or property of a lessee or his invitees or employees caused by defects in the leased premises, the rule amounting to an application of the maxim caveat emptor. This rule is subject to the exception that if there be some hidden defect in or danger on the premises, which is known to the lessor at the time of executing the lease, but which is not apparent to the prospective lessee, the lessor is obligated to inform the lessee thereof; and, failing so to do, the lessor renders himself liable for injuries sustained by the lessee resulting from such hidden defect. As to the lessee's employees or his invitees (except as to a lease of public or semipublic buildings), the lessor is liable to the same extent as he would have been had the lessee been injured. There are other exceptions not mentioned in the opinion in the Neuber case.

[3] 2. No liability for tort can be imposed on appellant-lessor even though he was negligent, unless there was a duty of care owed by appellant to Noll's invitees and employees.

[4] 3. Appellant, as lessor, did not owe Noll's invitees and employees any common law duty to prevent injury to them by the careless and negligent manner in which Noll carried on and conducted his business in the demised premises.

[5] 4. Aside from consideration of ordinance violations, there was no negligence, consisting of breach of any common law duty owed by appellant to Noll's employees, and recovery cannot be had on that theory.

[6] 5. Ordinance No. 87,000 of the City of Los Angeles, effective January 1, 1943, which constituted a new building code and expressly amended the "old" building code "in its entirety" repealed everything that was in the old ordinance and not contained in the new one.

[7] 6. All ordinances of the City of Los Angeles not applicable to buildings in existence on their respective effective dates were not admissible in evidence.

[8, 9] 7. All ordinances of the City of Los Angeles claimed to have been violated not by the structure of the building as a building, but by the use which the lessee made of the leased premises, were not admissible in evidence. These ordinances were held inadmissible on the ground that an employee of Noll, the lessee, stands as to the lessor in the shoes of the lessee and has no greater or different common law right against the lessor because of defects in the leased premises than has the lessee; that necessarily when a lessee leases premises that are safe as leased but are rendered unsafe by his use of them, neither the lessee nor his employees can recover from the lessor for injuries resulting from that condition. Among the ordinances held inadmissible was one requiring that every room in which explosive materials in lots of more than 8 pounds weight are manufactured or used in any process or kept in unsealed containers, and every room used for processing cellulose-nitrate, shall be sprinklered, and another providing that such a room shall have two separate exits.

8. With the exception of the construction of a door between the workroom and the showroom, which door served as the only exit from the workroom and did not open outward but opened only inward, there was no failure by the lessor to comply with any ordinance affecting the building as a building.

[10] 9. Notwithstanding provisions of the lease giving the lessor the right to reenter at all times, the right to cancel the lease if the law was not complied with, and the fact, if it was a fact, that the lessor "had full and complete knowledge of the illegal and negligent activities being conducted in the premises during Noll's entire period of occupancy", there was no legal duty on the part of the lessor to prevent the violations of ordinances by the lessee Noll.

10. Zoning ordinances of the City of Los Angeles have no application to the facts.

[11] 11. The lessor was not required under section 91.0315 of Ordinance No. 87,000 of the City of Los Angeles to apply for and obtain a "Certificate of Occupancy."

[12] 12. The failure to make application for a "Certificate of Occupancy" was not a proximate cause of the fire and consequent injury to Noll's employees.

[13] 13. Section 91.3303 of Ordinance No. 87,000, providing that "Doors serving as exits shall open only in the direction of exit * * *" applied to existing buildings and imposed a duty on the owner to comply therewith.

The cases at bar differ from the Neuber case in a number of important particulars. Respondents did not in the trial court, nor do they here, assert liability of appellant because of common law negligence. They assert liability and say that negligence was established "because of the violation of specific safety regulations contained in the Los Angeles Building Code." Respondents did not attempt to prove and do not contend that appellant (1) breached any promise to repair, or (2) leased unsafe premises for public use, as such, or (3) concealed known latent defects, or (4) was responsible on any other basis of common law liability. They do not claim that appellant was obligated to inspect the premises, to supervise the lessee's activities, or that it is responsible for the acts of the lessee. They maintain that "when a lessor lets premises which violate specific safety regulations established by law it incurs a liability to persons injured as a proximate result thereof, including employees of tenants." They say that the basis of liability in these cases was not that appellant failed to supervise Noll's activities or that it failed to inspect the premises to ascertain what he was doing, but was "its own act in knowingly" leasing the premises in its unlawful condition.

The major part of appellant's briefs, which were prepared before the Neuber case was decided, is devoted to argument in support of its contention that it did not owe any common law duty to respondents. As respondents did not so contend in the trial court, do not so contend here, and as the point was determined in the Neuber case, it is not necessary to discuss it.

Appellant's contention upon which its first point is based, i. e., that the record did not disclose the breach of any duty which appellant owed to respondents under any ordinance or statute, is narrowed by the Neuber decision to whether section 91.3303 of Ordinance No. 87,000 of the City of Los Angeles applied to the workroom in which the fire occurred, and if so, whether it imposed a duty on appellant, the breach of which constituted negligence.

Section 91.0101, subsection (b) of Ordinance No. 87,000 provides: "Purpose. The purpose of this Article is to safeguard life or limb, health, property and public welfare by regulating and controlling the design, construction, quality of materials, use and occupancy, location and maintenance of all buildings and structures erected or to be erected within the city." Section 93.3301, subsection (a), in Division 33, "Exits", in part, provides: "Purpose and Scope. The purpose of the limitations of this Division is to provide safe and continuous means of egress from every portion of every building. * * *" Section 91.3303, in Division 33, in part, provides: "(a) Scope. Every door serving as an exit from an aggregate floor area of more than one thousand square feet (1,000 sq. ft.) shall be constructed and installed in conformity with the requirements of this Section * * * (d) Details. Every door to an exit enclosure shall be self-closing. Doors serving as exits shall open only in the direction of exit and shall be openable from the inside without the use of a key. Sliding doors and rolling shutters shall not be used on exit doors." It will be noted that this section of the ordinance applies to each and every building with rooms of the specified square footage regardless of design, construction, quality of materials or type of use. For a long time prior to and at the time of the fire the only means of egress from the room involved—the workroom—was an exit, the door of which not only did not open outward but opened inward. The door had been in this condition at all times from the time the building was constructed.

[14–18] Appellant in its closing brief, for the first time on the appeals, argues that the City of Los Angeles could not and did not intend by ordinance to change or affect the general law of this state governing civil rights and duties as between a landlord on the one hand and a tenant and his employees on the other. The point should not be considered. It should have been made in appellant's opening brief. However, as it may arise on a retrial, we shall briefly indicate its fallacy. It would unduly lengthen this necessarily long opinion to allude to all of the ramifications of appellant's fine spun argument. Appellant concedes that the city had power to pass the ordinance as a police regulation; that the cases hold that "absent some applicable excuse, the violation of a municipal ordinance is negligence"; that the city has power to "'make and enforce all laws and regulations in respect to municipal affairs' (Constitution, Article XI, Sec. 8)"; and that the ordinance in question comes "within the words 'municipal affairs' as used in the Constitution." It argues "that any attempt to impose a penal duty on the owner or occupant of a building to do or refrain from doing any particular act for the preservation of the safety of a tenant or his employees, with the result that the act or omission will supply the element of civil duty inherent in an action ex delicto is not a municipal affair; and since, as to all matters other than municipal affairs, chartered municipalities 'shall be subject to general laws' (Constitution, Article XI, Sec. 8), it seems clear that the creation by ordinance of a civil liability which is repugnant to the general law of the State, is not permissible", and that a municipality cannot "by ordinance create a civil liability which does not exist under the general law. * * *" The argument is delusive in assuming that the liability of the owner created by the ordinance providing that "Doors serving as exits shall open only in the direction of exit * * *" is repugnant to the general law.

[19, 20] The Constitution expressly confers upon a municipal corporation power to "make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." (Article XI, sec. 11.) In People v. Fages, 32 Cal.App. 37, at pages 39–40, 162 P. 137, 139, the court stated: "It has been held that the legislative authority so delegated to local and municipal bodies within the limits specified is as broad as the power possessed by the Legislature itself. * * * When the Constitution grants to local authorities the right to make and enforce police regulations 'not in conflict with general laws,' it is intended that local

regulations of every kind may be made and enforced, except where the particular act described by the ordinance is the same act already included within the category of crimes as covered by the general Codes or statutes, or the punishment affixed by ordinance for acts of a lessor degree than similar acts described by the statute is in excess of or not in harmony with the punishment designated by the latter. All of the cases that we have examined go this far and no farther." It does not follow that because under general law a landlord is not liable for injuries to the person of the tenant or his invitees or employees, caused by defects in the leased premises, unless there is some hidden defect known to the lessor but not apparent to the lessee and the lessor fails to inform the lessee thereof, a municipality is thereby prohibited from enacting additional or supplementary local regulations. Different regulations may exist without a conflict. Pulcifer v. County of Alameda, 29 Cal.2d 258, 261, 175 P.2d 1; Natural Milk etc. Ass'n v. City etc. of San Francisco, 20 Cal.2d 101, 109, 124 P.2d 25; In re Iverson, 199 Cal. 582, 586, 250 P. 681; In re Hoffman, 155 Cal. 114, 117, 99 P. 517, 132 Am.St.Rep. 75; cf. Irwin v. Torbert, Ga.Sup., 49 S.E.2d 70; Williams v. Chicago, 266 Ill. 267, 107 N.E. 599, Ann.Cas.1916B, 514.

"A municipality, under the power delegated to it by the state, may enact ordinances creating duties for the protection of persons and property, and it is very generally held that those who violate such ordinances are liable for resulting injury to others." 45 C.J. 717, sec. 100; see, also, 45 C.J. 723, sec. 105; 1 C.J.S., Actions § 12, page 996; I Thompson on Negligence, 12, sec. 10. The argument has no merit.

[21–25] As we have stated, the Neuber case held that the provisions of the ordinance that [86 Cal.App.2d 596, 195 P. 2d 520] "Doors serving as exits shall open only in the direction of exit and shall be openable from the inside without the use of a key," applied to existing buildings and imposed a duty on the owner of the building to comply therewith. The ordinance imposed a duty on appellant. A breach of that duty is a violation of the ordinance and is negligence per se. The ordinance declares the duty and the breach constitutes the negligence. An owner incurs independent liability for injuries suffered by persons lawfully on the premises, including employees of a tenant, proximately caused by such negligence in the absence of some established defense. The ordinance imposes the duty irrespective of the use for which the premises are let or used. The ground of liability here is not the use made of the demised premises by Noll, nor that appellant failed to supervise Noll's activities, nor that appellant failed to inspect the premises to ascertain what Noll was doing, but is appellant's own breach of the provisions of the ordinance providing that the exit door shall open outward. The duty is imposed irrespective of appellant's knowledge or lack of knowledge of Noll's illegal operations. The ordinance imposes a positive, mandatory and continuing duty on the owner for the protection of persons lawfully in the building. The owner in such case is held liable for his own illegal act or omission and not for the act or omission of the tenant. The owner cannot avoid liability by making a lease imposing observance of the ordinance on the lessee. There is no immunity from the duty imposed on the owner by the fact that he is not an occupant. The liability of the owner—lessor—does not depend upon the concealment of latent defects, the leasing for public use, the breach of a covenant to repair, or the breach of any common law duty. Common law standards of duty applicable to the ordinary relationship of a landlord on the one hand and a tenant and his invitees and employees on the other hand are not relevant to the determination of negligence. The doctrine of imputed negligence—negligence of the tenant imputed to his employee and his invitee, epitomized by the catch phrase, the invitee stands in the shoes of the tenant,—does not apply to a case of injury to the tenant's employee or invitee which has resulted from the landlord's breach of a statutory duty. Roxas v. Gogna, 41 Cal.App. 2d 234, 241, 106 P.2d 227; Harmon v. M. H. Sherman Co., 29 Cal.App.2d 580, 586–587, 85 P.2d 205; Goetz v. Duffy, 215 N.Y. 53, 109 N.E. 113, 114; Pollard v. Trivia

Bldg. Corporation, 291 N.Y. 19, 50 N.E.2d 287, 290; Tralle v. Hartman Furniture & Carpet Co., 116 Neb. 418, 217 N.W. 952, 955; Burt v. Nichols, 264 Mo. 1, 173 S.W. 681, 684, L.R.A.1917E, 250; Moore v. Dresden Inv. Co., 162 Wash. 289, 298 P. 465, 467–473, 77 A.L.R. 1258; Landgraf v. Kuh, 188 Ill. 484, 59 N.E. 501, 503; Annis v. Britton, 232 Mich. 291, 205 N.W. 128, 129; Klein v. Young, 163 La. 59, 111 So. 495, 499; 4 R.C.L. 405, sec. 11; annotation 77 A.L.R. 1273. Cf. Bevan v. Century Realty Co., 64 Ohio App. 58, 27 N.E.2d 777; Singer v. Eastern Columbia, Inc., 72 Cal. App.2d 402, 410–412, 164 P.2d 531; Scholey v. Steele, 59 Cal.App.2d 402, 405, 138 P.2d 733.

[26] Appellant says that the square footage of the workroom was less than 1,000 square feet as a matter of law; that therefore the ordinance did not apply and should not have been received in evidence. It was stipulated that the floor area of the workroom exceeded 1,000 square feet if (1) the area of the stairwell and (2) either the portion of the floor covered by the balustrade or the ledge along the inner surface of the exterior wall are included, but if the stairwell opening and either the portion occupied by the balustrade or the square footage of the ledge is excluded, the floor area was less than 1,000 square feet. Section 91.0403(f) of Ordinance No. 87,000 defines: "Floor—Any structure which divides a building horizontally and shall include the horizontal members, floor coverings, and ceiling. Floor Area—The area in square feet within the exterior walls of a building but not including the area of inner courts, shaft enclosures, or exterior walls." Neither the area of the stairwell nor the portion of the floor covered by the balustrade nor the ledge along the inner surface of the exterior wall is excluded from the "floor area." It appears obvious that the square footage of the workroom exceeded 1,000 square feet.

Appellant's contention that the record did not disclose that the violation of section 91.3303 of Ordinance No. 87,000 contributed in any manner to respondents' injuries cannot be sustained. It is argued that the fact that the door to the only exit from the workroom opened inward and not outward did not impede or retard either respondent in leaving the room and consequently was not a proximate cause of the injuries.

Noll's principal activity was the manufacture of dice using celluloid for the purpose. Cellulose tetra nitrate is blended with camphor producing celluloid. Celluloid is a highly inflammable material. It burns rapidly. As it burns, it instantly emits the gasses of nitrogen, carbon and hydrogen and various combinations of these gases, all of which are hot and toxic, i. e., they burn the mucous membrane. Celluloid in the form of shavings or dust burns much faster and more violently than celluloid in its solid form. It is explosive at its ignition temperature, which is about 350 degrees Fahrenheit, without contact with flame. In shavings or particles it will ignite instantly on contact with flame and burns rapidly and fiercely.

The upper floor of the premises occupied by Noll was divided into two rooms, the "showroom" and the "workroom." Between these rooms there were double doors so constructed as to open into the workroom and not outward from it. The westerly door of these double doors was blocked by means of a table in the workroom which was pushed against it. A cash register was kept on the table. The easterly door of these double doors was the only exit from the workroom on the day of the fire.

On that day there was a quantity of celculose nitrate in the form of cut dice in the workroom. About 150 pounds were consumed by the fire. About 10 pounds were not touched. In the fabrication of dice small particles of celluloid were drilled or milled from the cubes and collected on the machines and on the floor. There were shelves in the rooms with curtains hanging from them. Dust and shavings from the fabrication were blown off from the machines with electric blowers causing the particles to fly around the room and settle on the floor, the walls and curtains, and upon the clothing, hair and persons of the employees. There was no suction equipment or contrivance of any kind installed in the workroom or elsewhere to remove this material at its source or at all, nor was any mechanical ventilation provided. The only ventilation of any kind in the workroom was afforded by the doors and windows. At the end of each day's work, the refuse and the celluloid dust and shavings on the floor were swept up by the employees and put into gunny sacks which were stacked along the wall until Noll found it convenient to take them away. At the time of the fire there were four gunny sacks full of celluloid shavings and sweepings stacked lengthwise one on the other along the north wall immediately east of the double doors, and there was a half full sack under Mrs. Finnegan's machine. Alongside the four sacks and east of them there was an open cardboard trash box containing celluloid shavings and other refuse.

The fire occurred close to 5:00 o'clock and quitting time. Respondent, Mrs. Finnegan, was standing about 6 or 7 feet southwest of the double doors leading into the showroom. Respondent, Miss Merchut, was near the southwest corner of the same room. A Mr. Reuter, another employee, was standing near the northeast corner of the room close to the four gunny sacks. Mrs. Finnegan was facing toward Miss Merchut and had just asked if she could help her. Mr. Reuter then made some remark to Mrs. Finnegan and as she turned around toward him, she saw an object fly through the air and land inside the cardboard trash box. She could not say what it was. Flames immediately came up from the cardboard box. The flames hit the gunny sacks. An explosion occurred and a sheet of fire instantly shot out and spread over the entire room. The smoke was intense.

In the Neuber case it was held that the exit door was open when Mrs. Neuber reached it; that her escape from the workroom was not impeded or retarded by the fact that the exit door did not open outward—the ordinance violation—and that therefore the fact that the door did not open outward, as a matter of law, was not a proximate cause of her injuries. In the cases at bar we have an entirely different factual situation.

Mrs. Finnegan testified with respect to the knob on the exit door: "Q. Mrs. Finnegan, the knob on this door, is it the kind of knob that—turn around here, will you? Can you see the knob on that door, which is an orthodox door knob of about two inches in diameter probably? A. Yes.

"Q. Is that the sort of knob that was on that door? A. No.

"Q. What kind of knob was on that door? A. It was one of those door knobs you would find on a cupboard door. It wasn't the kind that would turn. It was the kind you would just have to grab onto and turn on any object that it was attached.

"Q. Was it a knob that was attached at all to any catch or lock on the door? A. No.

"Q. It was simply as a handle to push or pull on? A. That is right, sir. * * *"

She further testified:

"Q. And was the door leading from the workroom to the showroom and the one we have been talking about here, open or closed at the time the fire occurred? A. It was closed, sir.

"Q. Where abouts in these premises did you get these burns to your hands? A. I got the worst part of my burns right directly at the door." "He [Reuter] was hollering for me to help him from the flames on him, and thereafter the girls and all started running in a panic and hollering, and I crawled over to the door. It was all a mass of flames there, and I got—when I got to the door, I felt this pressure of these people up on top of me, and I reached up and grabbed the knob in my hand, and it slid right on down as I pulled it again; but I grabbed around and pulled up again, and reached down, and when I finally got the door open Miss Merchut had her arms around my waist. I tried to throw her arms off me when I felt the dead weight, but could not. I finally got the door open. The first time I tried to open it outward. In the excitement and panic I forgot which way the door would open, but finally I got it open and got out and pulled Miss Merchut after me.

"Q. All right. Let me ask you, which way did that door open. A. It opened toward me. I had to pull it inward to get out.

"Q. That is, it swung inward into the workroom? A. That is correct, sir.

"Q. Was it a two-way door? Did it also open out? A. No, sir.

"Q. I assume it goes without saying you were highly excited while you were there at the door? A. Yes, sir, I was.

"Q. And did you recall, when you got there, which way the door did open? A. No, sir.

"Q. You attempted to open it first which way? A. I tried to push it from me, you know, to get out. * * * There was quite a bit of panic there at the door. I felt these people shove me from every which direction and pull me down, * * * I was concerned in trying to find the little knob there so I could get out myself. I knew—I was aware of Miss Merchut because she kept hollering, 'I am burning,' and she had her hands around my waist, and I tried to tear them loose, and of course when I got out she still had her hands around my waist. * * *

"Q. By Mr. Stanbury [Counsel for plaintiffs]: Were you, yourself, doing anything at the door except trying to get out? A. No, sir; that is all I was trying to do.

"Q. And in attempting to get out, were you using your hands? A. Yes, sir.

"Q. What were you doing with your hands? A. Part of the time I was using this one to try to protect my eyes, and the other one groping around for the little small knob.

"Q. All right. Did you use your hand when you got hold of the knob? A. Yes, sir, I pulled it in and got out.

"Q. Now, was it hot around that door? A. Yes, sir, it was all in flames.

"Q. Were there flames around you at the time you were there? A. Yes, sir.

"Q. Did you get your hands burned? A. Yes, sir. I got my hands all burned, and at the time I got out, why, my hands were bleeding, they were all cut, and the flesh was falling off them. My face was swollen, and I could feel a bursting and cracking sensation to my skin.

"Q. Was there anything wrong with your hands before the fire? A. No, sir.

"Q. Have you anyway of telling us how long you were at that door before you got out? A. It seemed like an eternity to me when I was there at the door. * * *

"Q. Before the fire what substance was in that central panel of those doors? A. Wood. * * *

"Q. And at the time this fire started, was there any obstacle or obstruction of any kind between you and this doorway? A. No, sir. * * *

"Q. By Mr. Gallagher [Counsel for defendant]: Now, it was just a matter of a second after the explosion occurred before you caught on fire, wasn't it? A. That is correct. I was right close to the door and in line with the fire, and I threw myself out.

"Q. In other words, you were on fire before you could hardly move at all? A. Yes, I was right in line with the explosion.

"Q. Now, the smoke was so thick and dense over in the vicinity of the door as you were crawling toward it, that you could not see the door, isn't that true? * * * A. That is right.

"Q. By Mr. Gallagher: And in your progress while crawling along the floor, you bumped against the table on which the cash register sat? A. Yes, because it was right next to the door.

"Q. You could not see the table or the cash register there on account of the smoke, isn't that right? A. That is right.

"Q. Now, when you got to the door, you stood up, isn't that right? A. That is correct.

"Q. And you could not see the door or the door knob on account of the flames and smoke there, isn't that right? A. The flames and smoke, yes.

"Q. You got over to a point where you thought you were close to the door, and did you start feeling for the knob? A. Well—

"Q. Or did you first try to push the door open? A. When I first got there, you see, it was just a matter of seconds from the time I threw myself to the floor until I hit the door, because I was very near it, and then I got up and tried to push my way out.

"Q. Then after you tried to push the door open, you remembered, or at least it came into your mind that the door opened inward, and you would have to get hold of the knob, isn't that right? A. At the moment of panic, like that, I was concerned in trying to push, and it would not work, so I felt around and had hold of the knob several times, but my hands slipped off from it, and the only time I really grabbed the knob I got the door opened."

Mrs. Finnegan also testified at the Neuber trial, which testimony was read into the record here as follows:

"'Q. All right, Mrs. Finnegan. Did you ever get hold of the knob at all up until the time you actually opened the door? A. No, sir.

"'Q. The first time you actually got hold of the knob of the door did you open the door? A. Yes, sir.

"'Q. And prior to the time you got hold of the knob of the door, did you personally move any other person? A. No, I just felt somebody on me. I didn't know it was. I just heard Miss Merchut's voice, that is all.

"'Q. What I mean is, you didn't take hold of any person's body with either hand and move it? A. No, I was only concerned in getting out of that room, Mr. Gallagher. * * *

"'Q. You told me that at the time you got hold of the door knob the first time you pulled the door open? A. Yes, sir.

"'Q. Isn't it a fact? A. Yes, sir.

"'Q. Is that the fact? A. Yes, I got it open. * * *'"

"Q. Now, you recall so testifying? A. Yes, sir. Like I said, there, I touched the knob but the only time I actually got hold of it, I got the door open."

Miss Merchut testified as follows:

"Q. [By Mr. Stanbury] What did you do when the fire broke out? A. I ran to the door.

"Q. When you say you ran to the door, you mean to the door to what? A. The exit door right near the elevator there. * * *

"Q. Now, whereabouts did you get into the flames? A. When I was on my way to the door.

"Q. How close to the door were you? A. Oh, just a matter of a few steps, about six or seven feet away from the door.

"Q. And when you got to the door were you conscious of anyone else being there? A. Mrs. Finnegan was there.

"Q. And could you see what Mrs. Finnegan was doing? A. Trying to get out, struggling there trying to get out.

"Q. What did you do, if anything? A. I tried to open the door.

"Q. What did you do? A. I was pushing it.

"Q. Which way did that door open? A. It opened inward.

"Q. During the time you had been working there hadn't you found out which way the door opened? A. I knew it opened inward.

"Q. Why were you trying to open it outward? A. When I came to the door and Mrs. Finnegan was there struggling with it, suddenly I became panicky realizing I was trapped, and I started pushing, I guess, at the door, and trying to shield my face from the flames, and Mrs. Finnegan opened the door and got out. * * *

"Q. By Mr. Stanbury: Now, why didn't you try to pull the door inward, yourself? * * * The witness: Well, sir, when I did get to the door, Mrs. Finnegan was struggling with it, and then, you know, I forgot, I became panicky and realized I was trapped and started pushing against it.

"Q. By Mr. Stanbury: You just forgot what you were doing? A. Yes, sir.

"Q. You were excited? A. Yes, I was.

"Q. When you were there at the door, what was it like so far as whether it was in a flame or not around there? A. Well, there was flame and I felt hot, and my face was burning, my arms.

"Q. How long were you there? A. It seemed like hours to me.

"Q. It seemed like hours to you? A. Yes, sir. * * *

"Q. Mr. Gallagher: Miss Merchut, so far as you know, you and Mrs. Finnegan were the first two people who actually got out of that workroom, isn't that right? A. Yes, sir.

"Q. And did you, according to your best recollection, and I realize it might not be possible for you to remember exactly, go out first, or did Mrs. Finnegan go out first? A. That is hard to say, sir.

"Q. You cannot tell that? A. I know Mrs. Finnegan opened the door and I went out."

[27-32] Whether there was a causal connection between the violation of the ordinance requiring that the exit door open outward and respondents' injuries was a question of fact for the jury. In order that it may be said that there was no causal connection, appellant must show that no inference can reasonably be drawn from the evidence that respondents' egress from the workroom was impeded or retarded because the door did not open outward. Where different inferences may reasonably be drawn from the same evidence, the decision must be left to the triers of fact. The conclusion of the jury will not be disturbed on appeal if some substantial evidence or reasonable inference lends support thereto. Nichols v. Mitchell, 32 Cal. 2d 598, 606, 197 P.2d 550. Want of proximate cause does not exist as a matter of law unless the only reasonable hypothesis is that such want exists; reasonable or sensible men could have drawn that conclusion and none other. Where there are differences that may be drawn, one for and one against, the one against will be followed. Before it can be held as a matter of law that want of proximate cause exists, the evidence must point unerringly to that conclusion. Smith v. Schwartz, 14 Cal. App.2d 160, 164, 57 P.2d 1386; Traylen v. Citraro, 112 Cal.App. 172, 175, 297 P. 649; Rovegno v. San Jose Knights of Columbus Hall Ass'n, 108 Cal.App. 591, 595, 596, 291 P. 848. The rule as to conflict of evidence applies to cases of contradictions in the testimony of a witness. The conflict is all the more for the jury for being intestine. Weintraub v. Soronow, 115 Cal.App. 145, 149, 150, 1 P.2d 28; Farmers' Bank of Camarillo v. Goodrich, 90 Cal.App. 717, 721, 266 P. 550; Dowd v. Joyce, 85 Cal.App. 377, 380, 259 P. 368. That there were inconsistencies is readily understandable when we consider the emotional instability and physical condition respondents were in when testifying, as disclosed by the exhibits and other evidence, and the stress and strain they obviously were laboring under, together with the normal difficulty of correctly recalling all that occurred while they were in the holocaust. It is not our function to resolve the contradictions.

[33, 34] The fact that appellant was not responsible for starting the fire does not exclude, as being a proximate cause of the injuries sustained by respondents, the fact that the exit door did not open outward. The question is still for the jury. Gerberich v. Southern Calif. Edison Co., 5 Cal.2d 46, 51, 53 P.2d 948; Taylor v. Oakland Scavenger Co., 17 Cal.2d 594, 602, 110 P.2d 1044; Fagan v. Union Pacific R. Co., 85 Cal.App. 2d 583, 586, 193 P.2d 776; Satterberg v. Pacific Gas & Elec. Co., 58 Cal.App.2d 296, 301, 136 P.2d 43; Lindsey v. De Vaux, 50 Cal.App.2d 445, 454, 123 P.2d 144; Harmon v. M. H. Sherman Co., 29 Cal.App. 2d 580, 587, 85 P.2d 205. It is sufficient if a defendant's negligence be a proximate cause of the injury. Sawdey v. Producers' Milk Co., 107 Cal.App. 467, 480, 290 P. 684; Goehring v. Rogers, 67 Cal.App. 253, 259, 227 P. 687, opinion of Supreme Court on denial of hearing. Appellant's negligent act or omission need not be the sole cause of the injury; it is enough that it be a legal cause. McEvoy v. American Pool Corp., 32 Cal.2d 295, 298, 195 P.2d 783. Liability may be imposed upon appellant where its negligence is one of several contributing factors, each of which is a proximate cause of the injury. Westover v. City of Los Angeles, 20 Cal.2d 635, 639, 128 P.2d 350.

The jury reasonably could infer from the evidence that when Mrs. Finnegan reached the door, with Miss Merchut immediately behind her, she reached up and grabbed hold of the knob; that she "tried to open it outward" and could not; that as a result of trying to open the door outward her hand slid down; that her hand slipped off several times; that thereafter, when she finally got hold of the knob, she pulled the door open. It could reasonably infer from her testimony that when she said she got hold of the door knob the first time she pulled the door open, she meant the first time after her hand had slid off from the knob and after it had slid off several times. The jury was warranted in concluding that the violation of the ordinance by appellant was a proximate cause of injuries suffered by respondents.

[35, 36] Appellant's contentions that respondents, as a matter of law, assumed the risk of their injuries and were guilty of contributory negligence, cannot be upheld. Appellant argues that each respondent had knowledge of the condition of the doors and exits and of the lack of sprinklers, of the dangerous substance with which she worked and that it was inflammable; that some of the other employees smoked in the workroom; and that each participated in the handling, storing, manufacturing and processing of cellulose nitrate, and therefore assumed the risk of their injuries.

The only basis of liability in those cases is the violation of the provision of the ordinance that "Doors serving as exits shall open only in the direction of exit. * * *" (Ord. #87,000, sec. 91.3303.) This is a police measure enacted to safeguard health, safety, life and limb. (Ord. 87,000, secs. 12.01, 91.0101.) The law is well established that the doctrine of assumption of risk is not applicable where the injury arises from a violation of an ordinance. The reason for the rule is stated in a concurring opinion by the late Mr. Justice Finlayson in his usual clear and persuasive way in Martello v. Beletich, 59 Cal.App. 533, 211 P. 20. In that case plaintiff sought recovery of damages as the result of a fire. Defendant was charged with keeping an automobile under the roof of a dwelling house in violation of an ordinance prohibiting such storage. Mr. Justice Finlayson said 59 Cal. App. at page 535, 211 P. at page 21: "Even if the trial court's findings should be construed as meaning that defendants' sole negligence lay in their violation of the city ordinance, nevertheless plaintiff's knowledge that defendants were violating this police measure would not be a defense to the action. The duty imposed upon defendants by the ordinance to keep their automobile elsewhere than in a part of the rooming house was not a contractual obligation. It was an obligation imposed upon defendants by a salutary police regulation. The doctrine of the assumption of the risk does not apply. Public policy forbids that the duty which defendants owed to plaintiff to keep their automobile out of the rooming house should be waived by plaintiff's mere passive quiescence, even though with knowledge of the infraction of the ordinance. In Adams v. Cumberland Inn Co., 117 Tenn. 470, 101 S.W. 428, it was held that one who continues to occupy a room in a hotel for six months with knowledge that there are no fire escapes on the building as required by ordinance does not thereby waive a compliance with the ordinance. The doctrine is there stated as follows: 'The plaintiff did not waive the duty which the defendant owed to him under the ordinance as an occupant of the hotel, nor assume the risks incident to its occupation in its then condition. The duty of the defendant to place the fire escapes upon its hotel was not a contractual obligation, and the doctrine of assumed risks has no application to this case. The ordinance is a police regulation, made for the protection of human life, and in the interest of that portion of the public occupying hotels and lodging houses. Public policy requires that duties of this kind be discharged, and that all consequences of a failure to do so shall follow. The individuals who are affected cannot suspend the law by waiver or express contract.'" The rule was followed in Rauch v. Southern California Gas Co., 96 Cal.App. 250, 258, 273 P. 1111, and Friedman v. Pacific Outdoor Adv. Co., 74 Cal.App.2d 946, 952, 170 P.2d 67. See, also, Moore v. Dresden Inv. Co., 162 Wash. 289, 298 P. 465, 473, 77 A.L.R. 1258; Burt v. Nichols, 264 Mo. 1, 173 S.W. 681, L.R.A.1917E, 250; Washburn v. Skogg, 204 Wis. 29, 233 N.W. 764, 767, 235 N.W. 437.

[37] Appellant's contention that respondents were guilty of contributory negligence as a matter of law (a) under common law principles and (b) by reason of violation of a statute and certain ordinances, is not supported by the record. Contributory negligence is "not established as a matter of law unless the only reasonable hypothesis is that such negligence

exists; that reasonable or sensible men could have drawn that conclusion and none other; that where there are different inferences that may be drawn, one for and one against, the one against will be followed; and that before it can be held as a matter of law that contributory negligence exists, the evidence must point unerringly to that conclusion." Anthony v. Hobbie, 25 Cal.2d 814, 818, 155 P.2d 826, 829, and cases therein cited; cf. Lindsey v. Vaux, 50 Cal.App.2d 445, 123 P.2d 144; Stockwell v. Board of Trustees, 64 Cal.App.2d 197, 148 P.2d 405.

[38, 39] It would unduly extend this opinion to set forth the provisions of the statute and the ordinances which appellant claims were violated by respondents and which it asserts proximately contributed to respondents' injuries. Whether or not a violation of a statute or ordinance proximately contributed to an accident, and whether the violation was excusable or justifiable, are questions of fact for the jury except in a case where the court is impelled to say that from the facts reasonable men can draw but one inference and that an inference pointing unerringly to the negligence of the party contributing to his injury. Although a violation of a statute is not excusable under the particular circumstances of the case, liability is also dependent upon proof that a duty was owed to persons in the class of the plaintiff or defendant who is relying upon contributory negligence and that the violation was a proximately contributing cause of the injury. Satterlee v. Orange Glenn School District, 29 Cal.2d 581, 590, 177 P.2d 279.

[40] At the request of appellant the jury was fully instructed with respect to the statute and ordinances claimed to have been violated by respondents and was told that a violation was negligence per se and that if a violation was a proximate cause of respondents' injuries they could not recover. The evidence was sufficient to warrant the jury in concluding that a proximate cause of the injuries sustained by the respondents, for which damages were awarded, was the violation by appellant of the ordinance requiring that doors serving as exits should open outward and that the claimed negligence of the respondents in violating the ordinances, if any, did not contribute to the injuries for which damages were awarded.

We conclude that the court did not err in denying appellant's motions for directed verdicts or in denying its motions for judgments notwithstanding the verdict.

[41] The trial judge over objection admitted in evidence a number of ordinances not applicable to existing buildings and ordinances applying only to the use made of the premises. As stated supra, it was held in the Neuber case that none of these ordinances was admissible in evidence as against the owner. Error in the admission of these ordinances was not prejudicial. They were offered and received in evidence solely as the basis from which the court could determine what instructions to give to the jury. They were not read by or to the jury except in instructions. Prejudice, if any, came from reading some of them to the jury in instructions, a subject to be considered later.

[42] Appellant's next point is that the verdict is without support as, so it says, there is no evidence from which the jury could find, without indulging in speculation and conjecture, what portion of respondents' injuries were attributable solely to the acts or omissions of appellant. The point is not good. Appellant argues that it is conceded, which it is, that appellant did not cause the fire. It argues that the evidence is without conflict that each of the respondents was on fire before she came near the exit door; and that there is no "clear-cut testimony * * * segregating the burns suffered * * * solely because of any acts or omissions" of appellant. No attempt was made below to hold appellant liable for all damage suffered by respondents and we cannot say that the jury so held. The jury, at the request of appellant, was instructed that appellant was not responsible for the fact that a fire occurred; that appellant was not legally responsible for any injuries sustained by either respondent as the proximate result of "The violation by Norman Noll of any statute or ordinance or any standard of conduct required to be observed by Norman Noll", and that "If you find

from all of the evidence that either plaintiff sustained injuries as a proximate result of negligence, if any, on the part of such plaintiff, or on the part of any person other than the defendants, or either of them, but that such, if any, injuries were aggravated or made more severe by negligence, if any, on the part of the defendants then you cannot included in the amount of your verdict, in the event you find in favor of such plaintiff, any compensation for that part of the injuries which such plaintiff would have sustained in any event regardless of any act or omission of the defendants." In the absence of any showing to the contrary, and none is made, we assume that the jury followed these instructions. 2 Cal.Jur. 852, sec. 499. As respondents say, "The injuries sustained by the plaintiffs were of a ghastly nature and would have supported considerably higher awards."

[43-45] In Reclamation Dist. No. 833 v. American Farms Co., 209 Cal. 74, at page 80, 285 P. 688, 690, the court stated: "It is well settled that one who contributes to a damage cannot escape liability because his proportional contribution to the result may not be accurately measured. Learned v. Castle, 78 Cal. 454, 18 P. 872, 21 P. 11; People v. Gold Run Ditch & Min. Co., 66 Cal. 138, 4 P. 1152, 56 Am.Rep. 80." See to the same effect: Switzer v. Yunt, 5 Cal. App.2d 71, 79, 41 P.2d 974; Stephani v. Abbott, 137 Cal.App. 510, 517, 30 P.2d 1033. In City of Oakland v. Pacific Gas & Electric Co., 47 Cal.App.2d 444, 118 P.2d 328, steam escaped damaging plaintiff's books. No obligation arose on the part of the defendant until it was requested to turn off the steam. Thereafter it delayed and this delay was the basis of its liability but the books had already been damaged and the defendant made the same argument as is made by appellant here. The court rejected it saying, 47 Cal.App.2d at page 450, 118 P.2d at page 331: "One who contributes to damage cannot escape liability because the proportionate contribution may not be accurately measured. [Citations.] It is incumbent upon the party alleging injury to prove the amount of damages. Respondent sustained that burden in this case. If the damages proven could be reduced proportionately, that burden rested upon appellant. Vitagraph, Inc., v. Liberty Theatres Co., 197 Cal. 694, 242 P. 709; Andersen v. La Rinconada Country Club, 4 Cal.App.2d 197, 40 P.2d 571. * * * As far as ascertainable from the record, there is evidence that appellant contributed substantially to the damage, or at least to the aggravation thereof, and that the amount of compensation awarded was 'an approximation to accuracy.' Slater v. Pacific American Oil Co., supra, [212 Cal. 648, 300 P. 31]." Appellant's comment that the court was "misled" in the City of Oakland case is naive and ingenious. See, also, Burford v. Baker, 53 Cal.App.2d 301, 308, 127 P.2d 941. The late Professor Carpenter said: "Where several persons act in concert and damages result from their joint tort, each person is held for the entire damages unless segregation as to causation can be established. Even though persons are not acting in concert, if the result produced by their acts are indivisible, each person is held liable for the whole. Death, burning of a building or the sinking of a boat are such indivisible results. The reason for imposing liability on each for the entire consequence is that there exists no basis for dividing damages and the law is loath to permit an innocent plaintiff to suffer as against a wrong-doing defendant. This liability is imposed where each cause is sufficient in itself as well as where each cause is required to produce the result." 15 So. Cal. L. Rev. 439. See, also Cummings v. Kendall, 41 Cal.App.2d 549, 107 P.2d 282.

In the recent case of Summers v. Tice, 33 Cal.2d 80, 199 P.2d 1, the same contention was made and some of the same cases cited as appellant makes and cites here. The court held, 33 Cal.2d at page 88, 199 P.2d at page 5: "In addition to that, however, it should be pointed out that the same reasons of policy and justice shift the burden to each of defendants to absolve himself if he can—relieving the wronged person of the duty of apportioning the injury to a particular defendant, apply here where we are concerned with whether plaintiff is required to supply evidence for the apportionment of damages. If defendants are independent tort feasors and thus each liable for the damage caused by him alone, and, at least, where the matter of apportionment is incapable of proof, the innocent wronged party should not be deprived of his right to redress. The wrongdoers should be left to work out between themselves any apportionment. See, Colonial Ins. Co. v. Industrial Acc. Comm., 29 Cal.2d 79, 172 P.2d 884. Some of the cited cases refer to the difficulty of apportioning the burden of damages between the independent tort feasors, and say that where factually a correct division cannot be made, the trier of fact may make it the best it can, which would be more or less a guess, stressing the factor that the wrongdoers are not in a position to complain of uncertainty. California Orange Co. v. Riverside Portland Cement Co., supra, [50 Cal.App. 522, 195 P. 694]."

The evidence shows that respondents were trapped by the door in a searing oven. The most severe ultimate damage in the workroom was in the immediate vicinity of the exit door. It reasonably may be inferred from the evidence that the most severe injuries suffered by each respondent were received at the exit door and that those injuries would not have been sustained had the door opened outward. Mrs. Finnegan's hands were practically destroyed as she used them at the burning door. The evidence was sufficient to enable the jury to find the damages suffered by respondents as a proximate result of the negligence of appellant.

Appellant claims that the court erred in admitting proof of the respondents' special damages and in instructing the jury thereon. This claim is based on two grounds: First, that there was no evidence from which the jury could determine the portion of medical expense in treating burns caused solely by appellant and the portion incurred in the treatment of burns otherwise caused. This claim is disposed of by what we have said on the previous point. Second, by the allowance of special damages Noll's Workmen's Compensation Insurance carrier is permitted to recover damages allegedly proximately contributed to by Noll's negligence. The argument appears to be that Noll's insurer stands in Noll's shoes and that any negligence of Noll is imputed to it as the recipient of any special damages awarded and thus that the judgments should be reduced accordingly. The parties agree that Noll was guilty of the grossest negligence.

Appellant's contention was squarely repudiated in Pacific Indemnity Co. v. California, etc., Ltd., 29 Cal.App.2d 260, at pages 268, 270, 276, 84 P.2d 313, 318, the court saying: "It therefore appears to us that the legislature never intended to make the lien thus given dependent upon the proof by the lien claimant that the employer was free from negligence or to relieve the third person wrongdoer of any of the responsibility resting upon him. In fact, nowhere does there appear any language in the act indicating that the third party wrongdoer can question the allocation of the judgment between the injured employee and his employer by the court. * * * There is no provision anywhere that the lien thus created is subject to any rule that the employer, in order to be entitled to the allowance thereof, shall be free from any negligence or fault proximately causing or contributing to the injury. * * * Contributory concurrent negligence of an employer is no defense against the allowance of a lien upon a judgment against a negligent third party." The decision was grounded on section 26 of the Workmen's Compensation Act as it existed in 1931. The section remained in the Act in substantially the same form until 1937 when it was incorporated in sections 3854 and 3855 of the Labor Code without material change. The sections were in effect at the time of the accidents in question. Limited Mutual etc. Ins. Co. v. Billings, 74 Cal.App.2d 881, 169 P.2d 673, cited by appellant, is not analogous. The point urged here was not involved in that case.

[46] If the law permitted appellant to avoid payment of part of the judgment because Noll did wrong, it would escape responsibility to the extent that Noll and his insurance carrier are compelled by law to assume liability for which appellant is responsible. See, General Box Co. v. Missouri Utilities Co., 331 Mo. 845, 855, 55 S.W.2d 442, 445; Clark v. Chicago, M., St. P. & P.R. Co., 214 Wis. 295, 252 N.W. 685,

689; Otis Elevator Co. v. Miller & Paine, 8 Cir., 240 F. 376, 378. Cf. Dodds v. Stellar, 30 Cal.2d 496, 503, 504, 183 P.2d 658. The right of an injured employee to recover damages against a third party tort-feasor is not defeated or impaired by the fact that his employer may also have been negligent and that the employer's insurance carrier has a right of indemnity for the amount of compensation payable by him. Appellant is liable for the full amount of damages proximately caused by its negligence, and what disposition is made of the amount recovered as between respondents and Noll's insurance carrier is no concern of appellant.

[47, 48] The suggestion of appellant that the legislation giving Noll's insurance carrier rights in respondents' recovery is special legislation is obviously untenable. Appellant is neither affected nor injured thereby. It is rudimentary that one may not urge the unconstitutionality of a statute unless his rights are adversely affected thereby. County of Ventura v. Southern California Edison Co., 85 Cal.App.2d 529, 539, 193 P.2d 512.

We have concluded that the court committed prejudicial error in its instructions to the jury compelling a reversal of the judgment. Appellant characterizes the instructions as confusing and conflicting. There is merit in the stricture. Eighty-one different instructions were given to the jury. All instructions to be referred to were given at the request of respondents. The court read to the jury sections of Ordinance No. 87,000 which did not apply to existing buildings and sections which applied only to the use which the lessee Noll made of the leased premises.

The jury was instructed that the ordinance provided that a Sub-Group E-1 Occupancy is every room in which explosive materials in lots of more than eight pounds weight are used and rooms used for processing cellulose-nitrate; that such an occupancy must be housed in a Type I building (a "Type I building" was not defined to the jury); that "Every room housing a Sub-group E-1 Occupancy shall be sprinklered"; that "every part of every building shall have two separate exits"; that this latter provision applied to existing buildings housing "Sub-Group E-1 Occupancies"; that "No building or structure or portion thereof shall be used or occupied until a Certificate of Occupancy has been issued therefor." The court said this was "read by way of preface" and that the part "applicable to buildings already existing on January 1, 1943" read: "No existing building or portion thereof shall require a Certificate of Occupancy unless the occupancy housed therein is different from that for which the original permit was issued"; that manufacturing to the extent carried on by Noll was not permitted in the zone in which the leased premises were located. The court told the jury with respect to each separate provision of the ordinance which it had read, that if appellant knowingly let the demised premises for any one of the prohibited purposes or knowingly let the premises while they were not sprinklered, or knowingly let with the intention of permitting the use for the manufacturing purposes carried on by Noll, that the same constituted a violation of the ordinance; and that if appellant knowingly let the premises to be used for a Sub-Group E-1 Occupancy, it was its duty to apply for a Certificate of Occupancy.

After reading these provisions of the ordinance, the court gave the following instructions: (#25) "In reading to you certain ordinances relating to buildings, I have told you what conduct would constitute a violation thereof. I instruct you that the violation, if any, of any of these ordinances by the defendant owner, if such violation proximately caused injury as a result thereof, would constitute negligence unless there is evidence to excuse what would otherwise be a violation." (#33) "The Court has stated to you the provisions of certain ordinances and in each instance has stated what would constitute a violation thereof insofar as such ordinances may, under the facts stated, have been applicable to the defendants. The Court has also stated certain ordinances, and will state others, which were applicable to the plaintiffs. Where a statute or an ordinance prescribes a certain conduct, that is to say, requires the doing of a certain act or forbids the doing of a certain act, the violation of such ordinance or statute amounts to negligence as a matter of law, and neither a Court nor jury could speculate as to whether an ordinarily prudent person would or would not have violated the ordinance or statute." In instruction #25 the jury was told that conduct in violation of the provisions of the ordinance would constitute negligence unless there was evidence showing an excuse for such conduct. In instruction #33 the jury was told that a violation of an ordinance is negligence per se and that they could not "speculate as to whether an ordinarily prudent person would or would not have violated the ordinance."

The following instruction was given: "You are instructed that in order to be held liable for the proximate results of unlawful structural features, if any, of a building, it is not necessary that the owner should itself have created the condition which caused the violation of law. The obligation of the owner with respect to the leasing of buildings which are structurally defective in violation of ordinances may arise when to its knowledge the tenant has changed the structure of said building, or is putting the same to uses for which the same are in violation of ordinances."

The Neuber case, Neuber v. Royal Realty Co., 86 Cal.App.2d 596, 195 P.2d 501, held, as we have stated, that (a) the section of the ordinance requiring that the premises be sprinklered, (b) the provision of the ordinance requiring two separate exits, (c) the zoning ordinance, (d) the provisions of the ordinance requiring a Certificate of Occupancy, did not apply to the facts in the case, and the fact, if it was a fact, that appellant had full knowledge of Noll's activities and had a right to re-enter and cancel the lease did not give rise to any legal duty on appellant to prevent violations by Noll. None of the provisions of Ordinance No. 87,000 except sections 91.0403(f) and 91.3303 should have been read to the jury.

After the instructions mentioned had been given, the court told the jury that "The Court charges you that neither the violation of the zoning ordinance, if any, as shown by the evidence nor the letting, if any, of a Type III building instead of a Type I building for housing a Sub-group E-1 Occupancy can afford a basis for recovering by either plaintiff against the defendants, or either of them, and it is not claimed by plaintiffs that they are entitled to recover on those grounds". Having charged the jury that a violation of the zoning ordinance was negligence, and that a letting of a Type III building for a Sub-Group E-1 Occupancy was negligence, to then instruct the jury that they could disregard such negligence could not do other than create confusion in a layman's mind.

After the jury had deliberated about three hours they returned to the courtroom and indicated that they desired a number of instructions reread. The court allowed the jury to separate for the night and told them to write out what they wanted reread or state in writing what they were worried about. The next morning the members of the jury presented several written questions to the court. The questions indicate utmost confusion. Some of them were: (a) "Law regarding sprinkling system," (b) "Type 3 building, is sprinkling system required whether or not inflammable materials are used in manufacturing? Reread regarding floor space," (c) "If blocking of exits is temporary, then it is not a structural change," (d) "Does landlord have to know an exit has been blocked in order to be liable?," (e) "Whose responsibility is it to keep exits from being blocked, such as nailing a prop to a door? Is a landlord liable if he does not do it? Landlord-Tenant. We are confused about a landlord being responsible for results of acts of a tenant. Does it all revert back to: 1. Leasing for illegal purposes; 2. Applying for permit to alter and giving false information to escape detection of illegal occupancy; 3. Failure to apply for certificate of occupancy; 4. Continuing with lease of illegal occupancy when each month after expiration of lease offered opportunity to cancel; all four of which would be proximate cause? Would landlord's failure to follow through and determine the cause of the first fire involving

Mr. Reuter contributory negligence?" (f) "Please again give illustration hypothetical case of landlord and tenant." (No hypothetical case had been stated in the instructions), (g) "By law, does a person have to know what kind of business goes on in his building?"

The questions and the proper method of answering them were considered at great length by the court and counsel in the absence of the jury. The court then reread a number of instructions and gave a number of additional ones. It gave the previous instructions relative to a "Certificate of Occupancy." Among the new instructions given was the following given at the request of respondents over repeated objections: "The plaintiffs charge that the defendants negligently failed to act—that is permitted the premises to be used without adequate exits and without sprinklers and thereby permitted the fire to grow and thereby hampered escape from the fire. It follows, therefore, that if you find that both the plaintiffs and the defendant property owner were negligent in these respects, you must determine, so far as proximate cause is concerned, how far the negligence, if any, of each operated as a proximate cause of the injuries sustained. Without attempting to advise you concerning the facts, and merely as a hypothetical case, I will give you an example. Suppose a person burned in a fire were guilty of contributory negligence with regard to the starting of a fire. Suppose further that another, charged with a duty not to permit premises to be used without an adequate number of exits, proper exits and sprinklers, was negligent in the discharge of that duty. The original fire might be the cause of the whole injury, without participation in the result by the absence of proper exits and sprinklers. In that case the absence of sprinklers and exits would not be a proximate cause of the injury. On the other hand, had the fire occurred in premises provided with sprinklers the fire might be extinguished before reaching serious proportions and before any injury was inflicted. In such case the absence of sprinklers could be a proximate cause either of the entire injury, or of the ultimate extreme of the injuries. Similarly the original fire might be of such a nature that adequate and proper exits might not have prevented injury or the aggravation thereof. In such case an absence of adequate and proper exits would not be a proximate cause of injury. On the other hand a fire could be of such a nature that it could have been escaped altogether if a required number of exits had existed, or could have been escaped before the ultimate injury was inflicted as the case may be. In such case an absence of a required number of exits or of a required type of exit could be a proximate cause of the whole injury, or of the ultimate aggravation thereof, as the case may be. Thus you will see that one factor may be a proximate cause of the original occurrence of a fire or other mishap, and other factors the proximate cause of the injury resulting therefrom. It is your province to view all of the evidence and to determine what factors of action or omission operated as proximate cause or causes in this case and what each, if more than one, proximately caused." Upon its own motion, the court instructed as follows: "'Is sprinkling system required whether or not inflammable materials are used in manufacturing?' Well, anything is an inflammable material that will burn—whether that means inflammable materials similar to or like nitrate cellulose, the answer is 'no', sprinklers are not required unless there are inflammable material, or material of that type."

The effect of these instructions was to tell the jury that if it found that appellant was negligent in not providing two exits or was negligent in not installing sprinklers and either was a proximate cause of injuries suffered by respondents they were entitled to recover from appellant. Appellant was not legally responsible for the fact that the premises did not have two exits or for the fact that the premises were not sprinklered. The premises had two exits when leased. Noll blocked one of them by nailing a timber against one door and placing planks over the stairway leading to it. The ordinance requiring that the room be sprinklered applied only to the use made of the building and not to the building as a building. These new instructions magnified and aggravated the previous ones with respect to providing two exits and installing sprinklers.

[49, 50] One may as well attempt to square a circle as to essay to harmonize these instructions. It is impossible to say whether the jury predicated liability upon the absence of two exits (for which appellant was not liable), or upon the fact that the workroom was not sprinklered (for which appellant was not liable), or upon the fact that the exit door did not open outward (for which appellant was liable). The rule is settled that where conflicting instructions are given, the verdict of the jury cannot be sustained and a reversal of the judgment is impelled unless the court can say that a miscarriage of justice has not occurred. Westberg v. Willde, 14 Cal.2d 360, 369, 371, 94 P.2d 590; Wells v. Lloyd, 21 Cal.2d 452, 458, 132 P.2d 471; Wright v. Sniffin, 80 Cal.App.2d 358, 363-366, 181 P.2d 675, and cases there cited. In Wright v. Sniffin, supra, the court observed, 80 Cal.App.2d at pages 363, 364, 181 P.2d at page 678: "The rule is well established that when the instructions are irreconcilably conflicting, and it 'cannot be ascertained upon what theory the verdict was returned,' they become erroneous and prejudicial, and therefore require a reversal of the judgment on that account. Starr v. Los Angeles Ry. Corp., 187 Cal. 270, 280, 201 P. 599, 603. In the case last cited a judgment for damages for injuries sustained by plaintiff was reversed for the giving of conflicting instructions which prevented the court from determining the theory upon which the verdict was returned. The court said: '* * * The instructions are to be construed together, but where the instructions are flatly contradictory, as is the case where the jury is instructed upon a specific state of facts to bring in a verdict in favor of the plaintiff or defendant and is elsewhere instructed in general terms not to do so, the instructions must be held to be conflicting and prejudicial, because it cannot be ascertained upon what theory the verdict was returned. * * * Under this condition it cannot be said that there is no miscarriage of justice when it cannot be ascertained from the record upon what theory the jury was authorized by the instructions of the court to render its verdict. * * * Because of the foregoing erroneous instructions, it will be necessary to reverse the case.'"

[51] The effect of the erroneous instructions was such as to cut off substantial defenses on the merits, i. e., (a) that liability could not be predicated on ordinances not applicable to existing buildings; (b) that liability could not be predicated on ordinances applicable solely to the use which the lessee made of the leased premises; and (c) that liability could not be predicated on the failure to make application for and obtain a "Certificate of Occupancy." An erroneous instruction which cuts off a substantial defense is prejudicial. Wallis v. Southern Pac. Co., 184 Cal. 662, 672, 195 P. 408, 15 A.L.R. 117; Keller v. Pacific Tel. & Tel. Co., 2 Cal.App.2d 513, 522, 526, 527, 38 P.2d 182; Dotson v. International Life Ins. Co., 89 Cal.App. 653, 657, 265 P. 357. After an examination of the entire record, we are of the opinion that the errors in the giving of instructions have resulted in a miscarriage of justice.

Judgments reversed.

SHINN, P. J., and WOOD, J., concur.

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GRANT v. AERODRAULICS CO. et al.

Civ. 16242.

District Court of Appeal, Second District,
Division 3, California.

April 1, 1949.

Hearing Denied May 26, 1949.

1. Pleading 🔑345(1.3)

A plaintiff is not entitled to judgment on the pleadings if the answer presents any issue as to material allegations of complaint or if it sets up affirmative matter constituting a defense.

2. Pleading 🔑350(1, 3)

A motion for judgment on the pleadings is in the nature of a general demurrer, and the trial court in ruling thereon must treat the allegations of the challenged pleading as true.

3. Patents 🔑218(5)

Where patent licensing agreement provided for a minimum guaranteed royalty and that balance thereof should become immediately due and payable when letters patent were issued, and authorized the licensee to terminate agreement if the basic design of invention should be unworkable, but licensee did not give notice of termination until more than six months had elapsed after issuance of letters patent, licensee was liable for balance due on the minimum royalty.

4. Patents 🔑214

In patent licensing agreement giving licensee authority to "terminate" or "revoke" agreement if basic design of invention should be unworkable, the quoted words meant the abrogation of so much of the contract as might remain executory at time notice of termination was given.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Revoke" and "Terminate".

5. Contracts 🔑217

The exercise of an option to terminate contract prevents liability for further transactions, but does not affect obligations which have already accrued.

6. Contracts 🔑241

An "alteration" of a contract is a modification or change in one or more respects which introduces new elements into the details of the contract, or cancels some of them, but leaves the general purpose and effect undisturbed. Civ.Code, § 1698.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Alteration".

7. Contracts 🔑215(2)

To "terminate" a contract means to abrogate so much of it as remains unperformed, thereby doing away with the existing agreement on the terms and with the consequences agreed upon.

8. Contracts 🔑254

The termination or abrogation of a written contract may be achieved by an oral agreement regardless of whether the oral agreement is executed, and in such case the statute imposing conditions on alteration of written contract is inapplicable. Civ.Code, § 1698.

9. Contracts 🔑255

An oral contract for cancellation of a written contract must be supported by sufficient consideration to be enforceable.

10. Contracts 🔑75(1)

A consideration for an agreement is not adequate when it is a mere promise to perform that which the promisor is already legally bound to do.

11. Contracts 🔑255

Ordinarily, a mutual cancellation of executory contractual rights is supported by a valid interchange of consideration.

12. Contracts 🔑53, 54(1)

A court of law will not inquire into the inadequacy of consideration for a contract, but such rule does not preclude the necessity of showing that consideration has some value at least.

13. Contracts 🔑54(1)

Something which is completely worthless cannot constitute a valid consideration for a contract.

14. Patents 🔑214

Where consideration for licensor's agreement to terminate patent licensing contract and cancel undisputed debt of $7,500 then due consisted of payment of $1,000 in two equal installments and release by licensee of all its rights under contract, but licensee's default had entitled licensor to revoke license and licensee claimed that the patented device was unworkable, the oral cancellation agreement was not supported by sufficient consideration. Civ. Code, §§ 1550, 1605.

15. Pleading ⚷256

Defendants should have been allowed to amend answer unless it appeared on the face of the answer that it was incapable of proper amendment.

16. Pleading ⚷236(1)

Where oral contract originally pleaded by answer was not supported by sufficient consideration and proposed amendment to answer contained no allegation of any new or different consideration, denial of motion for leave to amend was not an abuse of discretion.

◆

Appeal from Superior Court, Los Angeles County; Frederick F. Houser, Judge.

Action by David Grant against Aerodraulics Company, a copartnership composed of Gerald E. Rubens and others, partners, and Gerald E. Rubens and others individually, for cancellation of a contract and for a money judgment. From a judgment in favor of the plaintiff, the defendants appeal.

Judgment affirmed.

Prior opinion 199 P.2d 745.

Irwin M. Fulop and Ralph B. Herzog, both of Los Angeles (Benjamin D. Mathon, of Los Angeles, of counsel), for appellants.

Grivi & Norris, of Los Angeles, for respondent.

SHINN, Presiding Justice.

This is an appeal by The Aerodraulics Company, a copartnership, and its members both as partners and individually, from a judgment on the pleadings awarding David Grant the sum of $7,000 and cancelling a contract between the parties. It appears to be conceded by both parties that cancellation was properly decreed, and the only substantial question before us concerns the correctness of the money award.

The second paragraph of plaintiff Grant's complaint sets forth in haec verba the terms of a written contract, dated November 8, 1943, whereby plaintiff granted to defendant partnership (herein referred to as the Company) an exclusive world-wide license to produce and sell for commercial use only a hydraulic unloading valve invented by plaintiff. By the terms of this contract the Company was obligated to apply for and procure a patent upon the device at its own expense, "to diligently exploit, manufacture, use and sell said valve for commercial purposes," and to take reasonable measures to promote its use and sale. The Company further was required to pay plaintiff as "a minimum guaranteed royalty for said exclusive license for commercial use only, the sum of Ten Thousand Dollars ($10,000.00), whether sales of said valve be made or not." This so-called "primary royalty" was to be payable in stated installments pending the outcome of the patent application, with the balance thereof to become immediately due and payable when letters patent were issued by the United States Patent Office. An additional "reserve royalty" based on net sales was also provided for.

In respect to termination of the license, the contract contained the following provisions:

"12. In the event of the default of any payments of Primary Royalty due or to become due from Company to Inventor by virtue of this agreement, or in the event of default by the Company in the performance of any of the covenants herein contained, the entire consideration due hereunder shall become due and payable to Inventor forthwith, without further notice, and the Inventor may sue for and collect the entire indebtedness due him hereunder, and may further, at Inventor's sole option, upon giving notice to the Company in writing, and by depositing the same in the United States mails, cancel and revoke this license, and all rights of the Company hereunder shall then cease and terminate. * * *

"13. Company may not terminate or revoke this Agreement unless the basic design of said invention is unworkable and cannot be used advantageously, or unless an infringement search discloses that said invention infringes or conflicts with a patent previously filed in the United States Patent Office, or that said invention is not patentable. In such case as set forth herein, Company may cancel this Agreement upon giving notice in writing to the Inventor, and shall pay to Inventor any 'reserve royalty', on sales made by Company for commercial use. In the event of cancellation by Company Inventor shall retain all payments previously made to him and Company shall have no right to reimbursement thereof."

As the first of two separate causes of action, the complaint alleges that letters patent were issued in respect to the said valve on May 8, 1945; that the balance of the sum of $10,000 as provided in the contract then became due and payable; that defendants have paid $3,000 thereon, leaving a balance of $7,000 due, owing, and unpaid; and that demand in writing for said sum has been made, but defendants have failed and refused to pay said sum in whole or in part. The second cause of action, which was for cancellation of the contract, alleges that the Company has failed and refused to perform the provisions of the contract for the manufacture and sale of the valve, and is in default in payment of the primary royalty; and that because of said defaults, plaintiff, on August 15, 1946, gave the Company written notice of election to terminate the contract.

By their answer, defendants admit the execution and terms of the written contract as pleaded by plaintiff; admit the issuance of letters patent for plaintiff's device on May 8, 1945; admit the contractual obligation to pay $10,000 guaranteed royalty; admit payment of $3,000 to plaintiff and demand by plaintiff in writing for $7,000; admit that they have not entered into manufacture and sale of the said valve; and admit that plaintiff gave written notice of election to terminate the contract on August 15, 1946. Defendants deny, however, that they are indebted to plaintiff, and as an affirmative defense, allege the following: "That during the summer of 1945 plaintiff and defendants orally agreed that in consideration of the payment by the Aerodraulics Company to plaintiff of the sum of One Thousand Dollars ($1000.00), payable Five Hundred Dollars ($500.00) at said time and Five Hundred Dollars ($500.00) in the month of October, 1945, that said agreement described in Paragraph II of plaintiff's complaint, should thereupon be cancelled, terminated and of no further force and effect whatsoever; that The Aerodraulics Company paid to plaintiff at said time the sum of $500.00, and on or about the 17th day of October, 1945 tendered to plaintiff the additional sum of $500.00, as in said agreement provided which sum plaintiff refused to accept."

As a second affirmative defense, the answer quotes paragraph 13 of the contract as set forth above, alleges that "the basic design of plaintiff's invention is unworkable and cannot be used advantageously," and alleges that on that ground a written notice of election to cancel the contract was given plaintiff on November 13, 1945.

At the trial, prior to the introduction of any evidence, plaintiff moved for judgment on the pleadings. After argument thereon, defendants moved for leave to amend their answer, which motion was denied and judgment rendered on the pleadings in favor of plaintiff.

[1, 2] The legal principles which must govern our determination as to the correctness of the decision below are not in dispute. It is elementary that a plaintiff is not entitled to judgment on the pleadings if the answer presents any issue as to the material allegations of the complaint, or if it sets up affirmative matter constituting a defense. 21 Cal.Jur. 237-8. A motion for judgment on the pleadings is in the nature of a general demurrer, and the trial court in ruling thereon must treat the allegations of the challenged pleading as true. MacIsaac v. Pozzo, 26 Cal.2d 809, 161 P.2d 449, and cases cited; 21 Cal.Jur. 240.

[3-5] We have given consideration to the provisions of paragraph 13 of the agreement which extended to defendant the

privilege of cancelling the agreement in certain events, among which was the contingency that the basic design of the invention should be found to be unworkable and incapable of being used advantageously. In view of the allegation in the second affirmative defense that the agreement was cancelled by the company for this reason under the provisions of paragraph 13, the question arises whether such provisions for cancellation were intended to operate retrospectively so as to relieve the company from the duty to pay the unpaid portion of the minimum guaranteed "primary royalty." As we have seen, the balance of the minimum guaranteed royalty had accrued upon issuance of letters patent in May, 1945, and some six months had elapsed thereafter before the company gave notice of termination pursuant to the provisions of paragraph 13. Construing the allegations of the second affirmative defense in the light most favorable to defendant, we nevertheless cannot give a construction to paragraph 13 which would allow the defendant to escape liability for a minimum royalty that had already accrued. The words "terminate," "revoke" and "cancel," as used in the context of paragraph 13 in reference to the written agreement, all have the same meaning, namely, the abrogation of so much of the contract as might remain executory at the time notice is given, and must be sharply distinguished from the word "rescind," which appears nowhere in the paragraph, and which conveys a retroactive effect, meaning to restore the parties to their former position. Sanborn v. Ballanfonte, 98 Cal.App. 482, 488, 277 P. 152; Winton v. Spring, 18 Cal. 451, 453; Young v. Flickinger, 75 Cal.App. 171, 174, 242 P. 516. According to the settled rule of construction, "the exercise of an option to terminate prevents liability for further transactions but does not affect obligations which have already accrued." 17 C.J.S., Contracts, § 404, p. 893, and cases cited; see also, Mile v. Cal. Growers Wineries, Inc., 45 Cal.App.2d 674, 679, 114 P.2d 651; Randolph v. Lindsay, 158 Cal. 727, 730, 112 P. 300.

Analysis of the provisions of paragraph 13 makes it clear that the parties intended the usual construction of such clauses to obtain. In the event of termination of the agreement by the company, it would have remained obligated by the express terms of paragraph 13, to pay any "reserve royalty" that had accrued on account of sales, and this, we think, indicates an intention of the parties to give these provisions of the agreement only prospective operation. Why should the company have been obligated to pay reserve royalties and yet have been excused from payment of the guaranteed minimum primary royalty which fell due unconditionally upon issuance of the letters patent? It would appear to have been in the minds of the parties that each would render full performance up to the time of the exercise of the company's option to terminate the agreement, and that if the termination took place after the issuance of the letters patent it would necessarily also take place after the minimum royalty had been fully paid. The last sentence of the paragraph reads: "In the event of cancellation by Company the Inventor shall retain all payments previously made to him and Company shall have no right to reimbursement therefor." In giving proper effect to this provision, we think the company must be deemed to have paid the balance of the minimum royalty at the time it fell due, and that it was not the intention of the parties that the company could escape liability for matured royalty obligations by the mere device of not meeting them.

We therefore construe the paragraph as a whole to mean that in the event of termination of the agreement by the company plaintiff would be entitled to retain all moneys that had been paid to him and also to obtain all past due amounts which the company had failed to pay. In its answer it was alleged only that notice of termination was given in November, 1945. It is clear that the termination of the agreement by the company in November could not of itself have relieved the company of its obligation to pay the balance of the minimum guaranteed royalty which accrued in the preceding month of May.

It is evident from what has already been said that the primary issue for our consideration is whether, assuming all the allegations pertaining thereto to be true, the oral agreement to terminate the written contract, as set forth in defendants' answer, constitutes a valid defense to the action. In passing, it may be observed that the only alleged effect of the oral agreement was that the written contract "should thereupon be cancelled, terminated and of no further force and effect whatsoever." The answer nowhere alleges that the oral agreement purported to effect a cancellation or release of the admitted indebtedness of $7,500 then due, for the unpaid balance of which the action was brought by plaintiff, and on this ground might well be open to demurrer for uncertainty. Since, however, this objection might have been cured by an appropriate amendment, we shall for the purposes of our decision, resolve any uncertainty in favor of defendants and shall assume that the $7,500 debt was intended by the parties to be cancelled by the alleged oral agreement, or by full performance thereunder by the Company. This assumption is one which is highly favorable to defendants.

[6-8] At the outset, we may dispose of respondent's argument that since the alleged agreement to terminate was not in writing, and was not fully executed, it was, under the provisions of section 1698 of the Civil Code, completely ineffective to accomplish its purported purpose. Section 1698 provides that "A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise." A well-recognized distinction in meaning exists between the alteration and the termination of a contract. An "alteration" is a modification or change in one or more respects which introduces new elements into the details of the contract, or cancels some of them, but leaves the general purpose and effect undisturbed. 40 C.J. 1486, 58 C.J.S., Modification, p. 840; see Guidery v. Green, 95 Cal. 630, 634, 30 P. 786; Cross v. Ramdullah, 9 Cir., 274 F. 762, 767. To "terminate" a contract, on the other hand, means to abrogate so much of it as remains unperformed, thereby doing away with the existing agreement upon the terms and with the consequences agreed upon. Sanborn v. Ballanfonte, 98 Cal.App. 482, 488, 277 P. 152, and cases cited. This distinction has been frequently applied by the California courts, and it is now well-settled that the termination or abrogation of a written contract may be achieved by an oral agreement, whether executed or not, and that in such a case section 1698 of the Civil Code has no application. McClure v. Alberti, 190 Cal. 348, 350, 212 P. 204; Pearsall v. Henry, 153 Cal. 314, 325, 95 P. 154, 159; San Roque Properties, Inc., v. Pierce, 18 Cal.App.2d 379, 380, 63 P.2d 1198; Klein Norton Co. v. Cohen, 107 Cal.App. 325, 331, 290 P. 613. Language to the contrary which may be found in Mulrooney v. Pietro, 79 Cal.App.2d 311, 180 P.2d 62, upon which respondent places reliance, is not only unsupported by citation of authority but is opposed to the otherwise uniform rule of the California decisions.

[9, 10] An oral cancellation, however, is subject to the rules concerning contracts in general and hence must be supported by a sufficient consideration to be enforceable. Haberman v. Sawall, 72 Cal.App. 576, 582, 237 P. 776; Hooke v. Great Western Lumber Co., 54 Cal.App. 681, 683, 202 P. 492. Construing the affirmative defense most favorably to defendants, it appears that the consideration for plaintiff's agreement to terminate the contract and cancel the undisputed debt of $7,500 then due consisted of the payment of one thousand dollars in two equal installments, and a release by the Company of all its rights under the contract. Since the amount of the indebtedness was undisputed, however, payment by the Company of the lesser sum of $1,000 could not constitute a valid consideration for its cancellation, or for the termination of plaintiff's contractual rights against the Company. Civ.Code, sec. 1605; Moore v. Bartholomae Corp., 69 Cal.App.2d 474, 478, 159 P.2d 436; Rogers v. Rogers, 49 Cal. App.2d 366, 369, 121 P.2d 819; Gordon v. Green, 51 Cal.App. 765, 197 P. 955; Rest., Contracts, sec. 76(a); 1 Williston on Contracts, Rev.Ed., sec. 120. "It is an uniform rule of law that a consideration for an agreement is not adequate when it is a mere promise to perform that which the promisor is already legally bound to do."

General Motors Accept. Corp. v. Brown, 2 Cal.App.2d 646, 650, 38 P.2d 482, 484.

[11] Appellants contend that ample consideration may be found in the termination of their exclusive world-wide license to manufacture and sell plaintiff's invention. It may be conceded that, as a general rule, a mutual cancellation of executory contractual rights is supported by a valid interchange of consideration. Sistrom v. Anderson, 51 Cal.App.2d 213, 219, 124 P.2d 372; Haberman v. Sawall, supra, 72 Cal. App. 576, 582, 237 P. 776; Hooke v. Great Western Lumber Co., supra, 54 Cal.App. 681, 683, 202 P. 492; Rest., Contracts, sec. 406 and comment a; 1 Williston on Contracts, Rev.Ed., sec. 102A, pp. 327–8. However, in the foregoing cases and others cited by appellants, the rights which were yielded up were unquestionably of value to the respective parties, and since each was legally privileged to continue to assert those rights prior to the cancellation agreement, each suffered a legal detriment in giving them up.

[12, 13] The facts pleaded by appellants in the present case present an entirely different situation, in which the authorities cited by them are not controlling, for two reasons. First, the elementary rule that a court of law will not inquire into the adequacy of consideration for a contract (see Taylor v. Taylor, 66 Cal.App.2d 390, 398, 152 P.2d 480; Gerson v. Kelsey, 4 Cal. App.2d 158, 162, 40 P.2d 543, 43 P.2d 266; Rest., Contracts, sec. 81) does not preclude the necessity of a showing that the consideration has some value at least. See Rest., Contracts, sec. 80, comment a; Gifford v. Carvill, 29 Cal. 589, 593. Cf. Shipley Co. v. Rosemead Co., 100 Cal.App. 706, 713, 280 P. 1017. It is well settled that something which is completely worthless cannot constitute a valid consideration. Gifford v. Carvill, supra; Pacific Rys. Advertising Co. v. Carr, 29 Cal.App. 722, 157 P. 529; Schwarz v. Bohle, 47 Cal.App. 445, 190 P. 819; Shortell v. Evans-Ferguson Corp., 98 Cal.App. 650, 277 P. 519; Blyth v. Robinson, 104 Cal. 239, 37 P. 904. In accordance with this rule, it has been held that want of consideration is a good defense to an action on a note given in return for the assignment of valueless rights in an invention, Craddick v. Emery, 93 Wash. 648, 161 P. 484, or to an action on a contract for the sale of a void and worthless patent, Herzog v. Heyman, 151 N.Y. 587, 45 N.E. 1127, 56 Am.St.Rep. 646.

It was not alleged in the answer that the rights surrendered were of any value nor were any facts alleged from which it could be reasonably inferred that they were of value.

In the second place the answer wholly failed to show that plaintiff received any benefit from the surrender of the license. The company was in default; there was no question or dispute about it. Plaintiff was privileged to cancel and revoke the license by mailing notice to defendants. The answer did not allege that the company was claiming its default to be excusable or that it had been waived by plaintiff; nor were any facts alleged which indicated that plaintiff had waived his right to terminate the license. It cannot be presumed that plaintiff would have been satisfied with continued nonperformance by the company or that he would not have given notice of termination if the company had not voluntarily surrendered the license. Since plaintiff's acceptance of the surrender of the license indicated his dissatisfaction over defendants' failure to perform, the giving of notice of termination under the circumstances would have been an unnecessary act as to each of the parties.

[14] Appellants cite White v. Lee, C.C., 3 F. 222, and other cases, in which it was held that where a licensing agreement gave the licensor the right to terminate the license for breach by the licensee, the agreement continued in force until the licensor exercised his right by giving notice, and the mere breach of the agreement by the licensee did not ipso facto put an end to the license. This is not the question. We are considering only the fact that plaintiff could have terminated the agreement by notice mailed to the company, which would have amounted to exactly the same thing as the surrender of the license. It is suggested that the surrender of the license placed plaintiff in a position where he could deal with others, or manufacture the

device himself, free from interference by defendants; that it must therefore be considered that plaintiff derived some benefit from the surrender. No such possible benefits were alleged, and if there had been such, plaintiff was free to take advantage of them without the consent or assistance of defendants. It would be fanciful to hold that plaintiff received the benefit through the actions of defendants, who had nothing in the way of a benefit that they could rightly withhold from him, and therefore had nothing to give. Accordingly, we hold that the alleged oral agreement was not supported by "a sufficient cause or consideration," Civ.Code, sec. 1550, and could not constitute a valid defense to the action.

[15] Defendants urge that the denial of their motion for leave to amend was an abuse of the trial court's discretion which would justify a reversal of the judgment. The amendment should have been allowed unless it appeared on the face of the answer that it was incapable of proper amendment. See King v. Mortimer, 83 Cal. App.2d 153, 188 P.2d 502, and cases cited.

[16] Reviewing courts are somewhat disposed to discover sufficiency in a pleading where refusal of the right to amend it may result in a miscarriage of justice, particularly so when a party has not been given an opportunity to try his case on the merits. But, even so, it is true also that if plaintiff here is clearly entitled to the judgment which was awarded him, its benefits should not be withheld from him upon the mere possibility that defendants may have a defense to his demands other than the one they have pleaded. At no time either in their pleadings or briefs have defendants alleged or suggested any fact which, taken with the facts they have admitted, would enable them to show a legally sufficient consideration, consisting of value passed or detriment suffered by reason of the alleged oral agreement. In view of our conclusions, we are of the opinion that the answer was incapable of amendment to state a valid defense.

In considering the claim that a miscarriage of justice has occurred we deem it proper to refer to a proposed amendment to the answer found in defendants' closing brief and which, it is said, would have been filed had permission been granted. This proposed amendment contains no allegation with respect to a consideration for the oral agreement which adds anything to the original allegations, and it is subject to the same fatal objections as the original pleading. We should not assume that defendants could file a better answer than the one they exhibited to us in their brief as their proposed amended answer. We cannot see how the answer could have been amended consistently with defendants' admissions and allegations of fact, so as to allege a consideration for the oral agreement. The court did not err in denying leave to amend.

The judgment is affirmed.

WOOD and VALLÉE, JJ., concur.

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91 Cal.App.2d 163

PEOPLE v. APPLEGATE.

Cr. 718.

District Court of Appeal, Fourth District, California.

April 7, 1949.

Hearing Denied May 5, 1949.

1. Witnesses 🔑337(6)

In prosecution for grand theft, evidence of and of prior conviction of defendant of defrauding the government service of time in federal prison was properly admitted for impeachment purposes. Code Civ.Proc. §§ 2051, 2065.

2. Embezzlement 🔑44(4)

In prosecution for grand theft, evidence was sufficient to show that the association whose money the defendant was charged with embezzling had such a legally recognizable interest in the money as would support such charge. Pen.Code, §§ 484, 506, 506a, 951, 952.

3. Constitutional law 🔑258
Embezzlement 🔑2

Sections of statute providing that any person intrusted with or having in his control property for the use of any other person who fraudulently appropriates it to any use or purpose not in the due and lawful execution of his trust or secretes with fraudulent intent to appropriate it to such use or purpose is guilty of embezzlement, set forth in clear and understandable language sufficient to enable persons of ordinary intelligence to determine the specific and definite conduct which is thereby forbidden and do not violate the due process clause of the constitution. Pen.Code, §§ 484, 506, 506a, 951, 952.

4. Embezzlement ⚷48(3)

In prosecution for embezzlement of association's money where defendant testified that he did not intend to and did not in fact actually dominate and control the officers and directors of the association or its affairs, and officers of association were demanding that defendant turn over money belonging to it and were employing laborers and attempting to carry on the business of the association, court properly refused to charge that one partner could not be guilty under the law of embezzling money belonging to himself or to the partnership. Pen.Code, §§ 484, 506, 506a, 951, 952.

5. Embezzlement ⚷47

In prosecution for embezzlement of association's money, whether the defendant was withholding such money under claim of title in good faith was a question of fact for jury to determine. Pen.Code, § 511.

6. Embezzlement ⚷47

In prosecution for embezzlement, guilt of defendant was question of fact for the jury.

7. Criminal law ⚷1159(2)

Function of court on appeal from conviction is to determine from the entire evidence, together with the inferences and deductions therefrom, whether there is sufficient evidence to uphold the jury's finding.

8. Embezzlement ⚷44(1)

Evidence sustained conviction of embezzlement.

◆

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Warren F. Applegate was convicted of grand theft and he appeals.

Affirmed.

James B. Abbey, of San Diego, for appellant.

Fred N. Howser, Atty. Gen., Henry A. Dietz, Deputy Atty. Gen. and James Don Keller, Dist. Atty., San Diego County and Woodrow Wilson, Deputy Dist. Atty., both of San Diego, for respondent.

GRIFFIN, Justice.

Defendant was charged with grand theft in the language of the statute, Secs. 484, 951 and 952, Penal Code, that on September 15, 1947, he took "the personal property of the United Flower Growers' Association, a corporation, consisting of" $9,800, to which he entered a plea of not guilty. A jury returned a verdict of guilty. Defendant appealed.

It is conceded by defendant that "embezzlement", as that offense was previously known, may be charged and proved under this form of information. People v. Dunn, 40 Cal.App.2d 6, 104 P.2d 119. It is rightfully argued that the change in the offense was one merely in nomenclature and that the burden of proving all of the elements of the former offense still remains the duty of the prosecution. People v. Stevenson, 103 Cal.App. 82, 284 P. 487. The principal question raised on this appeal is the sufficiency of the evidence to support a charge of "embezzlement", as that crime was previously known.

The First National Real Estate & Management Company, a corporation, hereinafter referred to as the "Corporation", was incorporated in 1944. Prior to that time the company had existed as a partnership composed of one Turk, Wern and defendant Applegate. When the Corporation was formed, the interests of the three partners were closed out on their books and the same interests were entered in the Corporation books. Shortly thereafter, both Wern and Turk withdrew, and all the stock was then held by defendant. Its business consisted of acting as real estate broker in buying and selling property of others as well as its own. Applegate had no real estate broker's license. The Corporation operated under the brokers' licenses of the various officers. It incidentally appears that Applegate, in addition to his many other activities, conducted a training school for applicants for real estate brokers' licenses and charged a tuition fee for such service. Myron Donley was one of his many trainees. After passing the examination their licenses were kept in the office of the Corporation and at times there were as high as 100 licenses on the wall.

Applegate was the general manager of the Corporation and held a general power of attorney to, and did, transact all of the Corporation's business affairs. He selected its officers and apparently controlled their actions, and when one was selected he was given a stock certificate, representing three shares, which defendant required to be immediately endorsed in blank by the officer and returned to him. In April, 1947, Mr. Donley was thus selected to be president of the Corporation. Applegate told him that he (Applegate) owned all of the stock of the Corporation and all of its assets. Donley testified that he was not receiving any salary as president; that he had no authority in directing or in managing the Corporation but this was all done by defendant. A Mrs. Benson was appointed office manager. She likewise held a broker's license. Early in 1947, the Corporation purchased, on contract, a tract of land near Encinitas and offered the tract in smaller lots to various purchasers.

One Clark and defendant headed a flower-growing partnership company which had entered into certain agreements with purchasers of land from the Corporation to grow flowers on land previously sold by the Corporation to such purchasers. In 1947, this flower-growing company went into receivership. Applegate conceived the idea of promoting a new corporation to enter the flower-growing business, and in the summer of 1947, 15 of these lots were sold to purchasers and each agreed with the Corporation, through the defendant manager, or its selling agent, that they would pay to that Corporation, for the benefit of the new corporation to be formed, an additional sum of money (totaling $17,600) to be used by the latter to grow flowers on the land when that new corporation was formed. The money was then to be turned over to it and written contracts between that new corporation and the growers were to follow. Of the $17,600 paid in for this purpose, $7,800 was in the form of checks made payable directly to the United Flower Growers' Association, hereinafter referred to as the Association. The balance, or $9,800, was in cash or checks payable to the Corporation. The $7,800 in checks was given by the defendant to Helen Benson and was deposited in an account opened on September 2, 1947, 8 days before the Association was formed, in the name of "United Flower Growers' Association". Applegate, Donley and Benson had authority to draw on that account until the Association started to function, at which time Applegate's name was removed from such listed authority. Of the $9,800, $5,500 was taken directly from the Corporation by defendant and was receipted for by him. In one instance the money was receipted for by his secretary, Jimmie Wilson. The remainder, $4,300, was deposited, at various times, beginning July 28, 1947, to August, 1947, in a "trustee account" of the Corporation. In this account was kept money which did not belong to the Corporation. At various times defendant withdrew money from the trust fund for his personal use and for use in the operation of an "Inn" in which he was interested and which later went into receivership. On September 5, 1947, the balance in the trust fund was only $522. No money had been drawn from this account for the purpose of paying any funds over to the Association. On September 10, 1947, defendant, through his attorney, incorporated the "United Flower Growers' Association", and the first officers were office employees of defendant's attorney.

As to the organization of the Association, it was testified that in the summer of 1947, a conversation was had and an oral agreement was entered into by defendant Applegate, Helen Benson, and Donley, whereby Benson and Donley, in exchange for their services in managing that Association, were each to receive 33⅓ per cent of the stock, and the defendant Applegate was to furnish the equipment in addition to $10,000 for capitalization, in exchange for 33⅓ per cent of its stock. This agreement was later modified whereby each original stockholder waived 8 per cent of his stock to one Meek, in exchange for his services as an expert consultant. At a later time each waived one per cent to an attorney employed by the Association, in exchange for his services. Apparently, no stock was ever issued. After the organization of that Association the officers and directors appointed were Donley, president, one Wurman, vice president, Mrs. Benson, secretary-treasurer, and Meek. Applegate was never an officer. Mrs. Benson and Donley resigned from the Corporation upon becoming officers and stockholders of the Association. Written contracts (in September and October) were executed between the landowners and the Association and provided that the net profits from the flower-growing corporation would be split "50–50" between the owners and that Association. That Association accepted all of the contracts made on its behalf by the promoter, Applegate, and entered into performance thereof. The original contracts, as drawn, proved unsatisfactory to the new attorney for the Association and were recalled. During November and December, 1947, new ones were executed, which in effect made the Association the employee of the landowners for the purpose of growing flowers for them. The Association continued to function. A public accountant was employed to set up the books, and money was expended in furtherance of the contracts for flower growing. Defendant furnished $2,500 worth of equipment to the Association and took back a note, dated October 18, 1947, for one year, covering this amount, "to show his interest in the Association", until such time as the stock would be issued. Defendant never put up the $10,000 they claim he agreed to advance to the Association.

After Helen Benson became the secretary-treasurer of the Association she made demand on defendant for the balance of $9,800 due that Association. Applegate delivered to her 9 checks of the Corporation totaling $9,800, which were drawn on a Los Angeles bank. When the checks were presented for payment they were returned "N.S.F."

During the next few months the Corporation was in bad financial condition, with overdrafts at the several banks. Unpaid wages were due employees and a foreclosure suit was threatened under the main contract for the purchase of the entire tract. In October the $9,800 in checks were again presented for payment. One check for $400 cleared but the rest were again returned "N.S.F." They were again presented on several occasions with like results and later returned to defendant. At various times thereafter, in response to demands by the Association, defendant between October, 1947, and February, 1948, turned over various sums of money, and in this manner $5,600 of the $9,800 was paid to the Association. The balance of $4,200 was never paid over. It consisted of payments made by five named individuals. On June 21, 1948, the information in this action was filed, charging that defendant, on September 15, 1947, misappropriated $9,800. On March 1, 1948, the license of the Corporation was suspended by the Real Estate Commissioner. About March 15, 1948, the Association was forced to suspend further operations. The crops were not brought to maturity due to lack of funds. Its outstanding liability was $1,603.81.

Defendant Applegate concedes that there was a balance of $4,200 which was received by the Corporation under the agreements with the landowners, but claims that he refused to pay this sum over to the Association because he believed the officers thereof were squandering the money; that as trustee of those funds he might subject himself to "criticism" or to civil liability if he paid those amounts to the landowners; that since he had a claim against the Association in excess of that amount, to wit, $6,000, he was justified in retaining the $4,200.

The main point presented by defendant's brief is the argument advanced in the trial court that the money paid to the Corporation for advance capital for flower growing never was the personal property of the Association and that defendant should not have been charged in the information with taking its property; that the Corporation, or appellant, if that Corporation was his "alter ego", was responsible to the contributors and that by charging embezzlement from the Association he had been subject to and is now subject to double jeopardy; that since some of the money was paid to the Corporation before the Association was "even conceived, much less born", it could not be legally held to be the property of that Association which was later formed; and that if there is any embezzlement at all, it is embezzlement of the money taken from and belonging to the property owners, citing People v. Borchers, 199 Cal. 52, 247 P. 1084, 1085, in which it is said that one of the necessary elements of the crime of embezzlement by a bailee is that the accused was bailee of the prosecuting witness in holding the property, which property must actually belong to the alleged principal; that since some of the money was deposited by the owners with the bailee before the existence of the new Association, it could not be said that any trust relationship existed between it and the defendant or the Corporation.

Defendant offered evidence indicating that he did not remove his equipment from the properties until March, 1948, and at that time it was not in use and had been "scattered all around". Defendant testified in his own behalf and gave a resume of the volume of sales made by the Corporation. He said he was not connected with Clark in the original flower-growing venture although the Corporation did expend over $9,000 in experimental work in relation to the feasibilty of growing flowers on the land owned by it; that Clark was thrown into receivership, and it made a "very black name" for his Corporation because people thought it had "a connection there"; that Donley said he had found the right man (Meek) and he, Meek, and Donley suggested the formation of a flower-growing association and he told them he would help them out financially "to get them started etc."; that around July or August contracts were drawn, and Donley had the purchasers sign them and the money to raise flowers was to be turned over to the Association to be formed; that these contracts were considered in violation of the "Blue Sky Law" because of the profit-sharing provision; that new contracts were drawn and signed and the former ones were cancelled; that he was not interested in any stock in the new Association but would help it out financially; that he told Donley and Mrs. Benson that their "stock could control it"; that he objected to them using forms of receipts of the Corporation for the money paid for the benefit of the Association and they told him "You hold this money and when we get new contracts signed, then turn it back over"; that the Corporation took the money under these circumstances only and that he was not "interested in the profits or control" of the Association; that the Association spent too much money for supervision and he became alarmed; that he gave them a series of checks just to "hold back on the money" because he "didn't know legally who owned that money"; that he sold the Association the pipe and equipment that was left over from the Clark receivership for a note of $2,500; that no stock purchase was involved; that his Corporation also furnished the Association about $4,000 in equipment to develop the property; that when he saw that the Association funds were being mishandled he called a conference and told the officers thereof: "I want to serve notice on you that I want nothing further to do with you * * *"; that he demanded that the books of the Association recognize the ownership of the equipment and pay him for it; that he told them he would turn over all money collected except $6,500 which the Association owed the Corporation; that upon the advice of his attorney he paid no more money to the Association.

One Carter, a purchaser under one of the contracts, on March 30, 1948, made a written demand on defendant and stated that the Association "has not returned the * * * $1500 * * * which was paid to you on September 11, 1947" because "no part of said payment has been turned over to it by you * * * I therefore demand * * * $1500 which I paid to you." Suit to recover this amount was threatened. In this connection defendant argues that letter proves that the money belonged to the owner, Carter, and not to the Association. It should be here noted that the letter was written on the same day the complaint was issued and more than a month after the date of the claimed conversion. It is apparent that the letter, if material, would not establish the fact that the Association did not have any legally recognizable ownership therein.

[1] One of the first questions propounded to defendant on cross-examination was whether he had been convicted of a felony in Ohio for defrauding the Government and served time in the Federal prison. Defendant admitted the conviction and now argues that this fact so highly prejudiced the jury that it found the defendant guilty of an offense which in fact and in law was but a civil controversy as to whom the defendant owed the money. There was no error shown in the form of the question propounded. The answer was rightfully elicited for impeachment purposes under secs. 2051, 2065, Code Civ.Proc., and the jury was so instructed. We are unable to state, and it is not our province to determine what effect, if any, it had upon the jury.

The main point here raised, i. e., that the information was defective because the evidence showed that ownership of the money placed in defendant's hands was in the landowners rather than the Association, appears to us to be more technical than real. It is true that there is language in People v. Borchers, supra, which indicates that under a charge of embezzlement it must be shown that the accused was the agent or bailee of the complaining witness in holding the alleged embezzled property and that the property must belong to the alleged principal. In that case there was no contention that the defendant was "masquerading under the name of a corporation", and it was distinctly said that the defendant delivered the check to the Corporation in accordance with his duty so to do and the court therefore would not inquire what the charge against the defendant would have been if he had failed to comply with his duty and had converted the check to his own use, i. e., whether he should then have been indicted for embezzlement of a paper which was the property of the maker of the check, or of the property which belonged to the Corporation. Because all of the evidence showed that the defendant did deliver the check to the Corporation according to his duty, the court held there was no embezzlement by the bailee. The facts in the instant case are different. Sec. 506 of the Penal Code provides: "Every trustee * * * agent * * * or collector, or person otherwise entrusted with or having in his control property for the use of any other person, who fraudulently appropriates it to any use or purpose not in the due and lawful execution of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, * * * other than for that which he received it, is guilty of embezzlement, * * *."

Sec. 506a describes who are deemed to be agents under sec. 506 and a collector is deemed to be an agent and includes every person who collects, or has in his possession or under his control money for the use of another, whether in his name or otherwise, and who fraudulently appropriates it to his own use or the use of any person other than the true owner, or person entitled thereto, and not in the due and lawful execution of his trust.

It is conceded that the property here involved (the money) was not owned by defendant or his Corporation. He did not have title thereto. He merely held it as a trustee as between the owners and the Association. The trustee, under the terms of the trust agreement, was obligated to turn the money over to the United Flower Growers' Association, upon its incorporation, and upon the happening of that event, the Association was entitled to it. Demand was made by the Association for it and defendant refused to pay it over for the reasons above mentioned.

The fact that defendant gave the Association $9,800 in "N.S.F." checks, the full amount then claimed due, was strong evidence that defendant considered the money as the property of the Association. In the absence of some showing to the contrary by the landowners, they were no longer entitled to the money, since the provisions of the trust, so far as this trustee was concerned, were carried out.

[2] In People v. Gallagher, 100 Cal. 466, 35 P. 80, the court sustained a convic-

tion for embezzlement where the money converted had never been in the possession of the person having legal title. In People v. Treadwell, 69 Cal. 226, 10 P. 502, 509, it was held that an endorser of a note who turned it over for collection still had an interest in it sufficient to sustain an averment of an ownership on a charge of embezzlement. Then follows the conclusion that "Any legally recognizable interest in property is sufficient for that purpose." In People v. Torp, 40 Cal.App.2d 187, 104 P.2d 542, money was given by one Austin to defendant Torp, an attorney, to pay over to one Gaine for the purpose of certain property. Defendant delivered to Austin a deed executed by Gaine and appropriated the money received therefor to his own use. The information did not allege whose money it was. Defendant there raised the same point as here indicated and argued that it was necessary to establish legal title to the money which was paid by Austin to Torp. The court there held that the evidence showed that defendant held the money as trustee and appropriated it to his own use and not in the due and lawful execution of his trust; that the title to the property involved need not be absolute, for any "legally recognizable interest" is sufficient; that to establish legal title thereto was unnecessary; that it was sufficient if the money was given to defendant by Austin and was given as a trust fund for a specific purpose; that "Whether the legal title to the money was in the Austins, the Gaines or Mrs. Costa, is immaterial in this criminal proceeding. As far as the defendant is concerned he had no legal title to the money and his possession was for a limited purpose only. He cannot, in defense of his act, raise the question of title as between others." See, also, Seavey v. State Bar, 4 Cal.2d 73, 47 P.2d 281; People v. Foss, 7 Cal.2d 669, 62 P.2d 372. We see nothing in the Borchers case, supra, which is in conflict with this line of authorities holding that any "legally recognizable interest" is sufficient to sustain an averment of ownership in and prosecution for embezzlement by a trustee. We must conclude that there was evidence from which the jury might rightfully conclude that the Association had such a "legally recognizable interest" in the money as would support such a charge.

[3] The next point involves the contention that if secs. 506 and 506a of the Penal Code are to be applied, as above indicated, said sections are unconstitutional and in violation of due process, citing People v. Holder, 53 Cal.App. 45, 199 P. 832; In re Blaney, 30 Cal.2d 643, 656, 184 P.2d 892; and 16 Corpus Juris Secundum, Constitutional Law, §§ 567, 569, 579, 582, p. 1140 et seq. The gist of the argument follows the line of argument advanced under the first point raised and there disposed of, i. e., that the money alleged to have been embezzled from the Association would not, by any process of reasoning, have belonged to it, since title thereto had never passed to that Association; that defendant, under the charge, is therefore subject to double jeopardy should the landowners later attempt to charge him with embezzlement of these funds in the same amount. These sections, when reduced to their simplest elements, provide that any person intrusted with or having in his control property for the use of any other person, who fraudulently appropriates it to any use or purpose not in the due and lawful execution of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, is guilty of embezzlement. These statutes are set out in clear and understandable language sufficient to enable persons of ordinary intelligence to determine the specific and definite conduct which is forbidden thereby, and do not violate the due process clause of our Constitution. Connally v. General Construction Company, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322; United States v. L. Cohen Grocery Co., 255 U.S. 81, 41 S.Ct. 298, 65 L.Ed. 516, 14 A.L.R. 1045.

While sec. 506 of the Penal Code has never been under direct attack as to its constitutionality, the appellate courts have been called upon to directly construe the section and its effect. People v. Treadwell, supra; People v. Page, 116 Cal. 386, 48 P. 326; People v. Hatch, 13 Cal.App. 521, 109 P. 1097; People v. Crane, 34 Cal.App. 599, 168 P. 377; People v. Millsap, 85 Cal.App. 732, 260 P. 378; People v. Bullock, 92 Cal. App. 785, 268 P. 1059. Convictions under this section have been upheld without intimation that it was unconstitutional. We have come to the same conclusion.

[4] While it is conceded that the "alter ego" as between the Corporation and the defendant was properly submitted to the jury, and that there was evidence to support it, it is argued, in this connection, that the same question was applicable as between the Association and the defendant and that therefore, one partner cannot be guilty under the law of embezzling money belonging to himself or to the partnership, and that the court erred in refusing his instruction to this effect, citing People v. Brody, 29 Cal.App.2d 6, 83 P.2d 952. It is clear from defendant's testimony that he did not intend to and did not in fact actually dominate and control the officers and directors of the Association or its affairs to the extent that the separate existence of the Corporation should be disregarded and its acts and obligations recognized as those of the defendant. Those officers were demanding that defendant turn over the money retained by him. They were employing the laborers and attempting to carry on the business of flower growing and apparently had severed all connections with the Corporation. Under these circumstances it was not error for the trial court to refuse to instruct the jury as requested. Wittmann v. Whittingham, 85 Cal.App. 140, 146, 259 P. 63; Garvin v. Matthews, 193 Wash. 152, 74 P.2d 990, 992.

[5] Defendant next claims that under sec. 511 of the Penal Code reading: "Upon any indictment for embezzlement, it is a sufficient defense that the property was appropriated openly and avowedly, and under a claim of title preferred in good faith, even though such claim is untenable. But this provision does not excuse the unlawful retention of the property of another to offset or pay demands held against him" he was holding the money under a "claim of right" and it was therefore a "perfect defense" and accordingly he was entitled to a verdict of acquittal. It is not that defendant holds the money under a "claim of right", but he must hold it under a "claim of title in good faith". People v. Holmes, 13 Cal.App. 212, 216, 109 P. 489, 491. As we construe it, defendant was laying claim to the right to hold the money, based upon the proposition that the officers of the Association were "squandering the money", or, if it was the Association's money, he had an offset against it for the amount of the $2,500 note plus the claimed price of the machinery furnished. The prosecution's testimony showed that the $2,500 note was not supposed to have been paid by the Association and that there was no agreement to ever pay defendant for the machinery furnished. Even if, under the evidence, defendant was entitled to the benefit of an instruction under section 511, supra, the question whether he was withholding "under a claim of title * * * in good faith" was one of fact for the jury to determine. People v. Hill, 2 Cal.App.2d 141, 37 P.2d 849; People v. Newland, 15 Cal.2d 678, 104 P.2d 778. This issue was determined against defendant under an instruction given in the exact language of sec. 511.

[6-8] The last complaint is that the record does not disclose criminal intent on the part of the defendant, since the evidence shows that defendant turned over nearly three-fourths of the funds collected by him and that there is no evidence of conversion of the balance, at any time. At the insistence of counsel for defendant the entire record, consisting of over 650 pages, which includes his argument and the instructions given and refused, as well as the volume of exhibits received in evidence, have been read. It conclusively shows and defendant admits that he received the funds involved and for the purpose indicated. It likewise is apparent that he did not pay them over to the Association nor to the landowners but retained them under the several claims mentioned. The question as to whether this amount was in fact converted to defendant's own personal use was a factual question for the jury. Proper instructions were given on that subject and the jury was told that unless they found that defendant did "actually and personally take and convert" money "belonging to the Association", "with intent to deprive the owner thereof * * * you must find him not guilty". There is evidence that these moneys were placed in "a trust fund" of the Corpora-

tion; that defendant drew on these funds for his personal use, and on one occasion used some of them for the "Inn" which he was operating or promoting. There is evidence that the bank accounts were overdrawn and that defendant and the Corporation were delinquent in payments on the main contract for the purchase of the acreage, at least four months prior to trial, and that foreclosure proceedings thereon were being instituted. The fact that defendant and his Corporation were in bad financial straits is apparent from the record and the jury had the right to believe that defendant did not pay over the $4,800 because that sum had been appropriated to defendant's use, a use which was inconsistent with the trust agreement. Had the jury believed the defendant's story that there was no criminal intent on his part because he was acting under the advice of his attorney in withholding the money, we would not now be confronted with the question presented. Unfortunately, our problem on appeal from the judgment of conviction is a different one. We must determine from the entire evidence, together with the inferences and deductions arising therefrom whether there is sufficient evidence upholding the jury's finding. The evidence, when considered in this light, is sufficient. People v. Talbot, 220 Cal. 3, 28 P.2d 1057.

Judgment and order affirmed.

BARNARD, P. J., and MARKS, J., concur.

Hearing denied; SCHAUER, J., dissenting.

33 Cal.2d 740

MANCHESTER v. PEOPLE et al.

Cr. 4892.

Supreme Court of California, in Bank.

April 19, 1949.

Writ of Certiorari Denied June 20, 1949.
See 69 S.Ct. 1508.

1. Habeas corpus ⚷4

Habeas corpus may not serve as a substitute for an appeal.

2. Habeas corpus ⚷54

Relief sought by writ of habeas corpus and application for appointment of a referee to determine disputed questions of fact would not be granted unless petitioner sufficiently alleged facts in support of his position that prosecution knowingly used perjured testimony and false exhibits to obtain his conviction, and allegations which went to show that testimony given at trial was contradicted and for that reason falsity must have been known to prosecution would be insufficient as a basis of knowledge of their alleged false nature.

3. Habeas corpus ⚷30(1)

Reliance solely upon contradictions in a criminal prosecution as a foundation for allegation that false testimony was knowingly used by prosecution presents questions merely of weight and credibility which generally are not reviewable on appeal from judgment and cannot afford a ground for relief upon habeas corpus.

4. Habeas corpus ⚷54

Petitioner seeking release by habeas corpus on ground that prosecution knowingly used perjured testimony and false exhibits to obtain his conviction must set forth not only facts which he contends prove perjury of witnesses and knowledge thereof on part of prosecution, but must also show that those facts existed independently of contradictions appearing at trial, and facts alleged must also indicate that petitioner had no opportunity to present alleged true matter on trial.

5. Habeas corpus ⚷92(1)

Sufficiency of evidence or error in rulings during criminal prosecution are not proper issues for consideration in habeas corpus proceeding.

6. Constitutional law ⚷257
Habeas corpus ⚷90

Habeas corpus application based on asserted inconsistencies and contradictions appearing in testimony in prosecution of relator for incest, prejudice in trial court's rulings, misconduct of counsel for prosecution and incompetency of petitioner's counsel, without statement of independent facts of knowledge of falsity or suppression of asserted facts on part of prosecution, was insufficient to support conclusion that petitioner's constitutional guaranty of due process had been violated, and appointment of referee to determine disputed questions of fact was unnecessary.

◆

Habeas corpus proceeding by Ralph H. Manchester against the People of the State of California, and Robert A. Heinze, Warden of the State Prison at Folsom, to secure release from custody, wherein petitioner applied for appointment of a referee.

Application for appointment of a referee denied, writ discharged, and petitioner remanded to custody.

Ralph H. Manchester, in pro. per.

C. K. Curtright, of Sacramento, for petitioner.

Fred N. Howser, Atty. Gen. and Clarence A. Linn, Deputy Atty. Gen., for respondents.

SHENK, Justice.

The petitioner seeks his release from Folsom Prison on allegations that the prosecution knowingly used perjured testimony and false exhibits to obtain his conviction.

The petitioner was convicted on November 2, 1943, in the superior court in Sacramento county of the crime of incest committed on his ten year old daughter, Elaine. He was represented by counsel throughout the trial proceedings. No appeal was taken from the judgment nor from the order denying his motion for a new trial. Instead of taking an appeal, his counsel unsuccessfully sought to have the petitioner declared a sexual psychopath pursuant to sections 5500 et seq. of the Welfare and Institutions Code.

Several prior applications have been prosecuted by the petitioner on grounds similar to those here presented. In June 1944 he filed in this court an application for the writ of error coram nobis (Crim. 4562), on the ground that he was convicted through perjured testimony. The application was considered as more properly one for the writ of habeas corpus and was on June 12th denied for the reason that there was no allegation that the prosecution knowingly offered perjured testimony. On January 4, 1945, a petition for the writ of habeas corpus was denied by the District Court of Appeal, Third Appellate District (3 Crim. 1900). In February 1945 a petition for the writ of habeas corpus was filed in this court (Crim. 4621). That application was denied on March 22nd after the transcript of the evidence and other proceedings at the trial had been examined and on the ground that the allegations in the petition fell short of a showing that testimony at the trial was not the truth, or if it was false that the prosecuting attorney knew of its falsity. On November 16, 1945, the petitioner filed in the superior court in Sacramento County (Crim. No. 15623) an application for the writ of error coram nobis based on the same grounds. The application was denied on November 29, 1945, and no appeal was taken from the order of denial. On January 10, 1946, another application for the writ of habeas corpus was denied by the District Court of Appeal, Third Appellate District (3 Crim. 1957).

On March 29, 1948, the present petition was filed alleging that the petitioner's conviction was obtained on perjured testimony and false exhibits knowingly used by the prosecution at his trial.

On the return to the writ the petitioner appeared in propria persona and requested that the court appoint counsel to represent him. Counsel was appointed and time was allowed to file briefs. The court reserved the question whether disputed questions of fact might develop which would require the appointment of a referee.

[1-4] It may not be questioned that there was evidence at the trial that the petitioner committed the act charged against him. It is not necessary to relate that evidence in detail. The petition contains many contentions and arguments which would be appropriate only on an appeal from the judgment. Habeas corpus may not serve as a substitute for an appeal. In re Lindley, 29 Cal.2d 709, 722, 177 P.2d 918. Consideration will therefore be given to the sole question whether facts are alleged which, if proved to be true, would support a conclusion that the prosecution knowingly permitted the introduction of perjured testimony and false exhibits on the trial of the petitioner. See Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791, 98 A.L.R. 406. The relief sought may not be accorded unless the petitioner has sufficiently alleged facts in support of his position. Allegations which merely go to show that testimony given at the trial was contradicted, and for that reason the falsity must have been known to the prosecution, are insufficient as a basis of knowledge of their alleged false nature. Reliance solely upon such inconsistencies and contradictions as a foundation for the allegation that false testimony was knowingly used by the prosecution presents questions merely of weight and credibility which generally are not reviewable even on appeal from the judgment. Therefore in his application the petitioner must set forth not only the facts which he contends prove perjury on the part of the witness and knowledge thereof on the part of the prosecution, but it must also be shown that those facts existed independently of the contradictions appearing at the trial. The facts alleged must also indicate that the petitioner had no opportunity to present the alleged true matter on the trial; that is, that there was such suppression of the truth by the authorities as prevented his discovery and use thereof at the trial. Otherwise the defendant on trial could himself suppress the facts and reserve a case for his later release.

As the applicant's counsel states, it follows that the question remaining to be determined is whether the circumstances alleged are sufficient to cause this court to exercise its powers to receive evidence dehors the record and to order a reference.

To support his allegation that the charge was a "frame-up" the petitioner points to his wife's testimony at the trial that four days after the date of the alleged offense she saw him sitting in a parked automobile with a woman at a time when he should have been at work; that she spoke to him; that she then went home and on the way met Elaine, the daughter, returning from school; that she "didn't know what made her ask" but she questioned Elaine about her father's conduct toward her. This testimony was given at the trial subject to any contradiction which the petitioner now asserts. The petitioner knew where he was and who was with him, and he could have testified at the time of trial to the facts material on the question of motive for the prosecution of the charge. Otherwise, the possible motive as an inference of frame-up was before the jury from the wife's own testimony.

The petitioner contends that a towel introduced in evidence and identified by the prosecutrix was a false exhibit. He dwells on the improbability that four days after the alleged offense Mrs. Manchester could pick out an identifiable towel from the soiled clothes container, since the household contained many towels of the same kind. The specific point of alleged falsity is that the petitioner, as he now asserts and offers proof, had chronic gonorrhea and the towel was not shown to have those organisms on it; therefore, that the exhibit could not have been a towel used by him. He also relies on testimony that the child was examined for venereal infection and none was found. Again the petitioner does not indicate his lack of knowledge or opportunity to disclose the asserted facts at the trial.

Matters of contradiction in or sufficiency of the evidence and prejudice in the court's rulings on the trial are urged. In these respects the petitioner claims some discrepancies in the testimony of the daughter as to when the act occurred in relation to his present contention concerning his whereabouts during the day; also in her testimony that she obtained from the clothes closet a convertible hot water bottle to use for a douche, whereas the wife testified that when she left for work that Saturday morning the contrivance was being used to relieve a stiffness in the petitioner's neck.

The petitioner asserts that the court permitted two alleged prior convictions to be read to the jury although he had admitted them and that the court misinstructed the jury in specifying the date of the alleged offense as "on or about" the 25th of September, 1943, whereas the information specified only that date. He also accuses the prosecution of prejudicial misconduct in the course of the trial and argument, and charges his trial counsel with incompetency.

[5, 6] As pointed out in Re Lindley, supra, 29 Cal.2d 709, at pages 723, 724, 177 P.2d 918, the sufficiency of the evidence or error in rulings during the trial are not proper issues for consideration in this proceeding. Without further discussion it clearly appears that the petitioner's application is based on asserted inconsistencies and contradictions appearing in the testimony at the trial, prejudice in the trial court's rulings, misconduct of counsel for the prosecution and incompetency of his own counsel. He presents no statement of independent facts of knowledge of falsity or suppression of the asserted facts on the part of the prosecution. This is not sufficient to support a conclusion that his constitutional guaranty of due process has been violated. It therefore becomes unnecessary to appoint a referee.

The application for the appointment of a referee is denied. The writ is discharged and the petitioner is remanded to custody.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

33 Cal.2d 744

GUERIN et al. v. BLAIR.

L. A. 20800.

Supreme Court of California, in Bank.
April 20, 1949.

1. Bailment ⚷21, 22

Where rental agreement covering tractor prohibited sublease thereof without lessor's consent and provided for termination of lease on three days' notice for substantial breach of any provision thereof, retaking of possession, etc., sublease of tractor without lessor's consent was not void, neither did it terminate the lease, and in absence of such notice sublessee's possession was not unlawful.

2. Bailment ⚷22

The code provision which permits lessor of personal property to terminate the hiring and reclaim possession before the end of the term when the lessee uses or permits a use contrary to the agreement does not preclude the parties from agreeing to the condition of the specified notice before the lessor may exercise such right. Civ.Code, § 1931, subd. 1.

3. Replevin ⚷8(4)

A judgment for the recovery of personal property and for reasonable rental thereof during period of wrongful detention can be sustained only if the plaintiff had the right to the immediate, exclusive and unqualified possession of the property as against the defendant at the time of the commencement of the action and there was no preliminary act or condition to be performed before that unqualified right of possession came into being.

◆

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by E. R. Guerin, H. T. Guerin, R. S. Guerin, and D. L. Guerin, copartners doing business as Guerin Brothers, against John H. Blair, to recover possession of a tractor and reasonable rental value thereof during period of alleged wrongful detention by defendant. From a judgment for plaintiffs, the defendant appeals.

Judgment reversed.

Prior opinion 196 P.2d 651.

Arthur C. Webb, of Los Angeles, and Charles Reagh, of San Francisco, for appellant.

Latham & Watkins, of Los Angeles, and John G. Evans, of San Francisco, for respondents.

SHENK, Justice.

The plaintiffs sued to recover possession of a D-8 Caterpillar Tractor Serial No. 1H 3383 with power control unit valued at $6,000, together with its reasonable rental value for the period of alleged wrongful detention by the defendant. The latter appealed from the judgment for the plaintiffs.

The record shows the following undisputed facts:

The plaintiffs were engaged in the construction business in Los Angeles county, and in the purchase, sale, rental and repair of heavy construction equipment. On June 15, 1945, they purchased the above-mentioned tractor and control unit. On January 8, 1946, they entered into a written equipment rental agreement with one Vergil Grove of Riverside covering four items, including the tractor and control unit. The value of the listed equipment was stated as $46,000. The agreed total monthly rental was $3750, $850 of which applied to the tractor and control unit. The "approximate rental period" was stated as sixty to ninety days, with a provision for recall or return of the equipment upon thirty days' notice by either party. The agreement provided that no equipment should be sublet, nor should the lessee assign or transfer any interest in the agreement, without the written consent of the lessors. It was further provided that should the lessee defer any rental payment more than thirty days, or become bankrupt, or fail to maintain and operate or to return the equipment as provided, or substantially violate any provision of the agreement, the lessors upon three days' notice might terminate the agreement, take possession of the equipment without becoming liable for trespass, and recover all rental due, full damages for any injury to, and all expenses incurred in returning the equipment.

On January 15, 1946, Grove, without obtaining the consent of the plaintiffs, sublet the tractor and control unit to the defendant for a period of two months at a monthly rental of $800, or a total of $1600 which the defendant paid. Grove made rental payments to the plaintiffs totaling $5266.71, which covered amounts due on all the equipment to March 1, 1946. About March 15th the defendant notified Grove that the tractor was in disrepair and to retake and haul it away. That and other facts bearing on the lease relationship as between the defendant and Grove are deemed immaterial on this appeal.

In September 1946 the plaintiffs located the tractor and power control unit on the defendant's place. On September 6, 1946, a telegram demanding its return to the plaintiffs was sent to the defendant. On September 7, 1946, the present action was commenced to recover possession of the equipment from the defendant, together with damages for the alleged wrongful detention from March 1, 1946. The sheriff took possession of the equipment on September 12, 1946, and the plaintiffs thereafter received it and have since sold it.

The trial court made findings to the effect that on March 1, 1946, the defendant took possession of the tractor and control unit without right and without the knowledge, consent or authorization of the plaintiffs and retained such possession until September 12, 1946; that from and after March 1, 1946, the plaintiffs were entitled to the immediate possession thereof; that the reasonable value of the use of the equipment while in the defendant's possession was $800 per month, or a total of $5120 for the period of the unauthorized detention. Judgment was entered for that sum.

The defendant contends that the facts do not support the findings and judgment. He urges that the plaintiffs' only right was to terminate the lease by the required three days' notice to the lessee upon the latter's violation of the provision not to sublet without the plaintiff's consent, and that until such notice was given there was no right to retake possession of the equipment for the lessee's violation of that provision.

[1] The provision not to assign or sublet without the required consent was a covenant for the benefit of the plaintiffs who upon the breach thereof had the right to declare the lease terminated by giving the required three days' notice and thereupon to retake possession of the equipment. The subletting without consent was not altogether void. It was voidable and depended upon the exercise by the plaintiffs of their right to terminate the contract for the alleged breach upon giving the specified notice. The subletting or assignment without consent did not operate to terminate the lease or the assignment so as to give the plaintiffs the right to immediate possession. The three days' notice was a condition precedent to the exercise of the right to retake possession upon violation of the provision. The agreement provided the condition for notice before the right to retake possession accrued. The condition applied notwithstanding the fact that the equipment was in the defendant's possession without the consent of the plaintiffs. Since the subletting was voidable only the defendant's possession could not become unlawful until after the lessors' compliance with the condition with respect to notice. Under the express provisions of the agreement, neither the agreement nor the subletting is avoided until the required notice be given, but the sublease subsists subject to the plaintiffs' express remedy for breach of the covenant. Randol v. Tatum, 98 Cal. 390, 33 P. 433; Garcia v. Gunn, 119 Cal. 315, 318, 51 P. 684; Potts Drug Co. v. Benedict, 156 Cal. 322, 327, 104 P. 432, 25 L.R.A., N.S., 609; Johnston v. Landucci, 21 Cal.2d 63, 68, 130 P.2d 405, 148 A.L.R. 1355, citing Portuguese-American Bank v. Welles, 242 U.S. 7, 37 S.Ct. 3, 61 L.Ed. 116, Ann.Cas. 1918D, 643, and Restatement of the Law of Contracts, Sec. 176; People v. Klopstock, 24 Cal.2d 897, 901, 151 P.2d 641; see also Firpo v. Superior Court, 77 Cal.App. 207, 211, 246 P. 165.

The plaintiffs seek to support the judgment on the theory of unlawful possession by the defendant, as in cases of conversion. They rely on such cases as Harpending v. Meyer, 55 Cal. 555; Cerf v. Phillips, 75

Cal. 185, 16 P. 778; Coy v. E. F. Hutton & Co., 44 Cal.App.2d 386, 390, 112 P.2d 639; and First National Bank v. Thompson, 60 Cal.App.2d 79, 140 P.2d 75.

[2] The facts in those cases are distinguishable. There, the defendant's possession was received from one who had converted the property. It was for that reason deemed tortious and no prior notice or demand was necessary to maintain the action for recovery of possession and damages for unlawful detention. Similarly in Tucker v. Hagerty, 37 Cal.App. 789, 174 P. 908, also relied on, possession by the defendant constable pursuant to an illegal writ of attachment was deemed a wrongful invasion of the plaintiff's rights. Nor does the case of Carstensen v. Gottesburen, 215 Cal. 258, 9 P.2d 831, assist the plaintiffs. The facts there concerned the lease of a fishing barge for a division of the gross receipts as rental. It was provided that the lease was non-assignable and that no part of the barge could be sublet without the written consent of the lessors. The lessee, without consent, assigned a half interest in the lease to his co-defendant. There was no forfeiture clause in the lease. In the absence of such a clause the court deemed the provisions of subdivision 1 of Section 1931 of the Civil Code to be applicable. The plaintiffs here also invoke that section, which in substance permits the lessor of personal property to terminate the hiring and reclaim possession before the end of the term when the lessee uses or permits a use contrary to the agreement. The rental agreement incorporated the provision of that section, adding thereto the condition for notice. The code provision does not preclude the parties from agreeing to the condition of the specified notice before the lessors may exercise the right. In the Carstensen case we held that the notice actually given, in the absence of express agreement, was sufficient. The parties' agreement for the three days' notice in the present case conditioned the exercise of the plaintiffs' right.

[3] The judgment might be sustainable only if the plaintiffs had the right to the immediate, exclusive and unqualified possession of the property as against the defendant at the time of the commencement of the action, and there was no preliminary act or condition to be performed before that unqualified right of possession came into being. People's Savings Bank v. Jones, 114 Cal. 422, 426; Boles v. Stiles, 188 Cal. 304, 204 P. 848; Stanley W. Smith, Inc., v. Pilgrim, 93 Cal.App. 539, 541, 269 P. 765. Since they were required by their own agreement to give three days' notice after violation of the covenant not to sublet without consent before they could reinstate their right to possession of the equipment as against the defendant, and such a notice was not given, the findings are unsupported and do not support the judgment.

The judgment is reversed.

EDMONDS, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

91 Cal.App.2d 248

In re HEUSNER.

SHINN v. HEUSNER.

Civ. 7593.

District Court of Appeal, Third District, California.

April 14, 1949.

1. Elections 🔑298(1)

Contestant went outside issues presentable on election contest by attacking contestee's moral qualifications to be a supervisor on theory that his violation of election laws and government code "forever disqualified" him from holding office or exercising right of franchise. Elections Code, § 8511; Pol.Code, § 4028.

2. Elections 🔑271

That successful candidate is "ineligible" as ground for contest means lacking in legal qualifications, as prescribed for the office by statute. Elections Code, § 8511; Pol.Code, § 4028.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Ineligible".

3. Elections ⚿305(3)

In proceeding to contest election of deputy county clerk to office of supervisor, reviewing court need not decide point not raised in trial court, as to incompatibility of the offices.

4. Elections ⚿227(8)

That deputy county clerk acted in pursuance of his duties as such in connection with contested absentee ballots which contributed to his election as supervisor did not require that such ballots be disregarded on theory that office of supervisor was incompatible with that of deputy county clerk. Elections Code, § 8511; Pol.Code, § 4028.

5. Elections ⚿298(2)

The debarring of successful candidate for supervisor, based upon annulling absentee ballots submitted by such candidate, would not entitle contestant to the office unless enough absentee ballots were annulled that contestant received majority of votes cast. Elections Code, § 8511; Pol.Code, § 4028.

6. Elections ⚿271

The statutes prescribing method of voting absentee ballots apply to voters, and are directions to them as to how to proceed, and do not define "offenses against the elective franchise" as ground for election contest. Elections Code, §§ 4950 et seq., 5911, 5930(a, b), 11500 et seq.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Offense against the Elective Franchise".

7. Elections ⚿305(7)

Determination of fact questions under conflicting evidence was for trial court in election contest.

8. Elections ⚿291

Election contestant had burden of proof. Elections Code, §§ 4950 et seq., 5911, 5930(a, b), 11500 et seq.

◆

Appeal from Superior Court, El Dorado County; George H. Thompson, Judge.

Proceeding in the matter of the contest of the election of Cyril H. Heusner by Frank X. Shinn. From an adverse judgment, the contestant appeals.

Affirmed.

Russell F. Milham, and Thos. S. Marlor, both of Placerville, and Peter Mannino, of Sacramento, for contestant-appellant.

Henry & Bedeau, and Sherman C. Wilke, all of Sacramento, for respondent.

ADAMS, Presiding Justice.

This is an appeal from a judgment in an election contest case. Respondent Heusner, who was the incumbent supervisor of the Third Supervisorial District in El Dorado County, was opposed for reelection by appellant Shinn at an election held June 1, 1948. The final count gave Heusner 431 votes, including 32 by absentee ballots, and gave Shinn 425 votes, including 4 by absentee ballots. The contestant contends that certain of the absentee ballots should not have been counted, and that if same were eliminated he would be the winner by 22 votes. He also appears by his briefs to be attacking the moral qualifications of Heusner to be a supervisor, urging that the latter violated provisions of the election laws and the government code, and for that reason should be "forever disqualified from holding office in this state" and "forever disqualified from exercising the right of franchise."

[1] We think that appellant has gone outside of the issues which are presented or presentable on this contest. Section 8511 of the Elections Code prescribes the causes for which an election contest such as this may be instituted as follows:

"(a) That the precinct board or any member thereof was guilty of malconduct.

"(b) That the person who has been declared elected to an office was not, at the time of the election, eligible to that office.

"(c) That the defendant has given to any elector or inspector, Judge, or clerk of the election, any bribe or reward, or has offered any bribe or reward for the purpose of procuring his election, or has committed any other offense against the elective franchise defined in Chapter 3, Division VII or Division XIV, of this code.

"(d) That illegal votes were cast.

"(e) That the precinct board in conducting the election or in canvassing the returns, made errors sufficient to change the result of the election as to any person who has been declared elected."

[2] No malconduct of the precinct board or any member thereof under subdivision (a), or errors of the precinct board under subdivision (e), are relied upon on this appeal; and if contestant relies upon subdivision (b) there was no showing that Heusner was, at the time of the election, "ineligible" to the office of supervisor. "Ineligible" as used in such statute means, we think, lacking in legal qualifications; and there is no evidence in the case that respondent lacked legal qualifications such as are prescribed for supervisors by Political Code section 4028, or by any other statutory provision. See Ward v. Crowell, 142 Cal. 587, 588, 76 P. 491; also cases cited in 14 Words and Phrases, Perm.Ed., page 233, et seq.

Appellant does contend, however, that, while Heusner defends on the ground that he was a deputy county clerk and acted in pursuance of his duties as such in connection with the contested absentee ballots, the office of supervisor is incompatible with the office of deputy county clerk, and therefore respondent's office as supervisor became vacant when he accepted appointment as deputy county clerk. Citing People ex rel. Goodell v. Garrett, 72 Cal.App. 452, syl. 3, 237 P. 829.

[3, 4] Whether the two offices are incompatible need not be decided, first, because the point was not raised in the lower court; and second, even if the offices were incompatible the result would have been that by becoming a deputy county clerk respondent ceased to be a supervisor. We are unable to see that such result would have any bearing upon the validity of the absentee ballots, which contestant contends should be disregarded in this case. By accepting appointment to an incompatible office the most that would have been effected was Heusner's tenure at that time and not his right to future tenure as supervisor, for, by the same reasoning, in accepting the new term as supervisor he would vacate the office of deputy county clerk.

[5] While the prayer of plaintiff's complaint is that the court annul the absentee ballots submitted by Heusner, that the latter be debarred from holding public office, and that plaintiff be declared elected, if the real purpose of the action is to secure the position for plaintiff, the debarring of respondent would not have the effect of entitling plaintiff to such office unless enough absentee ballots were annulled that it could be said that contestant received the majority of the votes cast. See Bush v. Head, 154 Cal. 277, 284, 97 P. 512; People v. Rodgers, 118 Cal. 393, 396, 46 P. 740, 50 P. 668; Campbell v. Free, 7 Cal. App. 151, 153, 93 P. 1060; Budway v. Hollibaugh, 68 Cal.App.2d 473, 476, 157 P. 2d 30.

As for subdivision (c) of section 8511 of the Elections Code, it is not contended that respondent gave or offered any bribe or reward for procuring his election. Appellant does argue before this court that prior to the election Heusner violated a number of the provisions of the Elections Code, to wit: that he procured from the county clerk applications for absentee voters' ballots and the ballots, simultaneously, without giving receipts therefor, and that applications were signed in blank by prospective electors; that he violated the election laws in that he saw how certain people voted such absentee ballots; that he, instead of the voters, folded the ballots in many instances, enclosed them in identification envelopes, and himself sealed the envelopes; and that he swore to a false affidavit on such envelopes in contravention of section 5911 of the Elections Code; that he requested electors to vote absentee ballots, and violated the Elections Code in that no person had ever requested an application for an absent voter's ballot; that with the connivance of the county clerk he went to the home of one elector who had properly requested such a ballot, and "voted this elector"; and that he violated all of the provisions of section 5930 of the Elections Code, and particularly subdivisions (a) and (b) thereof.

[6] But the above cited code sections apply to voters, and are directions to them as to how they are to proceed in making use of absentee ballots, and do not define offenses against the elective franchise defined by the portions of the Elections Code set forth in Chapter 3, Division VII or Division XIV of such code, which are chargeable against respondent.

[7] The gravamen of appellant's complaint is that illegal votes were cast, that is, certain absentee ballots. However, the findings of the trial court negative the charges relied upon. Appellant merely recites portions of the testimony and relies thereon as grounds for reversal of the judgment of the trial court. But, assuming that there are conflicts, the determination of questions of fact was for the trial court. There is no contention that there is insufficient evidence to support its findings, and such being the case it is not incumbent upon this court to review it.

The trial judge rendered an opinion in which he stated the principle set forth in Rideout v. City of Los Angeles, 185 Cal. 426, 197 P. 74—that it is the duty of the court to validate an election impossible, and that it must be held valid unless plainly illegal. He then said that from a careful review of the evidence it could not be said that any of the 36 voting absentee voters were not duly registered; that he could find no warrant for making any finding that any of such voters was lacking in qualifications as an elector, or was lacking with regard to due registration, or that there was substantial departure from the prescribed voting procedure diminishing the result declared, or affecting or violating the secrecy or integrity of the ballots cast; that evidently, for the purpose of getting out the vote, registration deputies were made use of; and that a candidate for office was not regarded as unsuitable for rendering service to the county clerk in the delivery of blank application forms, in receiving applications for absentee ballots, in delivering ballots in response thereto, and in the reception from the voters of their voted identification envelopes and the return of same to the county clerk's office, all of which duties Heusner evidently performed as one authorized so to do. He concluded by saying:

"The evidence in the case has been carefully reviewed and scrutinized to determine if any of the facts relied on as a cause for complaint could be fairly held to affect the result declared by the canvassing board, or could be held as a fact sufficient to impeach the integrity of the absentee votes cast at the election had; and the Court is of the opinion that none has been shown of such invalidating nature, and the Court is further of the opinion that the votes attacked were legally cast by the voters, and that to disregard or reject them would be, without warrant, to disfranchise these voters.

"And it appears from the result found and declared that the contestee received the majority of the votes cast in the June election in the Third Supervisorial District for Supervisor, such finding will have to be confirmed, as required by the Statute, none of the attacks made by the contestant having been sustained."

[8] The findings are in accord with the above statement, and negative the allegations of plaintiff's complaint and the asserted facts relied upon by appellant upon whom rested the burden of proof. Coghlan v. Alpers, 140 Cal. 648, 653, 74 P. 145.

Chapter 5 of Division 8 of the Elections Code is entitled "Absent Voting," and section 5881, the first section in that chapter, reads: "This chapter shall be liberally construed in favor of the absent voter."

In view of the above provision and the findings of the trial court, there appears no reason why this court should interfere with the judgment below.

The judgment is affirmed.

PEEK and THOMPSON, JJ., concur.

91 Cal.App.2d 285

FROHMAN v. BONELLI et al.

Civ. 16600.

District Court of Appeal, Second District,
Division 3, California.
April 15, 1949.

Hearing Denied June 13, 1949.

1. Dismissal and nonsuit 🔑60(1)

The section of Code of Civil Procedure requiring the dismissal of all actions unless the summons shall be served and return thereon made within three years after the commencement thereof is mandatory. Code Civ.Proc. § 581a.

2. Process 🔑127

Under the Code of Civil Procedure providing that when summons is served it must be returned, etc., "returned" is used in the sense of filing with the clerk or justice, and not in the sense of making a certificate or affidavit of service only. Code Civ.Proc. § 410.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Returned".

3. Process 🔑127

A "return" is the evidence by which the court is informed that the defendant has been given notice to appear in court. Code Civ.Proc. § 410.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Return".

4. Dismissal and nonsuit 🔑60(2)

Under section of Code of Civil Procedure providing that all actions must be dismissed unless the summons shall be served and return thereon made within three years after the commencement thereof, an action must be dismissed unless the summons is served and filed with the clerk of the court together with the officer's certificate of service, if served by an officer, or the affidavit of the service of the person who served it, if served by any other person, within the three-year period. Code Civ.Proc. § 581a.

5. Appearance 🔑9(1)

A "general appearance" is made when a party asks any relief that can be given only on the hypothesis that he is properly before the court.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "General Appearance".

6. Appearance 🔑9(5)

An appearance made only for the purpose of moving to dismiss an action on one of the grounds specified in section of Code of Civil Procedure is made only on the hypothesis that the party is not properly before the court and is a "special appearance". Code Civ.Proc. § 581a.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Special Appearance".

◆

Appeal from Superior Court, Los Angeles County; Stanley N. Barnes, Judge.

Action by Daniel D. Frohman against William G. Bonelli and others. From an order dismissing the action for want of prosecution, the plaintiff appeals.

Order affirmed.

Charles A. Son and Joseph D. Taylor, both of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Bayard Rhone and William E. James, Deputy Attys. Gen., for respondent.

VALLÉE, Justice.

This action was commenced February 3, 1945. Summons was issued the same day. The defendant Bonelli was served with a copy of the summons and complaint on January 26, 1948. The affidavit of service was made on the summons on January 27, 1948. No appearance by any of the defendants named in the complaint was made in the three year period following the commencement of the action. On February 5, 1948, defendant served and filed a notice of motion to dismiss for lack of prosecution. The summons was filed with the clerk on February 6, 1948. The motion to dismiss was granted. Plaintiff appeals from the order of dismissal.

The question to be decided is whether the summons was "served and return thereon made" within three years after the commencement of the action as required by section 581a of the Code of Civil Procedure which so far as apt reads: "No action heretofore or hereafter commenced shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced must be dismissed by the court in which the same shall have been commenced, on its own motion, or on motion of any party interested therein, * * * and all such actions must be in like manner dismissed, unless the summons shall be served and return thereon made within three years after the commencement of said action. * * *" Appellant says that "return thereon made" as used in the statute "refers to the evidence supplied by the person serving the summons as to his official acts pursuant to the summons," relying upon a statement in Hooper v. McDade, 1 Cal.App. 733, at page 736, 82 P. 1116, at page 1117, with reference to the return of a sheriff on a writ of execution, in which the court said: "The return of a sheriff to a writ is an official statement by him of the acts done by him under the writ in obedience to its directions and in conformity with the requirements of law, and must show a compliance with such directions and requirements, or a sufficient reason for any noncompliance either in whole or in part. Freeman on Executions, § 355." Respondent says that the words "return thereon made" contemplates filing the summons in the office of the clerk from which it issued with evidence of service.

[1] The provisions of section 581a are mandatory. Gonsalves v. Bank of America Nat. Trust & Savings Ass'n, 16 Cal.2d 169, 172, 105 P.2d 118; City of San Jose v. Wilcox, 62 Cal.App.2d 224, 227, 144 P.2d 636; Anno. 167 A.L.R. 1095. In Vrooman v. Li Po Tai, 113 Cal. 302, 45 P. 470, the action was commenced July 23, 1877. Summons was issued and served the same day. It was filed with the clerk September 26, 1893. At that time the statute, Code Civ.Proc. § 581, subd. 7, read that the action shall be dismissed "unless summons shall have been issued within one year, and served, and return thereon made within three years after the commencement of said action." The court held that the statute was mandatory and that the action was properly dismissed because the summons had not been *filed* within three years after the commencement of the action. Modoc Land & Live-Stock Co. v. Superior Court, 128 Cal. 255, 60 P. 848, involved an action commenced September 5, 1896. Summons was issued September 4, 1897. It was served August 7, 1899. The officer's certificate of service was made on the summons prior to August 10, 1899. The summons was filed with the clerk September 16, 1899. The court held, 128 Cal. at page 256, 60 P. at page 849: "There is no substantial difference between this case and the case of Vrooman v. Li Po Tai, 113 Cal. 302, 45 P. 470. In that case it was held that under the provisions of section 581, Code Civ. Proc., the failure of the plaintiff to cause *the summons with proof of service thereof to be returned,* within three years after the commencement of the action, deprived the court of jurisdiction to proceed with the trial of the cause and render judgment therein." (Italics added.) In Grant v. McArthur, 137 Cal. 270, 70 P. 88, 89, the action was commenced January 11, 1897. The summons was served on some defendants in 1897, on one January 5, 1900, and on another January 10, 1900. January 11, 1900, an affidavit of service on the latter was filed with the clerk. The affidavit was not attached to any summons. A copy of the summons was filed January 11, 1900. January 15, 1900, in the language of the court, "The original summons was for the first time returned and filed." An order of the superior court dismissing the action was affirmed.

In Bellingham Bay Lumber Co. v. Western Amusement Co., 35 Cal.App. 515, 170 P. 632, the action was commenced June 27, 1908. June 19, 1911, the appealing defendant was served with summons. It was not filed. A judgment against the served defendant was reversed with instructions to dismiss the action as to it. Pearson v. Superior Court, 122 Cal.App. 571, 10 P.2d 489, was a proceeding in mandamus. In the petition for the writ it was alleged that summons was issued January 5, 1927; that it was served on the defendants January 26, 1927; "that the return of said summons was not made thereto until April 16, 1931." The date of the affidavit of service did not appear. The writ was issued compelling dismissal of the action.

The precise point made in the case at bar was not urged in any of the foregoing cases or in any California case to which we have been referred. These cases, however, were decided upon the premise that by "return thereon made" is meant the filing of the summons in the office of the clerk together with a statement of what was done in connection with the service thereof.

"Return" is defined as "To bring or send back to a tribunal or office, with a certificate of what has been done; to make return of, as a writ." Webster's New International Dictionary, 2d Ed.; Johnson v. Hilliard, 113 Colo. 548, 160 P.2d 386, 389. Also, as "to give back; restore," and "In *law,* to bring or send back, as a process or other mandate, to the tribunal whence it issued, with a short statement (usually indorsed on the process) by the officer to whom it issued, and who returns it, stating what he has done under it, or why he has done nothing; as, to *return* an execution non est inventus; to *return* a commission with the depositions taken under it. The return is now usually made by filing the paper in the clerk's office, instead of by presenting it on a general return-day in open court." The Century Dictionary and Cyclopedia, Vol. VIII. Black says "return" is "The act of a sheriff, constable, or other ministerial officer, in delivering back to the court a writ, notice, or other paper, which he was required to serve or execute, with a brief account of his doings under the mandate, the time and mode of service or execution, or his failure to accomplish it, as the case may be. Also the indorsement made by the officer upon the writ or other paper, stating what he has done under it, the time and mode of service, etc." Black's Law Dictionary, 2d ed., p. 1033. In Den v. Crawford, 8 N.J.L. 90, 112, it was said that to return is "to come back from him to whom it was given."

[2] Code of Civil Procedure, section 410, in part, provides: "* * * When the summons is served by the sheriff, a constable, or marshal, it must be returned, with his certificate of its service, and of the service of a copy of the complaint, to the office of the clerk or justice from which it issued. When it is served by any other person, it must be returned to the same place, with the affidavit of such person of its service, and of the service of a copy of the complaint. * * *" Obviously, "returned" is used in the sense of filing with the clerk or justice and not in the sense of the making of a certificate or affidavit of service only.

In United States v. Landrum, 6 Fed.Cas. No. 3, 393, pages 816, 817, the court stated: "Every process which is issued by a court must be returned, unless some special statute otherwise provides, to the court which issues it. This is essential in order, first, that the court may know that its order has been obeyed: and, second, that the records of the court may be complete. The very term 'return' implies that the process is taken back to the place whence it is issued. A thing delivered by one person to another is not 'returned' when it is delivered to a stranger, and at a place other than the place of original delivery." In Smith v. Drake, 174 Ark. 715, 297 S.W. 817, the court held that "return" is the indorsement as to what the officer has done on the writ and filing it with the clerk. In Arkansas Rice Growers' Co-op. Ass'n v. Minneapolis-Moline Power Implement Co., 188 Ark. 187, 65 S.W.2d 913, the court declared, page 915: "It was said, in the case of Jones v. Goodbar, 60 Ark. [182] 185, 29 S.W. 462, 463, that: 'The bringing back of the writ by the officer, and filing it in the office of the justice or clerk from which it issued, together with this written certificate of his proceedings under it, indorsed on the writ or upon some paper attached thereto, constitute in law the return of the writ.'" See, also, Clyatt v. United States, 197 U.S. 207, 25 S.Ct. 429, 49 L.Ed. 726, 730, 731; State v. Melton, 8 Mo. 417; Harman v. Childress, 11 Tenn. 327; Hogue v. Corbit, 156 Ill. 540, 41 N.E. 219, 221, 47 Am.St.Rep. 232; Tate v. Biggs, 89 Neb. 195, 130 N. W. 1053, 1054; Johnson v. Curlee Clothing Co., 112 Okl. 220, 240 P. 632, 633; State ex rel. Montgomery Ward & Co. v. District Court etc., 115 Mont. 521, 146 P.2d 1012, 1014.

In some of the cases as in Hooper v. McDade, supra, 1 Cal.App. 733, 82 P. 1116, "return" is stated to be an indorsement in writing made on the process or annexed thereto by the officer or person certifying what he has done pursuant to the command of the process or in connection with the service thereof. But in none of those cases that we have examined was there any necessity of determining whether "return" included bringing the process back to the court from which it issued, or filing it therein.

[3] A return is the evidence by which the court is informed that the defendant has been given notice to appear in court. Smith v. Kelly, 7 N.C. 507; Bourgeious v. Santa Fe Trail Stages, 43 N.M. 453, 95 P.2d 204, 206.

In 1933 section 581a was amended, Stats. 1933, p. 1869, by adding the following: "All actions, heretofore or hereafter commenced, must be dismissed by the court in which the same may be pending, on its own motion, or on the motion of any party interested therein, if summons has been served, and no answer has been filed, if plaintiff fails, or has failed, to have judgment entered within three years after service of summons." Appellant argues that this provision conflicts with the provision requiring dismissal unless the summons is served and return thereon made within three years after the commencement of the action. He asserts that under the amendment he would be entitled to judgment against respondent within three years after the date of service on him, January 26, 1948, if respondent should default by failing to answer. He says that if the words "return thereon made" include filing the summons with proof of service with the clerk, the three year period after the service of summons within which the plaintiff must have judgment entered, if no answer is filed, is cut down so that by reason of the failure to return the summons the time within which appellant may take judgment is not three years from service of summons but three years from the commencement of the action. There is no conflict. The amendment of 1933 did not take away a prior existing ground for dismissal. It created an additional ground. After the amendment the grounds were (1) unless summons is issued within one year, (2) unless the summons is served and return thereon made within three years, and (3), the amendment of 1933, if summons has been served, and no answer been filed, if plaintiff fails, or has failed to have judgment entered within three years after the service of summons. Perry v. Dabney, 76 Cal.App.2d 395, 397, 173 P.2d 62; Schultz v. Schultz, 70 Cal.App.2d 293, 297, 161 P. 2d 36. The amendment merely imposes upon the plaintiff an additional duty to have judgment entered within the prescribed time. The contingencies on which the action must be dismissed are mutually exclusive.

[4] We conclude that the phrase "all such actions must be in like manner dismissed, unless the summons shall be served and return thereon made within three years after the commencement of said action," as used in section 581a of the Code of Civil Procedure, means that an action must be dismissed unless the summons is served and filed with the clerk of the court together with the officer's certificate of service, if it was served by an officer, or the affidavit of service of the person who served it, if it was served by any other person, within the three year period.

[5, 6] Appellant also claims that by making the motion to dismiss respondent appeared generally in the action and thereby cured the failure to return the summons to court. The point is not good. Sharpstein v. Eels, 132 Cal. 507, 508, 64 P. 1080; Bellingham Bay Lumber Co. v. Western Amusement Co., 35 Cal.App. 515, 518, 170 P. 632. A general appearance is made when a party asks any relief that can be given only on the hypothesis that he is properly before the court. Lacey v. Bertone, 33 Cal.2d 649, 203 P.2d 755. An appearance made only for the purpose of moving to dismiss an action on any one of the grounds specified in section 581a is made only on the hypothesis that the party is not properly before the court. It is a special appearance. Brock v. Fouchy, 76 Cal.App.2d 363, 370, 172 P.2d 945. To hold otherwise would emasculate the statute.

Order affirmed.

SHINN, P. J., and WOOD, J., concur.

Hearing denied; CARTER, J., dissenting.

91 Cal.App.2d 319

GREENBERG et al. v. BIANCO.

Civ. 3757.

District Court of Appeal, Fourth District, California.

April 18, 1949.

Sales ⚷=181(11)

Evidence sustained finding that purchaser of orange crop was not prevented from picking crop by seller, but neglected and refused to do so as agreed without justification entitling seller to damages resulting from resale of crop at a loss.

◆

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by Robert R. Greenberg and others against Frank D. Bianco to recover an advance payment made on a contract for purchase of an orange crop wherein defendant filed a cross-complaint for damages. From the judgment, plaintiffs and cross-defendants appeal.

Judgment affirmed.

L. Kenneth Say, of Fresno, for appellants.

J. A. Chase, of Visalia, for respondent.

BARNARD, Presiding Justice.

By written contract dated March 19, 1947, the plaintiffs agreed to buy from the defendant a crop of oranges on a four-acre tract at a certain price per box. The contract, which was executed for the plaintiffs by Robert R. Greenberg, contained a provision that it should not be modified or amended, in whole or in part, by any oral statement or representation on behalf of either party.

The plaintiffs having failed to pick the oranges the defendant sold them for the best price obtainable. The plaintiffs then brought this action to recover $1000 which they had paid as an advance payment on the contract, alleging that the defendant had notified them in writing that he would not allow them to pick or harvest the crop. The defendant answered and also filed a cross complaint alleging that, because of the plaintiffs' failure and refusal to pick the crop, he had been forced to resell the crop at a loss, and praying for the difference between the contract price and the amount he had received.

The court found in favor of the defendant, finding that the plaintiffs neglected and refused to pick the crop, and that it is not true that the defendant had given them written notice that they would not be allowed to do so. It was further found that the defendant caused the crop to be picked and sold on the then available market, receiving $912.31 therefor; and that, under the terms of the contract, the agreed price for the oranges actually picked would be $3221. Judgment was entered denying any relief to the plaintiffs and awarding the defendant a judgment for $1318.68, being the difference between the contract price and the amount the defendant has received. This appeal followed.

Appellants' sole contention is that the evidence is insufficient to support the findings and judgment, and that it conclusively appears that the respondent prevented them from harvesting the oranges. It is argued that the evidence discloses that appellant Robert R. Greenberg on May 23, 1947, notified the respondent by telephone that the crop had been resold to Western States Packing House; that this new buyer attempted to pick the oranges; and that the respondent prevented it from doing so. While there is some evidence to this effect there is ample evidence to the contrary.

The respondent testified that in the telephone conversation on May 23, Mr. Greenberg said nothing about having resold the crop to Western States; that Greenberg then told him that he wanted to break the contract, and offered to allow him $500 if the contract was rescinded, which offer he refused; that a few days later two men representing Western States came to the ranch, having brought some boxes; that he asked these men if they had anything in writing from Greenberg; that they said they did not and told him to see Greenberg; that he called Greenberg and asked him for his written authorization, but got no satisfaction; that he immediately went to Greenberg's office and Greenberg became angry and accused him of stopping the crew from picking; that Greenberg then told him he would allow the fruit to rot on the trees; and that Greenberg at no time told him he had resold the crop to Western States. There is also evidence that the crop was then deteriorating and that an immediate picking of the crop was necessary if any of it was to be saved. The written notice relied on by appellants was not a notification that they would not be allowed to pick the crop. It notified them that the crop was ready, demanded that it be picked, and stated that the crop would be sold at the best price obtainable if the contract was not performed forthwith.

While there is some conflict, the evidence fully supports the court's findings. It may further be said that it justifies the inference that the appellants intentionally breached the contract.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

91 Cal.App.2d 362

PEOPLE v. NEAL.

Cr. 2539.

District Court of Appeal, First District,
Division 2, California.

April 20, 1949.

Hearing Denied May 19, 1949.

1. Criminal law ⇨1137(8)

Defendant could not on appeal complain of alleged misconduct of district attorney invited by defendant.

2. Criminal law ⇨1137(2)

A defendant inviting error in trial court, and refusing to permit a correction there, would not be permitted to take advantage of such error on appeal.

Appeal from Superior Court, City and County of San Francisco; Preston Devine, Judge.

Raymond A. Neal was convicted for second-degree burglary, and, from the judgment of conviction and from an order denying his motion for new trial, he appeals.

Judgment and order affirmed.

Raymond A. Neal, in pro. per.

Fred N. Howser, Atty. Gen., and Clarence A. Linn, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

Defendant was tried before a jury on an information charging burglary. The jury returned a verdict of guilty and determined it to be of the second degree. Though represented by counsel during the trial, defendant prosecutes in propria persona his appeal from the judgment and from the order denying him a new trial.

A police officer while on patrol saw the defendant and one other in a tobacco shop at about 1:30 A.M. The shop was closed and the front door locked. Lights were on sufficient to enable the officer to recognize defendant. The two men saw the officer and ran to the rear door. The officer went down an alley to head them off. He found the rear door open and then heard a crash of glass as defendant jumped through the front window. He followed defendant down the street and made the arrest. Thereafter two buttons matching those on defendant's overcoat were found by the broken window, and a screw driver matching the marks made in opening the rear door was found in defendant's pocket. When arrested defendant had an open cut on his left ear. He was taken to the emergency hospital for treatment. While defendant was at the Mission police station an officer brought in the two buttons found near the broken window. Two buttons were missing from defendant's overcoat. The two found at the store matched those remaining on the coat.

Defendant testified that he was a merchant seaman in port waiting for his ship. He spent the night drinking alone at taverns in the neighborhood of the premises and was walking past the store when a man came through the window, knocked him down, and gave him a blow with his fist. Defendant ran after his assailant, but there were so many people on the street at that late hour that the assailant was lost in the crowd and the pursuing police officer seized defendant for the purpose of making an arrest of someone in order to protect his friend the storekeeper in his illegal operations as a bookmaker. He attempted to prove this relation by cross-examination of the two parties.

The foregoing statement discloses substantial evidence to support the verdict. In fact the argument of appellant does not go to the question of sufficiency of the evidence, but is directed to the claim that the greater portion of the evidence should be disbelieved.

[1] The appellant next argues a charge of misconduct which presents a most peculiar situation since if misconduct occurred it was of his own making. During the cross-examination of the complaining witness, appellant's counsel sought by innuendo to imply that the storekeeper was engaged in bookmaking and gambling and that the arresting officer might have had knowledge of such activities. He conceded that he had no evidence of those facts and could develop them only by cross-examining the witness and the police officer. He gave at the time the impression that he was merely casting aspersions on the witnesses. Objections to his questions were sustained but he referred to it again in his argument to the jury. The district attorney replied to this argument and appellant now argues that such reply was misconduct. No objection was made by appellant at the time of the argument and there was no request for an admonition. But if this were misconduct it was all invited by appellant. He may not complain at this time. People v. Deysher, 2 Cal.2d 141, 152, 40 P.2d 259; People v. Rinesmith, 40 Cal.App.2d 786, 792, 105 P.2d 1021.

Other charges of misconduct do not merit consideration.

[2] Error is assigned in the rulings on the cross-examination of the complaining witness on this same subject of gambling activities and on the cross-examination of the arresting officer. If any error occurred on the original rulings it was cured by the court's offer to reopen the case and to permit the examination for the purpose of showing bias. Counsel for appellant refused the offer, stating that he had no information supporting his suspicion. The incident does not warrant further comment except that a defendant in a criminal case should be bound by the rule applicable to all other trials—that when he invites error in the trial court and refuses to permit a correction there, he should not be permitted to take advantage of it on appeal.

Judgment and order affirmed.

GOODELL and DOOLING, JJ., concur.

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91 Cal.App.2d 292

SERNA v. SERNA.

Civ. 16679.

District Court of Appeal, Second District,
Division 3, California.
April 15, 1949.

1. Divorce 🔑311

A court may order issuance of a writ of execution as to installments for child's support due under divorce decree, after lapse of five years from date of unpaid installments, where due notice has been given to divorced husband accompanied by affidavits setting forth reasons for failure to secure writ of execution within five years. Code Civ.Proc. §§ 681, 685.

2. Divorce 🔑311

An order for issuance of execution as to installments for child's support under divorce decree, may be made after the lapse of five years from date of unpaid installments only if, during five years after last installment was paid, divorced wife exercised due diligence in locating and levying on property owned by divorced husband, or in following available information to a point where a reasonable person would conclude that there was no property within that time. Code Civ.Proc. § 685.

3. Divorce ⚷311

A divorced wife applying for issuance of execution as to installments for child's support under divorce decree after lapse of five years from date of unpaid installments, need not always show that an unsuccessful attempt was made to locate and levy on property of divorced husband. Code Civ.Proc. § 685.

4. Divorce ⚷311

Where divorced husband made payments for support of child in accordance with divorce decree until August 16, 1940, and thereafter he informed divorced wife that he had no money, subsequently he disappeared and wife was unable to locate him, and wife later discovered that husband had been in the armed forces until late 1943, or early 1944, court abused its discretion in denying wife's motion of March 28, 1948, for issuance of writ of execution to enforce payment of sums unpaid for support of child between August 15, 1940, and June 1, 1942. Code Civ.Proc. § 685.

◆

Appeal from Superior Court, Los Angeles County; Stanley N. Barnes, Judge.

Suit for divorce by Louis L. Serna against Josephina Serna, wherein the plaintiff was awarded a final decree of divorce, which required the plaintiff to pay the defendant $15 a month for support of a minor child. From an order denying the motion of the defendant for an order directing the issuance of a writ of execution to enforce payment of sums unpaid for support of the child, the defendant appeals.

Order reversed with directions.

William H. Brawner and Robert M. Newell, both of Los Angeles, for appellant.

No appearance for respondent.

VALLÉE, Justice.

On March 24, 1939, plaintiff was awarded a final decree of divorce from defendant. The decree provided that plaintiff pay defendant for the support and maintenance of a minor child $15 per month. On March 28, 1948, defendant filed a notice of motion for an order directing the issuance of a writ of execution to enforce payment of sums unpaid for the support of the child between August 15, 1940, and June 1, 1942. The motion was denied. Defendant appeals.

The motion was heard on the uncontradicted affidavit of defendant. There was no counter affidavit filed although plaintiff was represented by counsel on the hearing of the motion. He has not made an appearance here.

The facts stated in defendant's affidavit are: Plaintiff made the payments until August 16, 1940. About October, 1940, and repeatedly thereafter she asked plaintiff for support and maintenance for the child as ordered by the court. He informed her he had no money and could make no further payments. Some time thereafter plaintiff disappeared and she was unable to locate him. She was without any funds with which to collect the payments from plaintiff and plaintiff represented to her that he was without funds. He made no payments after August, 1940, until a writ of execution was issued on June 19, 1947. The writ was retroactive to June 15, 1942, but the payments accruing from August 16, 1940, through June 1, 1942, are unpaid. After procuring the writ of execution defendant had the order modified to provide an increase in the award for the support of the child. At the hearing on the order to show cause re modification defendant learned for the first time, through the testimony of plaintiff, that he had been in the armed forces during the war and that after his discharge in late 1943 or early 1944 he began the operation of a bar and dance hall and reported a net income for tax purposes of from $8,000 to $10,000 a year for the years 1944, 1945, and 1946. Plaintiff made no allotment for the support of the child while he was in the service.

[1-3] Appellant contends that the trial court abused its discretion in denying the motion. A trial court may order the issuance of a writ of execution after the lapse of five years from the date of unpaid in-

stallments of a support award "after due notice to the judgment debtor accompanied by an affidavit or affidavits setting forth the reasons for failure to proceed in compliance with the provisions of section 681 of this code." Code Civ.Proc., sec. 685, Wolfe v. Wolfe, 30 Cal.2d 1, 180 P.2d 345. Section 681 provides that a party may have execution issued within five years after entry of judgment. Such an order may be made only if, during the five years after the last installment was paid, the judgment creditor exercised due diligence in locating and levying on property owned by the debtor, or in following available information to a point where a reasonable person would conclude that there was no property within that time. Whether diligence has been exercised depends on the circumstances. The applicant for the writ need not always show that an unsuccessful attempt was made to locate and levy on property of the judgment debtor. Passow v. Bell, 27 Cal.App.2d 360, 81 P.2d 224; Atkinson v. Atkinson, 35 Cal.App.2d 705, 96 P.2d 824; Troendle v. Clinch, 74 Cal.App.2d 480, 169 P.2d 55; Long v. Long, 76 Cal.App.2d 716, 173 P.2d 840.

[4] In the present case the facts presented by appellant stand uncontradicted. They are sufficient to show that appellant was diligent. They are adequate justification for appellant's attempt to collect the payments accruing under the decree within five years after they became due. It is the intent of the law, and of good morals as well, that everyone being able should pay his debts. This principle is peculiarly applicable to a debt arising from a decree awarding support for a minor child. McClelland v. Shaw, 23 Cal.App.2d 107, 72 P.2d 225. Respondent has property which should be applied to the payment of his debt. He has not been injured by any delay. We are unable to find any sound reason supporting the order. We are satisfied that the order is so plainly erroneous as to amount to an abuse of discretion.

The order is reversed and the superior court is directed to issue a writ of execution upon the decree in question.

SHINN, P. J., and WOOD, J., concur.

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91 Cal.App.2d 322

In re LEWIS' ESTATE.

MARTIN v. KELLER et al.

Civ. 3780.

District Court of Appeal, Fourth District, California.

April 18, 1949.

Hearing Denied June 16, 1949.

1. Wills ⚷464, 465

Where testator had but little formal education, improper punctuation and capitalization should not be taken as controlling in the construction of testator's holographic will.

2. Wills ⚷525

Where holographic will of uneducated man devised all of his property to be "equeally divided between Luella Martin at Perris California. And Stanly Keller, Roy C. Keller and James L. Keller. All three live at Willowbrook California", trial court's construction that the property should be equally divided among the four persons named and not one-half to the first person and one-sixth to each of the other three persons appeared reasonable and consistent with the intent of the testator, and such interpretation could not be disturbed on appeal, even though another interpretation was possible.

3. Wills ⚷487(3)

In proceeding to construe will, life insurance policies and changes of beneficiary in such connection were properly excluded, since the will must be interpreted by the language used therein rather than by the language of some entirely different instruments.

4. Wills ⚷97

Where a separate writing by testator and headed "Beneficiaries" was not signed by the testator and was not dated and was delivered with holographic will to the clerk of court, and in proceeding to construe the will was first offered as an example of the decedent's handwriting and to show his manner of punctuation, and later was offered together with the will, such writing was not part of the will, and objection to it as a part thereof was properly sustained.

5. Wills ⚷487(3)

In proceeding to construe will, a former will which had been revoked on its face and which was offered to show the intention of the testator was properly excluded.

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Proceeding in the matter of the estate of John Lewis, also known as John L. Lewis, deceased, on petition of Luella Martin, executrix, for a construction of decedent's will, to which Stanley Russell Keller, James L. Keller, and Roy C. Keller filed objections to the executrix' interpretation of the will. From the judgment rendered, the executrix appeals.

Affirmed.

Calvin H. Conron, Jr., of Bakersfield, for appellant.

Harvey, Johnston, Baker & Palmer, of Bakersfield, for respondents.

BARNARD, Presiding Justice.

This is an appeal from an order and decree construing the meaning of the dispositive provision of an holographic will.

The deceased, employed for many years as a stationary engineer, was a man with little formal education. He was 64 years old at the time of his death. In his will, dated August 4, 1941, he declared that he was not married and that he had no brothers or sisters, and he appointed Luella Martin "as Executor." The provision of the will which is here in question reads as follows: "Fourth: I give, devise and bequeath all my property, real and personal, wherever situated, to be equeally divided between Luella Martin at Perris California. And Stanly Keller, Roy C. Keller and James L. Keller. All three live at Willowbrook California"

The will was admitted to probate, Luella Martin being appointed as executrix on July 30, 1947. On April 8, 1948, she filed a petition alleging that she was unable to close the estate because she was uncertain whether it should be distributed one half to herself and one sixth to each of the other named benficiaries, or one fourth to herself and one fourth to each of the other three. It was further alleged that she believed the clear intent of the decedent, as disclosed by the will, is that one half should be distributed to her and one sixth to the other devisees, respectively, and the court was asked to determine the manner in which the estate should be distributed. The other three beneficiaries filed an objection to this interpretation of the will, and prayed that it be construed as requiring an equal distribution to the four persons named, one fourth to each. After a hearing the court found in favor of the three objectors, construed the will accordingly, and entered an order decreeing that by the terms of the will the testator intended that each of the four parties should receive one fourth of his estate, and ordering that the property should be so distributed. From this order the executrix has appealed.

The appellant first contends that the will, on its face, indicates that the testator intended one half of his estate to pass to her. It is argued that the use of the word "between" instead of "among" indicates an intention to divide the estate into two parts only; that the use of a period following the first "California" indicates an intention to make a definite cleavage in the distribution of the estate as between Luella Martin and a separate class consisting of the three Kellers; that the use of a capital A in the word "And" following that period, coupled with the use of the period, fortifies this conclusion; that the absence of the word "and" between "Stanly Keller" and "Roy C. Keller", from a grammatical standpoint, indicates an intention to connect the three into one group; that had the testator intended to put all four in an equal status he would have inserted an "and" at this point and omitted the period and the capital A; that he again refers to the three boys as one group when he says "All three live at Willowbrook California"; and that the fact that he named Luella Martin as executrix indicates that he believed she was the person most interested in seeing the will properly probated.

[1] This appears to us to be a strained construction, especially since the deceased was admittedly a man with little school

education. The use of the word "between" instead of the word "among" is quite commonly used when a division into more than two parts is intended, and the use of that word here is far from controlling. In re Estate of Morrison, 138 Cal. 401, 71 P. 453; In re Estate of Rauschenplat, 212 Cal. 33, 297 P. 882, 78 A.L.R. 1380. The use of a period after the first "California", and the use of a capital A in "And" following that period, would not necessarily indicate an intention to make a definite cleavage between two separate classes of devisees. The photostatic copy of the will indicates that the testator was somewhat careless in the use of punctuation marks a fact which would hardly distinguish him from many other people. While there is a period after the first "California" in the will there is no period after the second "California", where one should be, and there is a comma after the third "California" where there should be a period. It is not certain that the first letter of the word "And" following the first "California" was intended to be a capital A. That letter is very similar to the "a" in several other words beginning with "a" which appear in other portions of the will, where the words are very cleary in the middle of sentences. The word "equally" is misspelled. The first part of the fourth paragraph, down to the period following the first "California", does not make a complete sentence. The same is true of the words which follow down to the period after "James L. Keller". Obviously, these clauses were intended to go together, which is inconsistent with the idea that separate classes were intended by the two incomplete sentences. Under such circumstances, the improper punctuation and capitalization, if any, should not be taken as controlling. In re Estate of Olsen, 9 Cal.App. 2d 374, 50 P.2d 70.

It would appear that any distinction made by the testator, as between Luella Martin and the other three beneficiaries, occurs because he was inserting the places at which they lived, respectively, and not because he intended to divide them into two classes. This view is supported by the fact that he provided that his property was to be "equeally divided between" four named persons. The fact that he later named one of the four "as Executor" is in no way suggestive that he thereby intended to give that person a greater interest in his estate.

[2] The interpretation given to this paragraph of the will by the trial court appears to be reasonable and consistent with the intent of the testator and, under well established rules, that interpretation may not be disturbed on appeal even though another interpretation is possible. In re Estate of Bourn, 25 Cal.App.2d 590, 78 P.2d 193.

The appellant next contends that the history and circumstances of the parties support the conclusion that the testator intended to give her one half of his property, rather than an intention to give one fourth to each of those named. The deceased lived with the grandmother of Luella Martin from the time he was two years old until he was about twelve. From then until the time he was about sixteen he lived with Luella Martin's mother. He was two years younger than Luella Martin, and admittedly felt friendly to her throughout his life. She saw him a few times after he left her mother's home and up to the time he came to the San Joaquin Valley, about 1920. Thereafter she did not see him again until 1946, although she wrote to him at times. After 1932, she did not know where he lived.

The testator was intimately acquainted with the respondents from the time they were small children, beginning about 1920. They and their parents moved to Los Angeles soon after that, and the testator was in the habit of spending his vacations with them, and the boys visited him during their school vacations for many years. He took the boys on many fishing trips and other excursions. During the last war the boys, who were in the armed services, wrote to him frequently and came to see him when on leave. In 1937, the testator married the grandmother of the three boys and she died in 1940. This will was made the next year. If these surrounding circumstances are material here, they are as favorable to the court's conclusion as to the other interpretation, if not more so.

[3] It is next contended that the court erred in refusing to consider certain written declarations of the deceased in interpreting the will. It is first argued that the court erred in refusing to admit in evidence two life insurance policies, carried by the testator, with the changes of beneficiary made in that connection. It appears that during the married life of the testator this insurance was payable to his estate. After his wife died the testator had one policy changed in favor of Luella Martin and the other changed to one of the three boys. Shortly thereafter, this second policy was also changed to name Luella Martin as beneficiary. These instruments were offered on the theory that had the testator intended that the boys should participate in his estate upon an equal basis with Luella Martin, they would have been designated as beneficiaries in the insurance policies as well as in the will. This contention is without merit. A will is to be interpreted by the language used therein rather than by the language of some entirely different instrument. In re Estate of Tompkins, 132 Cal. 173, 64 P. 268. It may also be observed that the fact that the value of the insurance policies had been given to Luella Martin might well cause the testator to give her a lesser rather than a greater, interest under the will.

[4] In a second instance, it is contended that the court erred in refusing to consider another writing as a part of the will. This writing is a memorandum headed "Beneficiaries". Under that is the name Luella Martin, with her address. Under that is a line. Below the line appears the names of the three respondents, with their addresses at Willowbrook Calif. This writing was delivered with the will to the clerk of the court. It was first offered by the appellant as an example of the decedent's handwriting and to show his manner of punctuation. It was admitted for that purpose. Later, it was offered together with the will, "conjunctively as the last Will and Testament." An objection was sustained on the ground that it was not a part of the will. It was not signed by the testator and was not dated. Obviously, it was not a part of the will and the objection was properly sustained.

[5] Finally, it is contended that the court erred in refusing to admit a former will executed by the testator and prepared by a lawyer. In that will he left his property to his wife and in the event of her death to her two children, one of them being the mother of the three respondents. That will had been revoked on the face thereof. It is argued that this will indicates that the deceased at no time intended that the three boys, as a group, should receive more than one half of his estate since under that first will they would have indirectly succeeded to the one half interest of their mother. The first will clearly discloses that the testator then intended to leave all of his property to his wife's family. Conditions had changed when the second will was executed as the testator's wife was dead and her daughter, the mother of the three respondents, had then remarried. Under these circumstances, it is only natural that the testator should make a different distribution of his property. While he then gave a portion to the appellant there is nothing in connection with the previous will which would indicate any intention, in executing the second will, to correspondingly limit the share which the three boys should receive. The previous will was not admissible for the purpose for which it was offered, In re Estate of Vanderhurst, 171 Cal. 553, 154 P. 5, and no prejudice appears.

The order appealed from is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

91 Cal.App.2d 226

EVANS v. ZEIGLER et al.

Civ. 16576.

District Court of Appeal, Second District,
Division 3, California.
April 14, 1949.

1. Pleading 🔑237(7)

Amendment to complaint alleging an account stated for services rendered on a certain date by changing date or time when services were alleged to have been rendered to conform to proof was properly allowed.

2. Limitation of actions 🔑127(4)

Action to recover for services rendered commenced within two years after oral agreement to render services was entered into was not barred by two year statute of limitations relating to actions upon obligations not founded upon an instrument in writing, by virtue of an amendment to complaint which did not state a new cause of action more than two years after date of agreement. Code Civ.Proc. § 339.

3. Account stated 🔑19(3)

Evidence that plaintiff mailed defendants an invoice and a statement showing balance due for services rendered, to be a certain amount and that thereafter defendants informed plaintiff that they had received invoice but did not know where they were going to get the money to pay plaintiff and a further promise by defendant to make a payment to plaintiff established an "account stated" between plaintiff and defendant for amount due for services rendered.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Account Stated".

4. Work and labor 🔑22

Common count alleging that defendant is indebted to plaintiff in certain sum for reasonable value of work, labor and services performed for defendants at their request, that such work, labor and services were and are reasonably worth a certain sum, that work, labor and services performed consisted of construction, building and operation of a 500 ton hydro-press, was sufficient, as against contention that there was no allegation therein as to date or as to what services were rendered. Code Civ. Proc. § 426, subd. 2.

5. Assumpsit, action of 🔑5

Common counts are proper forms of pleading in California.

6. Limitation of actions 🔑180(2)

When cause of action is stated in form of a common count, defense of statute of limitations may not be raised by demurrer unless it affirmatively appears on face of complaint that cause of action is barred.

7. Limitation of actions 🔑183(4)

Under general denial to common count for services rendered, defendant could urge any defense which tended to show that plaintiff did not have a subsisting cause of action, and could rely on defense of statute of limitations thereunder.

8. Limitation of actions 🔑197(1)

Where evidence showed that services for which plaintiff was seeking compensation were rendered 14 months prior to filing of action, two year statute of limitations relating to actions upon obligations not founded upon an instrument in writing could not be relied upon by defendants to bar action for services rendered. Code Civ.Proc. § 339.

9. Contracts 🔑322(2)

In action to recover reasonable value of services rendered for supervising construction of a hydro-press, evidence that plaintiff supervised every step and every piece of work that was done, purchased parts for press, supervised making, machining and assembly of parts and that after delivery of press to defendants he trained persons to operate it, was admissible.

10. Contracts 🔑28(3)

Evidence was sufficient to establish an oral promise on part of defendants to pay plaintiff for services rendered in connection with supervision of construction work on hydro-press and entitled plaintiff to recover thereunder.

11. Contracts 🔑175(3)

Evidence sustained finding that reasonable value of services rendered by plaintiff in supervising construction work of hydro-press was $3,000.

◆

Appeal from Superior Court, Los Angeles County; John Gee Clark, Judge.

Action by Evan Evans against Frank E. Zeigler and G. R. Harris, doing business as Zeigler, Harris and Co., for services rendered. From a judgment for the plaintiff, defendants appeal.

Affirmed.

Edgar T. Fee, of Los Angeles, for appellants.

Marlan Proctor, of Burbank, for respondent.

WOOD, Justice.

Plaintiff commenced this action to recover a balance allegedly due for services rendered by him in constructing a hydro press for defendants. Judgment was for plaintiff for $3,000 and interest. Defendants appeal from the judgment.

On January 8, 1945, plaintiff and defendants entered into a written agreement whereby the defendants employed plaintiff as a consulting engineer for a period of five years. One of plaintiff's assignments, under the terms of the agreement, was to supervise the construction of a 500-ton hydro press to be used for metal stamping and die making, which was to be a new or expanded part of defendants' business. In payment for his services plaintiff was to receive 50 per cent of the net profits from the expanded part of the business. That contract was terminated by mutual consent on June 1, 1945, before the press was completed. Plaintiff was paid for his services, in accordance with the terms of the written contract, to and including May 31, 1945. Plaintiff testified that at the time of terminating the written contract the parties orally agreed that plaintiff should continue to supervise construction of the press until it was completed and that he would be paid $3,000 for such services; that said amount was to be paid as follows: $1,000 thirty days after completion of the press, and $2,000 sixty days after completion of the press; that he continued to supervise construction of the press until it was completed, about two months later, but defendants did not pay any part of the amount which it agreed to pay for such services. Defendants testified that there was no agreement to pay plaintiff for services rendered after the termination of the written agreement.

There were three causes of action in the complaint. The first cause of action alleged an account stated as of December 1, 1945, in the sum of $3,000. The second cause of action alleged that defendants "are indebted" to plaintiff for "work, labor and service done and performed for the defendants, and each of them, at their special instance and request * * * on or about 8th day of January, 1945, for the construction and building and operation of a five hundred ton hydro-press"; and that on or about December 1, 1945, plaintiff and defendants had ascertained that the sum of $3,000 was due and owing plaintiff. The third cause of action alleged that $3,000 was the reasonable value of services rendered by plaintiff at the request of defendants.

At the close of testimony on behalf of plaintiff, plaintiff made a motion to amend the second cause of action to conform to proof by changing the date or time when the services were alleged to have been rendered from January 8, 1945, to the "1st day of June, 1945, to or about Sept. 1, 1945." The court granted the motion over defendants' objection.

[1, 2] Appellants' contention that that amendment set forth a different cause of action cannot be sustained. It was alleged, in effect, in the second cause of action, that an account was stated on December 1, 1945; and in addition thereto it was alleged, in effect, that the basis for the account stated was services rendered on a certain date—January 8, 1945. The amendment merely stated that the services were rendered on dates other than the one specific date alleged, and the motion to amend was made after it had been disclosed by the evidence that the services were rendered after June 1, 1945. The

allegation as to when the services were rendered was unnecessary in view of the fact that an account stated was alleged in the second cause of action. Appellants contend further that the second cause of action, as amended on October 22, 1947, was barred by the statute of limitations. Their argument is in substance that since the amendment was based upon an oral agreement entered into on June 1, 1945, and since the amendment was made more than two years thereafter, the cause of action was barred by the two-year statute of limitations relating to oral contracts. The action was commenced on October 1, 1946, which was within two years after the oral agreement was entered into, and of course was within two years after the services were rendered. As above stated, the amendment did not state a new cause of action. The second cause of action was not barred by the statute of limitations.

[3] Appellants assert that the evidence was not sufficient to establish an account stated. As shown above, the first cause of action was also upon an account stated. The court found that about December 1, 1945, an account was stated between plaintiff and defendants in the sum of $3,000. There was evidence that plaintiff mailed defendants an invoice about December 1, 1945, and a statement about January 1, 1946, showing the balance due to be $3,000. Plaintiff testified that defendant Harris told him he had received the invoice but did not know where they were going to get any money to pay plaintiff; that after the statement was mailed plaintiff had several conversations with defendants regarding the sum due; that on one occasion defendant Zeigler told him they were going to have "a time" paying their income tax, and that would have to come before plaintiff's "money would come"; and that on another occasion defendant Zeigler promised to make him a payment. The finding that there was an account stated is supported by the evidence.

[4-8] Appellants also contend that the third cause of action, which was based upon a common count for the reasonable value of services rendered, was insufficiently pleaded, in that, there was no allegation therein "as to the date" or as to what services were rendered. The material allegations in that cause of action were as follows: "That the defendant is indebted to the plaintiff in the sum of Three Thousand Dollars ($3,000.00) for the reasonable value of work, labor and services performed for the defendants, at their request; that such work, labor and services were and are reasonably worth the sum of Three Thousand Dollars ($3,000.00); that the work, labor and services performed consisted of construction, building and the operation of a five hundred ton hydro-press." That was a sufficient pleading of a common count for the reasonable value of services rendered. The usual form of common count for services rendered "alleges that they were performed at the request of defendant and that he promised to pay for them." Smith v. Bentson, 127 Cal.App.Supp. 789, 793, 15 P.2d 910, 911. Section 426 of the Code of Civil Procedure, subd. 2, requires that the complaint must contain "a statement of the facts constituting the cause of action * * *." Common counts are proper forms of pleading in this state. Miller v. McLaglen, 82 Cal.App.2d 219, 223, 186 P. 2d 48. In the case of Pleasant v. Samuels, 114 Cal. 34, 45 P. 998, the causes of action were stated in forms of common counts, and it was contended that they were inconsistent with the provisions of section 426, subdivision 2, of the Code of Civil Procedure. It was stated therein, 114 Cal. at page 38, 45 P. at page 999: "It was not necessary to state when the plaintiff * * * advanced to and for the defendant the moneys sued for, or when defendant became indebted to plaintiff therefor * * *." See also Kraner v. Halsey, 82 Cal. 209, 211, 22 P. 1137. Furthermore, when a cause of action is stated in the form of a common count, the defense of the statute of limitations may not be raised by demurrer unless it affirmatively appears on the face of the complaint that the cause of action is barred. Pike v. Zadig, 171 Cal. 273, 277, 152 P. 923; McFarland v. Holcomb, 123 Cal. 84, 87, 55 P. 761. In the present

case it does not so appear from the allegations of said third cause of action. This, however, does not deprive defendant of his right to urge any defense which tends to show that the plaintiff does not have a subsisting cause of action. It was stated in the case of DeSantis v. Miller Petroleum Co., 29 Cal.App.2d 679, at page 683, 85 P.2d 489, 491: "The law is settled in California that where, as in the instant case, the complaint is based upon a common count under a general denial defendant may urge any defense which tends to show that the plaintiff does not have a subsisting cause of action. [Citing cases.]" Appellants' contention herein that the cause of action for the reasonable value of services rendered under the oral contract of June 1, 1945, was barred by the statute of limitations is not sustained. The uncontradicted evidence shows, and the court found that the services for which plaintiff seeks compensation were rendered during July and August, 1945. Plaintiff commenced this action October 1, 1946, which was within the two-year period prescribed by section 339 of the Code of Civil Procedure for actions upon obligations not founded upon an instrument in writing.

[9-11] Appellants assert further that the evidence was insufficient to support the findings. The court found, with reference to the reasonable value of the services rendered, that "between the 1st day of June, 1945, to on or about the 1st day of September, 1945, the defendants, * * * became indebted to the plaintiff in the sum of Three Thousand Dollars ($3,000.00) on account of work, labor and services performed for the aforesaid defendants, at Burbank, California, at the aforesaid defendants' special instance and request; that said work, labor and services were reasonably worth the sum of Three Thousand Dollars ($3,000.00); that no part of the same has been paid, and there now remains due, owing and unpaid on account of said work, labor and services, the sum of Three Thousand Dollars ($3,000.00)." There were substantial conflicts in the evidence as to several questions involved. There was evidence on behalf of plaintiff that the press was about one-third finished on June 1, 1945. Defendants testified that when the written contract was terminated plaintiff agreed to complete the press, but that defendants did not agree to pay him for services rendered after June 1, 1945. Defendant Zeigler testified that plaintiff said he would complete the press at his own time and expense. Plaintiff testified, as above stated, that the parties entered into an oral agreement under which plaintiff was to continue to supervise construction of the press after June 1, 1945, until it was completed, and defendants were to pay him $3,000 in consideration for said services. Plaintiff testified further that pursuant to that oral agreement he continued to supervise construction of the press until it was completed; that he devoted more than 40 hours per week to such supervision, and supervised "every step and every piece of work that was done"; that his services consisted of purchasing the parts for the press, supervising the making, machining and assembling of the parts of the press, and putting it into "complete operation"; that after delivering the press to defendants he trained persons to operate it; that he was called back by defendants on several occasions in a consulting capacity on "problems they might have in each case"; that he devoted between 70 and 100 hours in this manner after the press was completed; that plaintiff received no part of the compensation agreed to be paid for services performed by him subsequent to June 1, 1945; that plaintiff demanded payment many times and defendants pleaded hardship; that on July 1, 1946, defendant Zeigler promised plaintiff he would give him a substantial payment on August 1, 1946; and that on August 1, 1946, plaintiff went to defendants' place of business where defendant Harris told plaintiff that defendants were "not going to pay for that press." That evidence was properly admitted under the allegations of the third cause of action. It was sufficient to establish an oral promise on the part of defendants to pay plaintiff for services rendered, at their request, subsequent to June 1, 1945. The evidence was sufficient to support the findings regarding the reasonable value of services rendered at the request of defendants. Appellants' further contention that the findings do not support the judgment is not sustained. The

findings were to the effect that the defendants were indebted to plaintiff in the sum of $3,000, and the judgment was against defendants for that amount.

The judgment is affirmed.

SHINN, P. J., and VALLEE, J., concur.

91 Cal.App.2d 304

FAUST v. FAUST.

Civ. 16613.

District Court of Appeal, Second District, Division 3, California.
April 18, 1949.

1. Appeal and error 🔑931(1), 989

In reviewing evidence on appeal, District Court of Appeal must disregard conflicts and give evidence and inferences therefrom their fullest effect in support of findings.

2. Husband and wife 🔑256, 266

In determining whether property is community or separate property, trial judge is not bound by form of deed alone, but property may be found to be other than that indicated by deed either because of intent with which deed was made, or made and received, or because of oral agreement between husband and wife, carried into effect, determining their respective interests in the property.

3. Husband and wife 🔑266

An agreement between husband and wife to transmute community or separate property from one status to another need not be executed with any particular formality as long as it may be fairly inferred that transmutation was intended.

4. Husband and wife 🔑264

In divorce suit, evidence sustained finding that portion of monies on deposit in escrow received from sale of realty, title to which stood in name of wife as sole and separate property, was community property in view of agreement fully consummated by spouses during marital life.

5. Divorce 🔑252

Where divorce is granted on ground of extreme cruelty, court must award more than half of community property to innocent party.

6. Husband and wife 🔑255

Where community and separate property are commingled, and property is purchased with mixed funds, and each contribution is clearly ascertainable, the character of funds remains unchanged, and there is both a community and a separate interest in the property purchased.

7. Husband and wife 🔑255

Where realty was purchased by husband and wife with title in name of wife as her sole and separate property, but purchase was actually made partly with community funds and partly with separate funds of wife, court would, in determining husband's interest in community property to be awarded in divorce suit, determine extent to which funds represented wife's separate property and would award husband interest only in that portion representing community property.

◆

Appeal from Superior Court, Los Angeles County; Joseph M. Maltby, Judge.

Action by Don D. Faust against Geraldine L. Faust for divorce and division of community property, wherein defendant filed a cross-complaint. From the judgment, defendant appeals.

Judgment modified, and as modified, affirmed.

Rogers & Rogers, of Long Beach, for appellant.

William Kinley, of Long Beach, for respondent.

VALLÉE, Justice.

Defendant, Geraldine L. Faust, appeals from that portion of an interlocutory decree of divorce granted to plaintiff, Don D. Faust, decreeing a portion of monies on deposit in an escrow, received

from the sale of real estate in Arcadia, California, title to which stood in the name of defendant as her sole and separate property, to be community property and disposing of it as such.

On March 29, 1946, respondent instituted a suit for divorce against appellant on the ground of extreme cruelty and for a division of the community property, which he alleged consisted of a house and lot in Arcadia of the approximate value of $16,000. Appellant answered and cross-complained. Respondent's allegation with respect to the community property was denied by appellant, and in her cross-complaint she alleged the community property consisted of cash in an undeterminable sum, a 1936 Dodge Coupe valued at $800, United States War Bonds of the face value of $900, and household furnishings of an undeterminable value. An interlocutory decree was awarded respondent. No complaint is made by appellant as to the disposition made by the trial court of property other than the money on deposit in an escrow derived from a sale by appellant of property located in Arcadia (referred to as the "Arcadia property"), for a total sum of $16,900. With respect to this latter sum, the court found that $8,388 thereof was community property and concluded that respondent was entitled to $4,194, half thereof.

Appellant contends that this finding is unsupported by the evidence. She also contends that, in the event the court determines the evidence is sufficient to establish a community interest, the amount found to be of a community character is not supported by the record.

[1] Disregarding conflicts, and giving the evidence and the inferences therefrom their fullest effect in support of the findings, Andrews v. Andrews, 82 Cal.App.2d 521, 525, 186 P.2d 744, we cannot say that the disputed finding is without support.

The parties were married in Las Vegas on November 22, 1941, and separated in the month of March, 1946. One month after the marriage, they purchased a parcel of improved real property in Fontana, California (referred to as the "Fontana property"), consisting of two and one-half acres, for $3,850, payable $900 down and the balance in monthly installments of $35. Because of an outstanding indebtedness which respondent owed a former wife, it was agreed between the parties that title should be taken in the name of appellant as her separate property, and the real estate agent who sold the property was so instructed. Respondent testified that the property "was supposed to be put in both our names as community property" after his account with his former wife was settled, but "we never got around to it." The down payment was made from funds acquired by appellant prior to her marriage with respondent.

Respondent moved onto the property in January of 1942. Meanwhile, because of the war, appellant remained in Long Beach where she was employed as a telephone operator but she spent each week end with respondent on the ranch. The parties considered the "Fontana property" as their home. Respondent immediately began to make extensive and substantial repairs and improvements on the property, the money for which came partly from respondent's separate property, partly from proceeds received "off the property," and partly from unemployment insurance money respondent had been drawing. He estimated that, exclusive of his labor, the total improvements made by him on the premises amounted to "around $900." In the month of January, the parties purchased 600 baby chickens for $200 with money borrowed from Bank of America, which appellant paid off. Subsequently, from profits of the ranch, 4100 additional chickens were purchased. Respondent devoted his entire time to the management and operation of the property and, as appellant testified, "had complete financing of the farm." The parties raised chickens in commercial quantities, sold the eggs, and likewise sold grapefruit crops. The money that came from the sale of the crops was turned over to appellant, and the money from the chickens was retained by respondent. Appellant assisted respondent in selling eggs and received therefor a small stipend. Joint income tax returns were filed by the parties showing the income of each to be community property. These reflected that in 1942 the property returned a net profit of $158.56, in 1943 a net profit of $1605.64, and in 1944 a net profit of $1718.31.

The monthly installments upon the balance of the purchase price of the "Fontana property" were paid partly out of separate funds belonging to appellant and partly out of community income, being appellant's salary and profits and proceeds received by respondent from the operation of the ranch. The property was completely paid for by April of 1944. In November, 1944, the property, including the furniture, was sold for $6,460. Respondent testified:

"Q. Did you have any discussions relative to trading this property for another property, as to how the deed was to be made out? A. After that time the deeds were to be made in both our names, be community property.

"Q. What did she say? A. She said it would be all right.

"Q. When did that conversation take place? A. It taken place just about the time the place was sold.

"Q. Then what happened? A. After we sold the place she wanted to keep the money in her bank and buy another place, which I agreed to, which we never bought another place. The last time we looked was in San Fernando Valley. We went with a man by the name of Fred Senter and spent a whole day there but didn't find anything suitable.

"Q. What year? A. January, 1945."

Appellant retained the proceeds from the sale of the "Fontana property" in her bank account.

In June of 1945, appellant, without the knowledge or consent of respondent, purchased the "Arcadia property" for $12,500, title to which was taken in her name as her separate property. She made a down payment of $7500, which payment included the funds received from the sale of the "Fontana property." The balance of the purchase price was paid from proceeds received by appellant from the sale of real property owned by her prior to her marriage to respondent. Thereafter, and without the knowledge or consent of the respondent she sold the "Arcadia property" for $16,900. This is the sum of which $8,388 was found to be community property and $4,194 thereof awarded to respondent.

[2-4] In determining whether property is community or separate property of the spouses, a trial judge is not bound by the form of the deed alone. Tomaier v. Tomaier, 23 Cal.2d 754, 757, 146 P.2d 905; In re Estate of Watkins, 16 Cal.2d 793, 797, 108 P.2d 417, 109 P.2d 1; Kenney v. Kenney, 220 Cal. 134, 136, 30 P.2d 398; Rogers v. Rogers, 86 Cal.App.2d 817, 821, 195 P.2d 890: Andrews v. Andrews, 82 Cal.App.2d 521, 524, 186 P.2d 744; Horsman v. Maden, 48 Cal.App.2d 635, 640, 120 P.2d 92. Property may be found to be other than that indicated by the deed either because of the intent with which the deed was made, or made and received, or because of an oral agreement between a husband and wife, carried into effect, determining their respective interests in the property. Thus, property which ordinarily would be the separate property of one of the spouses may be converted into community property at any time by an executed oral agreement between the spouses, and vice versa. Tomaier v. Tomaier, 23 Cal.2d 754, 757, 146 P.2d 905; In re Estate of Watkins, 16 Cal.2d 793, 797, 108 P.2d 417, 109 P.2d 1; Kenney v. Kenney, 220 Cal. 134, 136, 30 P.2d 398; In re Estate of Kelpsch, 203 Cal. 613, 265 P. 214; Title Insurance & Trust Co. v. Ingersoll, 153 Cal. 1, 5, 94 P. 94; Rogers v. Rogers, 86 Cal.App.2d 817, 821, 195 P.2d 890. An agreement made at the time the property is acquired has the same effect. An agreement between husband and wife to transmute property from one status to another need not be executed with any particular formality as long as it may be fairly inferred from all of the circumstances that transmutation was intended. In re Estate of Watkins, supra, 16 Cal.2d 793, 797, 108 P.2d 417, 109 P.2d 1; Kenney v. Kenney, supra, 220 Cal. 134, 136, 30 P.2d 398; In re Estate of Sill, 121 Cal.App. 202, 204, 9 P.2d 243. There was substantial evidence sufficient to establish that notwithstanding title to the "Fontana property" was taken in the name

of appellant, it was community property by agreement, fully consummated by the spouses during their marital life by the declarations, acts and conduct heretofore related. Upon the sale of the "Fontana property" the proceeds therefrom were likewise community.

[5] Where a divorce is granted on the ground of extreme cruelty, as here, the court must award more than half of the community property to the innocent party. Tipton v. Tipton, 209 Cal. 443, 444, 288 P. 65; Falk v. Falk, 48 Cal.App.2d 762, 770, 120 P.2d 714. The court awarded half of the community interest in the "Arcadia property" to respondent. He is not complaining because he was not awarded more than half. We think, however, that the court erred in determining that $8,388 of the 16,900 received from the sale of the "Arcadia property" was community property. The evidence discloses that the only property of a community nature invested in this parcel of real estate was the proceeds from the "Fontana property." The balance was paid from appellant's separate property owned by her prior to her marriage to respondent. While the evidence supports the conclusion that the "Fontana property" became community property there is no evidence to support such a conclusion with respect to any other parcel of real property owned by appellant prior to her marriage to respondent, nor was such a contention advanced by respondent at the trial. The agreement between the parties, as testified to by respondent, was that the proceeds from the "Fontana property" were to be used to purchase another parcel of property, title to which was to be in the names of both parties. There is not a scintilla of evidence that there was any agreement that any separate property invested by appellant in such a venture would likewise be community property.

[6, 7] Where community and separate property are commingled and property is purchased with the mixed funds, as here, and each contribution is clearly ascertainable, the character of the funds remains unchanged. 3 Cal.Jur.Supp. 524, sec. 40. There is both a community and a separate interest in property purchased with separate and community funds where each contribution is clearly ascertainable. Miller v. Brode, 186 Cal. 409, 413, 199 P. 531. Here the amounts contributed in the purchase of the "Arcadia property" are ascertainable. The community contributed $6,460, and appellant, $6,040 of her separate funds, to the purchase price. By stipulation of the parties, additional testimony not before the trial court is incorporated in the record for our consideration. It shows that the total cost of the property, including improvements, was $13,239.73. The net receipts from the sale of the property was $15,877.25. The net profit from the sale was $2,637.52. This profit should be distributed in proportion to the amount the separate fund —51.2%—and the community property—48.8%—invested in the property bear to it. Thus, $1,287.11—48.8% of $2,637.52—of the profit earned is community. The total community interest in the "Arcadia property" is, therefore, $7,747.11 ($6,460 + $1,287.11), of which respondent is entitled to one-half, or $3,873.56. We have no doubt but that the trial judge would have reached the same conclusion had this evidence been before him.

The part of the judgment which now reads: "The sum of $4,194.00 cash of the funds now on deposit in the escrow in the Bank of America National Trust & Savings Association, Arcadia Branch, as his separate property. Money received from the sale of 1941 Buick, to defendant, as her separate property; one-half of the United States War Savings Bonds to defendant, as her separate property, and defendant is awarded the remaining sums of money now in deposit in said escrow after deducting the sum of $4,194.00 therefrom, as her separate property," is modified to read as follows: "The sum of $3,873.56 cash of the funds now on deposit in the escrow in Bank of America National Trust & Savings Association, Arcadia Branch, to plaintiff, as his separate property. Money received from the sale of 1941 Buick, to defendant, as her separate property. One-half of the United States War Savings Bonds to defendant, as her separate property, and defendant is awarded the remaining sums of money now on deposit in said escrow after deducting the sum of $3,873.56 therefrom, as her separate property."

As thus modified the judgment is affirmed.

SHINN, P. J., and WOOD, J., concur.

91 Cal.App.2d 238

SLOPER v. SLOPER et al.

Civ. 7592.

Sac. 5975.

District Court of Appeal, Third District, California.

April 14, 1949.

Rehearing Denied May 14, 1949.

Hearing Denied June 13, 1949.

1. Husband and wife 🔑264

In suit by husband against wife for declaratory relief, evidence sustained finding that automobile court was community property, though title thereto had been taken by wife in her name alone.

2. Appeal and error 🔑717

The opinion of a trial judge may not be resorted to on appeal in lieu of necessary findings.

3. Husband and wife 🔑264

Deeds whereby wife acquired title to automobile court and conveyed it to purchasers, and the contract of purchase, made by wife in absence of and without knowledge of husband, were not conclusive evidence that wife owned the automobile court as her separate property.

4. Husband and wife 🔑262(2)

In supporting findings and judgment determining community interests of husband and wife in property acquired after their marriage, it is not necessary to prove an express agreement between them that it shall become their community property.

5. Husband and wife 🔑263, 264

Oral evidence satisfactorily indicating that spouses intended that automobile court taken in wife's name was to be community property was competent and adequate to support findings and a judgment to that effect.

6. Husband and wife 🔑263

When an automobile court was acquired by agreement of spouses, and without knowledge of the husband, deed was taken in name of the wife only, but court was occupied and operated as a business by both spouses who made valuable improvements and repairs and paid installments on purchase price from receipts of business, conduct and admissions of spouses were competent evidence that it was intended by them to become their community property.

7. Husband and wife 🔑249

The intention of spouses with respect to the character of realty to be acquired, is controlling, regardless of whether there is an express agreement that it is to become either community or separate property.

◆

Appeal from Superior Court, Mendocino County; Lilburn Gibson, Judge.

Suit for declaratory relief by M. A. Sloper against Fannie D. Sloper, Milton J. Milan and Aileen C. Milan. From an adverse judgment, Fannie D. Sloper appeals.

Judgment affirmed.

Chas. Kasch, Leo M. Cook, Hale McCowen and J. R. Thomas, all of Ukiah, for appellant.

Mannon & Brazier, of Ukiah, and Royal E. Handlos, of San Francisco, for respondent.

THOMPSON, Justice.

In a suit for declaratory relief, the trial court determined that a specified portion of the Holland Auto Court in Mendocino County, and the proceeds of sale thereof to the extent of $13,342.90 is community property of plaintiff and his wife, Fannie D. Sloper. From that judgment the wife has appealed.

The spouses acquired the property during their marriage, for the sum of $9,034.

Without knowledge of the plaintiff, his wife took title in her own name. After the auto court had been operated by Mr. and Mrs. Sloper for about two years, she sold and conveyed it to the codefendants, Milton J. Milan and wife, for $29,000, subject to a deed of trust to secure the unpaid portion of the purchase price, in the sum of $19,000. Mrs. Sloper retained the $10,000 payment and claimed the auto court and the entire proceeds of the sale thereof, as her separate property.

The judgment also determines that the purchasers of the said property, Milton J. Milan and his wife, are the legal owners and entitled to retain possession thereof. The plaintiff has not appealed, and the right of possession of the property is not involved on this appeal.

The plaintiff and defendant Fannie D. Sloper are husband and wife. They were married March 28, 1943. They were separated June 17, 1947. Each of them was previously married. Plaintiff has an adult son as issue of his previous marriage. Mrs. Sloper has three living children as issue of her former marriage. At the time of their marriage each of them owned separate real and personal properties. Mr. Sloper was, for a time thereafter, employed in the State Forestry Division at a small salary. The Holland Auto Court in Mendocino County included a guest house, residence and eight cottages, owned by Mr. and Mrs. Fred C. Holland. Before and after the marriage of Mr. and Mrs. Sloper, her unmarried brother, Fred Frazer, rented a cottage in that auto court. Plaintiff also rented a cottage and lived on that property. He was acquainted and friendly with Mr. Frazer. After their marriage, Mr. and Mrs. Sloper lived there. Both spouses discussed with Mr. Frazer a proposition of buying and operating the Holland Auto Court jointly. Mrs. Sloper objected to that arrangement. Her brother had no money to invest in the project. The plaintiff testified that she said to her husband, "I think we had better take it. We can live here as long as the War goes, and we can always get our money back and the interest we pay will be just like rent." Mr. Sloper talked with the owners, Mr. and Mrs. Holland, about buying the property. Mr. and Mrs. Sloper discussed with Mr. Schietz, the father of Mrs. Holland, the proposal to purchase that property and was informed by him that it could be bought for $9,000, with a cash payment of $1,000, and the balance on easy terms. Mr. and Mrs. Sloper discussed the matter and agreed to buy it. Mr. Sloper then owned a home in Ukiah, as his separate property, which he afterward sold for $3,600. When he and his wife decided to buy the Holland Auto Court he said to her, "Well, I haven't got the money right now until I sell that property in Ukiah to make the first payment," to which she replied, " 'I can handle the first payment. He only wants a thousand dollars down and I can handle that' so that was all right with me." During the absence of plaintiff the Hollands called and contracted with Mrs. Sloper to sell her the property for $9,034, upon payment of $1,034 cash, and the balance to be paid in installments of $50 per month, with 4% interest on deferred payments. She went with them to the Mendocino County Title Company and executed a written contract on October 9, 1943, in her name as vendee, upon the terms mentioned. At the same time the owners executed to her a grant deed. A quitclaim deed from Mr. and Mrs. Sloper to the owners was also prepared and signed by Mrs. Sloper. She then made the initial payment of $1,034 from her separate funds. The instruments were left in escrow with the Bank of Ukiah, to be delivered pursuant to instructions upon fulfillment of the contract for purchase of the property. The quitclaim deed was executed as a means of clearing the title in the vendors in the event of default or abandonment of the contract. Mrs. Sloper later told her husband that the documents for purchase of the property had been executed, but she failed to inform him that they were made in her name only, as vendee. He did not see or read the contract or deed of conveyance. He had no knowledge of the fact that the deed and contract named his wife only as the purchaser, until more than two years later. Upon request he went to the bank and signed and acknowledged the quitclaim deed October 16, 1943. He testified that he did not read the instrument and that he supposed it was a note binding himself and his wife to pay the balance of the purchase price. But it contained the names of both spouses as grantors.

Mr. and Mrs. Sloper immediately took charge of the Holland Auto Court and operated it successfully for a period of about two years and a half. Both of them devoted their services and attention to the business. Plaintiff said that he worked there regularly eight to sixteen hours per day. He said he kept the books and collected the rental and receipts, which he turned over to his wife, who kept the cash in their home. He regularly paid at the bank the installments on the contract with proceeds from the property which his wife kept in the house. They made numerous repairs and improvements at considerable expense, which were paid from receipts from the business. He purchased furniture for the place from the Hollands, and paid the interest on deferred installments under the contract, with his own separate funds.

One year later, in October, 1944, Mr. Sloper sold his separate Ukiah property for $3,600. It was subject to a mortgage of $500. He then suggested to his wife that he would apply the remaining $3,000 of said separate funds upon the contract of purchase of the Holland Auto Court, but she said, "No. The place is paying out. Won't be long now. It is doing better than we expected." She added, "It is doing so well now that you won't have to pay any more interest. It can pay its own interest." The plaintiff testified that his wife never told him nor intimated to him that he had no interest in that property "until after the place was sold" by her to the codefendants, Milton J. Milan and his wife, for $29,000 on August 14, 1946.

In 1946, plaintiff and his wife talked of selling the property. Mr. Milan, a prospective purchaser, came to their home to see them about the proposed purchase. Plaintiff introduced Milan to his wife. Plaintiff and his wife discussed the sale at a price of $20,000. He objected to selling for that price and insisted they could obtain more. She said "I think we had better take it." When he left home to go to the coast for several days, he told his wife, "You better call up Mr. Milan and if he is ready to settle this we will fix up those papers before I go to the coast, because I may be over there ten days." She replied, "I had word from him and he is not ready." When he returned, he said to her, "Well, that has been hanging a long time. We had better fix up those papers with Mr. Milan." She then replied, "They are all fixed up. I have got my money in the bank." He then inquired, "Well, did you put it in a joint bank account?" and she replied, "Oh, no. No, * * * I won't have a joint bank account with anybody, and I never did." That was his first knowledge of the fact that his wife had made the sale, or that she apparently claimed the entire property and proceeds of sale as her separate property. He said to her, "Well, * * * where do I come in?" and she said, "I am going down and talk to my attorney, see what he has got to say."

On August 14, 1946, Mrs. Sloper, in the absence of her husband, closed the sale of the property to Milton J. Milan and his wife for $29,000. She was then paid $10,000 in cash, which she deposited in her own bank account. She executed to the grantees her deed which reads, "Fannie D. Sloper, dealing with her separate property", as grantor. At the same time the grantees executed and delivered to her their note for $19,000 at 5% interest, payable to her in installments of $160 per month, and secured by a deed of trust to her as beneficiary, dated August 14, 1946, which was recorded the following day at the request of Mendocino County Title Company. She made the final payment May 12, 1946, to the former owners, Mr. and Mrs. Holland of the original purchase price, pursuant to their contract.

Mr. and Mrs. Sloper then quarreled about their community interests and the ownership of the Holland Auto Court property, and the proceeds of sale to the Milans. For the first time, after the sale of the property to the Milans, Mrs. Stoper claimed the entire property and proceeds of sale as her separate property, and told her husband that if he thought he had any interest in it he had better see an attorney. Their dissensions over that property led to their separation June 17, 1947. This suit was commenced by the plaintiff July 11, 1947.

The complaint alleges that "It was *intended at all times by plaintiff and his said wife* that said real property would be thereby acquired by them as their community property, and not as the separate property of said wife." (Italics added.)

After trial by the court, findings were adopted favorable to the plaintiff. The court determined that said husband and wife "agreed between themselves" to purchase the property for $9,034, and that the wife agreed to pay from her separate funds the initial sum of $1.034, and that the balance of the purchase price would be paid "out of the subsequent earnings of the husband or wife." The court further found that Mrs. Sloper paid on the purchase price, from her separate funds, the total sum of $5,187.22, being 53.99% of the purchase price, and that the balance of the purchase price, to wit, the total sum of $4,445.96, or 46.01% of the entire purchase price, was derived from the community earnings of the husband and wife, by their personal services and income from the operation of the Holland Auto Court. The court further found that all of the allegations of the complaint, not inconsistent with the specific facts found, are true. The court did include in its findings the statement that *"There was no agreement* between them" that they would have equal interests in the property, or that it would be acquired or owned as their community property. But the court did find that the allegations of paragraph II of the complaint are true. It is there alleged the parties at all times *intended* that the Holland Auto Court would become their community property. And the court further specifically found that the husband at all times believed he had an equal community interest in the property, and that he never intended to give to his wife his services or personal expenditures for care and improvement of the property, or his portion of the income therefrom as her separate property. As a conclusion of law the court found that plaintiff and his wife own equal community interests in the property and the proceeds of sale to the Milans "to the extent of $13,342.90." Judgment was rendered accordingly.

The appellant contends that she owns the entire property and the proceeds of sale thereof, as her separate property; that the evidence does not support the findings or judgment, and that the findings do not support the judgment and are inconsistent for the reason that the court determined by its finding that "there was no *agreement between them,"* that the Holland Auto Court would become their community property.

[1] The evidence is conflicting regarding the community interests of the spouses in the property. But we are of the opinion there is adequate evidence to support the findings and judgment, and that the asserted inconsistency in findings may be reasonably reconciled in support of the judgment.

[2] Clearly, the court determined that the spouses own and are entitled to equal community interests in the proceeds of sale of the property to the extent of $13,342.90, and accrued interest thereon. That means each is entitled to one-half of that sum. The findings indicate exactly how the judge arrived at that apportionment of the community interests. That method of figuring the respective interests is further shown by the opinion of the judge. But, of course, the opinion may not be resorted to in lieu of necessary findings. The court gave credit to appellant for all payments which she made from her separate funds. Such payments are not included in the proportion of proceeds of sale which are determined to be community property.

[3-6] In this case the instruments in writing, including the deeds of conveyances, when the spouses originally acquired the property and when Mrs. Sloper sold it to the Milans, and the contract of purchase, which transfers of title were procured and made by the appellant in

the absence and without the knowledge of plaintiff, are not conclusive evidence that appellant owned the Holland Auto Court as her separate property. As between the spouses, her conduct and declarations as related by the plaintiff adequately support the findings and judgment of the court. Tomaier v. Tomaier, 23 Cal.2d 754, 757, 146 P.2d 905; Huber v. Huber, 27 Cal.2d 784, 788, 167 P.2d 708; Silverstein v. Silverstein, 76 Cal.App.2d 872, 876, 174 P.2d 486; Rogers v. Rogers, 86 Cal.App.2d 817, 195 P.2d 890; 41 C.J.S., Husband and Wife, § 489 c, page 1034. It is not necessary in support of findings and a judgment determining community interests of a husband and wife in property acquired after their marriage, to prove a previous *express agreement* between them that it shall become their community property. Oral evidence satisfactorily indicating that the spouses intended that it should be their community property is competent and adequate to support findings and a judgment to that effect. When an auto court is acquired by agreement of the spouses, and without knowledge of the husband the deed is taken in the name of the wife only, but the property is occupied and operated as a business by both spouses who make valuable improvements and repairs and pay installments on the purchase price from the receipts of the business, the conduct and admissions of the spouses are competent evidence that it was intended by them to become their community property. The presumption created by the deed in the name of the wife only is rebutted by the conduct and declarations of the grantee. In Huber v. Huber, supra, 27 Cal.2d at page 788, 167 P.2d at page 711, it is said in that regard: "* * * It is likewise true that parol evidence is admissible to establish the absence of an intention to make a gift of either separate or community property, although the instrument of conveyance is made by the husband to the wife alone or as joint tenant with him or is from a third person to the wife or to both as joint tenants at the husband's direction in cases where there is no showing of fraud, mistake or undue influence. [Citing authorities.]"

Numerous California cases declare that principle. In Rogers v. Rogers, supra, [86 Cal.App.2d 821, 195 P.2d 892] it is said:

"* * * And the trial court is not bound to base its conclusion as to the character of the property upon the deeds alone. The form of the deeds is not always necessarily controlling. As was said in Re Estate of Wilson, 64 Cal.App.2d 123, 126, 148 P.2d 390, 392: 'It is now too well settled to justify more than the citation of the authorities that in spite of the mold into which a deed would seemingly press a title, * * * property which, measured by the deed, would not be community property, *nevertheless may be just that.* * * *' [Citing authorities.]"

And in Tomaier v. Tomaier, supra, the court said 23 Cal.2d at page 757, 146 P.2d at page 906:

"It is the general rule that evidence may be admitted to establish that real property is community property, even though title has been acquired under a deed executed in a form that ordinarily creates in the grantee a common law estate with incidents unlike those under the law of community property. Thus land may be shown to be community property even though it is granted to one spouse alone as his or her property in fee simple. [Citing authorities.] Again, it may be shown that husband and wife *intended* to take property as community property even though they accepted a deed drawn to them as tenants in common. * * * It has in fact been held unequivocally that evidence is admissible to show that husband and wife who took property as joint tenants actually *intended it to be community property.*" (Italics added.)

We conclude that the evidence adequately shows that the spouses acquired, held and operated the Holland Auto Court, with the intention that it should become, and that it and the proceeds from its subsequent sale are, their community property to the extent determined by the findings and judgment in this case.

[7] In view of the specific findings and judgment that the spouses own definite shares of a designated portion of the proceeds of sale of the property, as community property, we are convinced that the further finding that "there was no *agreement* between them" that it would become their community property may be reasonably reconciled in support of the judgment. Evidently, the court intended to determine by that language that there was no previous *express* agreement to that effect. The complaint alleged that "It was intended at all times by plaintiff and his said wife that said real property would be thereby acquired by them as their community property." That allegation was found by the court to be true. Moreover, the court specifically found that the spouses "agreed between themselves" to purchase the property for $9,034, and that the wife agreed to make the initial cash payment of $1,034, after which the remaining installments of $50 per month would be paid "out of the subsequent earnings of the husband or wife." If more specific findings had been adopted on that subject, it is evident they would have been adverse to the appellant. The foregoing authorities indicate that it is the *intention* of the spouses with respect to the character of the property to be acquired, which is controlling, regardless of whether there is an express agreement that it is to become either community or separate property. Horton v. Winbigler, 175 Cal. 149, 159, 165 P. 423. The mere absence of such express agreement is immaterial, if the intention of the spouses is otherwise adequately shown by their conduct or admissions.

In the case of Horsman v. Maden, 48 Cal.App.2d 635, 120 P.2d 92, which was a suit by the executor of the estate of Emile Maden, deceased, to quiet title to real property, based on a deed of community property from a husband to his wife, the appellate court, in reversing the judgment, held that the presumption created by Section 164 of the Civil Code is not conclusive of the intention of the husband to convey it to her as her separate property. A judgment of nonsuit rendered against the executor was reversed. The appellate court said, 48 Cal.App.2d at page 640, 120 P.2d at page 95: "Property may be regarded as community property regardless of whether the record title stands in the name of the husband or of the wife or in the names of both the husband and the wife, and the courts are invested with full power to determine the status of any such property. [Citing authorities.] And where it is claimed that an instrument in writing, executed by the husband to the wife, constituted a gift to the wife and changed the status of community property to that of separate property of the wife, *the question of the intention* of the husband in executing such instrument becomes 'the all-important and controlling question.' [Citing authorities.]"

Upon a subsequent appeal, after retrial of the case last cited, a judgment for the defendant was affirmed. Horsman v. Maden, 69 Cal.App.2d 11, 157 P.2d 882, 885. On the last appeal a reversal of the judgment was urged on the ground, among others, that the court failed to specifically find upon the issue as to whether it was the *intention* of Mr. Maden by his conveyance of the property to his wife to change the status of the property from the community to a separate interest therein. In that case the court found that Mr. Maden "made a deed of gift of the real property." In the present case the court found that the spouses intended to purchase the property and that they own community interests in a specified proportion of the proceeds of sale. In the second Maden case, in which the judgment was affirmed, the court said 69 Cal.App.2d at page 15, 157 P.2d at page 885: "Plaintiffs complain with justification that the findings are not carefully prepared. However, they are sufficient to support the judgment. Objection is raised to the court's failure to find on the issue of Maden's intent in making the transfers. It is true that there is no specific finding on this point but the court found that Maden gave the securities to defendant and made a deed of gift of the real property. Implicit in the finding of a gift is a finding of Maden's intent in transferring the property to his wife. The actual transfer of the property plus an intention to give are the constituent parts of a gift. There is ample authority for holding that findings which fully support the judgment will not be set aside on appeal for failure to make a finding on an issue if a finding thereon results by necessary implication from those made. 24 Cal.Jur. sec. 207, p. 974; 10 Cal.Jur.Supp. sec. 207, p. 753."

We conclude that the findings in this case are reasonably reconcilable as previously stated, and that they adequately support the judgment.

For the foregoing reasons the judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

Hearing denied; EDMONDS, CARTER, and TRAYNOR, JJ., dissenting.

91 Cal.App.2d 147

O'CONNOR v. O'CONNOR.

No. 13879.

District Court of Appeal, First District, Division 1, California.

April 7, 1949.

Hearing Denied June 2, 1949.

1. Divorce ⚷155

There is no limited divorce in California.

2. Divorce ⚷294

Court did not lose jurisdiction to deal with custody of children by denying divorce. Civ.Code, §§ 136, 138.

3. Divorce ⚷301

Finding that parties were separated was not required to give trial court power to make an order concerning custody and support of children after denying divorce, where court found that allegations in complaint respecting length of time elapsing between marriage and time of separation of parties was true and that separation was in no way caused by conduct of defendant husband. Civ.Code, §§ 136, 138.

4. Divorce ⚷301

Findings are not required for an order respecting custody of children of parties to a divorce proceeding.

5. Divorce ⚷169

Husband and wife ⚷272(1)

Where decree denied wife a divorce with prejudice and awarded to husband and wife jointly custody of two minor children and required husband to pay wife certain amount per month for support of children, community property in hands of wife thereafter retained its character, and wife and husband were still married, although actually, not legally, separated.

◆

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Action by Adrienne Lucille O'Connor against Gerald Joseph O'Connor for divorce. From a judgment for defendant, plaintiff appeals.

Affirmed.

P. H. McCarthy, Jr., F. Nason O'Hara and Herbert S. Johnson, all of San Francisco, for appellant.

Sullivan, Roche, Johnson & Farraher, of San Francisco, for respondent.

BRAY, Justice.

Appeal by plaintiff on the judgment roll alone from a judgment denying a divorce with prejudice, awarding to plaintiff and defendant jointly the custody of their two minor children, and requiring defendant to pay plaintiff $75 per month for the support of said children.

It is somewhat difficult to understand plaintiff's position on this appeal. She does not contend that the evidence did not justify the court's refusal to grant her a divorce, or that the court abused its discretion in granting joint custody of the children, nor does she attack the amount awarded for support of the minors or the court's failure to grant support for herself. Her appeal seems to be based mainly upon the rather tenuous proposition that when the court denied her a divorce, the entire proceeding fell and the court had no power to deal with the children. Other minor questions are raised, which will be discussed later.

Pleadings.

Plaintiff complained for divorce on the ground of extreme cruelty, asked for custody of the two minor children, support for them and herself, and that "a distribution of the community property be made," its size or value being unknown to her. Defendant answered, denying the charges of cruelty and that he was not a fit and proper person to have custody of the children, setting forth the community property which was of little value, and all of which he alleged was in the possession of the plaintiff, and asked that a divorce be denied plaintiff and that the family remain together.

After a trial, the court found that defendant was not guilty of any cruelty towards plaintiff, but on the other hand, was "a kind and loving husband" and "affectionate father." It then entered the judgment above mentioned, making no disposition of community property.

"Limited Divorce."

To support her contention that the court had no jurisdiction to deal with the children, plaintiff evolves a rather unique theory. It is, that in a divorce action, the court must do one of three things: (1) grant an absolute divorce; (2) grant a "limited" divorce (in both of these cases the court has full authority to deal with the children); or (3) deny a divorce (as here), but such denial constitutes a complete dismissal of the proceedings and the court loses all jurisdiction to deal with the children.

[1, 2] Plaintiff argues at great length that there is such a thing in California as a "limited divorce," that is, a judicial decree that one spouse, although still married, has the right to live away from the other spouse, regardless of the desire of the latter for reconciliation. Actually, this issue is not important to the case, as the plaintiff does not contend that the evidence required the court to grant such a divorce, but uses such a theory for the purpose of arguing that without granting such a divorce (or an absolute one) the court lost jurisdiction over the children. Plaintiff is wrong in both particulars. There is no "limited" divorce in this state, nor by a denial of a divorce does the court lose jurisdiction to deal with the custody and support of the children.

While there are some early California decisions which speak of "limited" divorces, generally they are referring to decrees of separate maintenance and do not use the term in the sense used by plaintiff. However, in Grant v. Grant, 68 Cal.App. 23, 228 P. 412, the court stated that section 137 of the Civil Code provided, in effect, for a limited divorce. That this is not the proper construction of the section is clearly decided in Monroe v. Superior Court, 28 Cal.2d 427, page 431, 170 P.2d 473, at page 475, where the court said: "A limited divorce places the relationship of the parties beyond the reach of either of them alone. They are still married in the sense that neither may remarry, but they are no longer married in the sense that either can give the other the choice of resuming the marital relation or being guilty of desertion. As between themselves the parties are in the same position as they are after a decree of absolute divorce. The California law makes no provision for such limited divorces. It was expressly so held in McMullin v. McMullin, 123 Cal. 653, 56 P. 554, and although Grant v. Grant, 68 Cal.App. 23, 228 P. 412, contains a dictum to the contrary, the question was definitely settled in Cardinale v. Cardinale, 8 Cal.2d 762, 68 P.2d 351." See also Cal.Law Review, vol. 35, p. 153.

Custody and Support.

[2] That the court, after denying a divorce, has the authority to deal with the children is well settled in this state. In Morrow v. Morrow, 60 Cal.App. 688, 214 P. 239, the wife sued for a divorce. The husband cross-complained, also asking for a divorce. The court denied either a divorce and awarded the custody of the three minor children to the husband. On appeal it was held: "The court was authorized to make the order giving the custody of the children to the defendant (Civ.Code, §§ 138 and 246; Ex parte Gordan, 95 Cal. [374], 377, 30 P. 561), notwithstanding that a divorce was denied to both parties." 60 Cal. App. page 692, 214 P. page 241.

Section 138 of the Civil Code, referred to in the Morrow case, is quite comprehensive. It provides: "In actions for divorce the court may, during the pendency of the action, or at the final hearing or at any time thereafter during the minority of any of the children of the marriage, make such order for the custody, care, education, maintenance and support of such minor children as may seem necessary or proper * * *."

The Morrow case, in applying section 138 in a case where divorce was denied, answers a further contention made by plaintiff that the court in our case could only act under section 136 of the Civil Code, which is a more limited section than 138. Section 136 provides: "Though judgment of divorce is denied, the court may, in an action for divorce, provide for the maintenance by the husband, of the wife and children of the marriage, or any of them." See also the quotation, infra, from Jacobs v. Jacobs, 68 Cal.App. 725, 230 P. 209. Whether the court here acted under section 136 or section 138 is unimportant, as under either section it was empowered to provide for the care and custody of the children.

A case similar to the one at bar is Jacobs v. Jacobs, supra, 68 Cal.App. 725, 230 P. 209. There the wife sued for divorce on the ground of cruelty. The husband cross-complained, alleging cruelty and desertion. The court denied a divorce to either party, granted the wife the custody of the minor child, and ordered the husband to pay $100 per month for the support of the wife and child. Exactly as in our case, the husband, on appeal, contended, as the wife does here, that by denying a divorce the court divested itself of jurisdiction to award support for the wife and custody of and support for the child. After first holding that the court did have the power to make such an award for the wife, the court then said that the jurisdiction of the court to award custody and support of the child "is expressly found in sections 136 and 138 of the Civil Code. The welfare of minor children being of paramount concern in cases of this kind, the court may, under the authority of section 136, as well as section 138, of the Civil Code, make such order for the custody, care, education, maintenance, and support of the minor child as may seem necessary or proper. * * * There cannot, therefore, be any doubt as to the jurisdiction of the trial court to award the custody of the minor child to the wife, and to compel the father to pay for its support." 68 Cal.App. page 731, 230 P. page 211.

Findings and Judgment.

[3, 4] Plaintiff contends that the court made no finding that the parties were separated at the time of judgment, and hence the court lacked power to make an order concerning the custody and support of the children. This latter conclusion is erroneous. No findings are required on a custody order. Booth v. Booth, 69 Cal.App.2d 496, 159 P.2d 93. Moreover, the complaint alleged and the answer admitted that the parties separated on a certain day. The court found that the allegations in the complaint "respecting the length of time elapsing between said marriage and the time of separation of the parties hereto are true" and that "the separation of plaintiff and defendant was in no way caused by any act or conduct of defendant." If findings on the subject were needed, these, in view of the court's award of custody and support, were sufficient to show that the parties were still separated.

[5] The court found that there was community property in the hands of plaintiff. It made no award thereof. Plaintiff contends that this leaves her uncertain as to the present status of this property. The interesting part of this contention is that although plaintiff has contended strenuously that the court did not, but should have, granted a limited divorce, she now states "if the trial court simply denied her prayer for a divorce without allowing her a limited divorce," the parties, under the authority of Barrow v. Barrow, 42 Cal.App. 48, 183 P. 365, would then be left where they were. The court did not grant a limited decree; therefore the property is still community property. Plaintiff, again on the assumption that she received a limited divorce, contends that she does not know what her marital status is. As she was denied a divorce, she and her husband are still married, although actually, not legally, separated. The decree is not uncertain, nor

does it indicate that the court approved of this separation. The court merely took cognizance of the fact of separation and made provision, as was its duty, for the protection of the children.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concur.

91 Cal.App.2d 346

PEOPLE v. LEWIS et al.

Cr. 716.

District Court of Appeal, Fourth District, California.
April 19, 1949.

1. Gaming 🔑98(5)

To justify convictions of occupying room with paraphernalia for purpose of recording bets on results of horse races, prosecution need not prove by direct evidence that defendants occupied room for such purpose, but purpose for which it was used may be shown by surrounding circumstances. Pen.Code, § 337a, subd. 2.

2. Criminal law 🔑1159(2)

Where jury could reasonably conclude from circumstances established by evidence that defendants were guilty of occupying room with paraphernalia for purpose of recording bets on results of horse races, verdicts of conviction cannot be disturbed on appeal. Pen.Code, § 337a, subd. 2.

3. Gaming 🔑98(5)

Evidence of surrounding circumstances was sufficient to support convictions of occupying room with paraphernalia for purpose of recording bets on results of horse races. Pen.Code, § 337a, subd. 2.

4. Criminal law 🔑386

In prosecution for occupying room with paraphernalia for purpose of recording bets on results of horse races, evidence of telephone conversations between arresting officers in room and persons calling with reference to their bets was admissible, not for purpose of establishing truth of statements over telephone, but to establish that room was being occupied for placing bets on horse races. Pen.Code, § 337a, subd. 2.

5. Criminal law 🔑1169(5)

In prosecution for occupying room with paraphernalia for recording bets on results of horse races, admission of testimony as to telephone calls, wherein alleged betters asked arresting officers, answering telephones in room, whether either of two persons, described by their Christian names only, was there, was not prejudicial error as leading jury to believe from hearsay evidence that callers referred to two of three defendants, where no motion was made to strike any portion of conversations and court instructed jury that testimony was admissible only to establish that room was being occupied for placing bets on horse races. Pen.Code, § 337a, subd. 2.

6. Criminal law 🔑829(3)

In prosecution for occupying room with paraphernalia for purpose of recording bets on results of horse races, defendant's requested instruction to jury as to meanings of words "keep" or "keeping" and "occupy", in statute defining offense charged, was properly refused as covered by similar instruction in practically same language and instruction that causal connection reasonably justifying inference that defendants occupied and kept place where devices were utilized for purpose of registering bets must be established. Pen.Code, § 337a, subd. 2.

7. Criminal law 🔑450

In prosecution for occupying room with paraphernalia for purpose of recording bets on results of horse races, an expert's testimony that papers, books, and paraphernalia found in room constituted bookmaking paraphernalia was not inadmissible as invading jury's province and expressing opinion on ultimate question to be decided by jury. Pen.Code, § 337a, subd. 2.

8. Gaming ⚿98(5)

Evidence was sufficient to establish connection of two defendants with third defendant's occupation of room with paraphernalia for purpose of recording bets on results of horse races. Pen.Code, § 337a, subd. 2.

9. Criminal law ⚿1023(9)

Where trial court suspended imposition of sentence on jury's verdict convicting defendants of occupying room with paraphernalia for purpose of recording bets on results of horse races and imposed fine as condition of probation, there was no final judgment of conviction, from which appeal could be taken. Pen.Code, § 337a, subd. 2; § 1237.

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Jack Gordon Lewis and Sidney Earle Almgren were convicted, and Wesley Bernard Ambrose pleaded guilty, of occupying a room with paraphernalia for the purpose of recording bets on the results of horse races, and defendants Lewis and Almgren appeal.

Appeal dismissed.

Thomas Whelan, of San Diego, for appellants.

Fred N. Howser, Atty. Gen., and James A. Doherty, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendants and appellants Jack Gordon Lewis and Sidney Earle Almgren, and defendant Wesley Bernard Ambrose were jointly charged with violating section 337a, subd. 2, of the Penal Code in that they occupied a room with paraphernalia for the purpose of recording bets upon the result of horse races. Ambrose pleaded guilty. The other defendants were convicted by a jury and the trial court suspended imposition of sentence for one year and imposed a fine of $200 each as a condition of probation.

The building described in the evidence consisted of a building mart in the nature of a small business center. Behind this building was a mill room and two store rooms which extended along the north side and across the width of the entire building. The floor of the mill room was of concrete and on a higher plane than the level of the main floor. Leading from the floor of the mill room down four or five steps, approach is made to a toilet marked "Women." Adjoining the toilet room was another room which could be entered only by passing through the toilet room. This room was in the nature of a secret chamber and was closed off from the toilet by the insertion of two panels which, when in position, gave the appearance of a blank wall and was evidently constructed for the purpose of carrying on race-horse betting by phone. Off of this same secret room was located another toilet with no outside entrance.

On February 19, 1948, Deputy Sheriff Ashley and other fellow officers (being informed of the nature of the room and of the alleged illegal operation) went up the alley in back of the building and through the mill works room, where several employees were working, including a young man described as a "hunchback," who was working near the head of the stairway. Apparently the officers were scouting around for about 15 minutes endeavoring to find an entrance to the secret room. They later discovered the "hunchback" coming up the stairway out of the "Women's" toilet. They also saw one or two other persons on this same stairway at different times. Ashley testified that just as he started down this short stairway the three defendants "were filing out, single file", through the toilet marked "Women"; that one of the defendants was near the first step, one in the toilet room and the last one was coming through the secret panel doorway, which was then opened. Officer Earnest brushed by the defendants, went into the secret room, and saw flames bursting forth from the toilet bowl in that room. Scorched papers were rescued and other papers and paraphernalia which were later identified by an expert as typical of paraphernalia used by bookmakers in that community, were found and admitted in evidence. The room was filled with smoke. Three card tables were lined up against the wall with telephones on each table. The wires thereto had been cut and parts of the phone had been hidden in the toilet. Ashley brought all three of the defendants into the room and ordered defendant Lewis to hook up the wires. They were replaced by him and the missing parts were produced and service was resumed. In a short time the phone began to ring on numerous occasions and the deputies answered the phones. Several alleged patrons unknowingly attempted to place bets with the officers. In fact the lines became so busy the officers asked the defendants if they didn't want to answer the calls. "They just laughed." These phones were installed on November 11, 1947, and were listed under the name "Rebman Grain & Produce Service." On February 19, 1949, service was disconnected for the reason: "Questionable business."

Appellants failed to testify at the trial. On their appeal counsel for them frankly admits that the room was occupied by defendant Ambrose for the purposes charged in the complaint. His main contention is that there was no evidence showing that either of these two appellants had ever occupied or been in the room in question where the paraphernalia was located prior to the time they were "Herded" in there by the officers on the day of the arrest; that since there were other men in and about the premises and not occupying that room, it was just as logical to believe that these two appellants were likewise not occupying it for the purposes alleged, citing such cases as People v. Simon, 66 Cal.App.2d 860, 153 P.2d 420; People v. Greco, 47 Cal.App.2d 628, 118 P.2d 886.

[1–3] The circumstances related might well have led the jury to believe that the presence of these two appellants was essential to assist the other defendant in carrying on such a flourishing business that three separate phones had to be operated at the same time at three different tables. Appellant Lewis showed considerable familiarity with the premises as well as the means by which telephone service could be reinstated. The great volume of paraphernalia used, including adding machines, pencils, pads, and other recording devices, were circumstances to be considered. It is not necessary for the prosecution to prove by *direct evidence* that defendants occupied the room for the purpose of recording bets on horse races. The purpose for which the room was used may be shown by surrounding *circumstances,* and if the jury could reasonably conclude from the circumstances established that defendants were guilty, such verdict cannot be disturbed on appeal. These rules are so well established that citation of authority would be superfluous. The circumstances outlined above are sufficient to give support to the verdict as rendered. People v. Radley, 68 Cal.App.2d 607, 157 P.2d 426; People v. Ravenscroft, 90 Cal.App.2d 543, 203 P.2d 109.

[4] Over objections, the officers were permitted to relate the contents of the calls while they were answering the phones in the secret room on the occasion of the arrest. Appellants contend that the court erred in receiving evidence of the conversation on the telephone between the arresting officers and those who called with reference to their bets. It is the established rule that the court may properly receive evidence of such conversations not for the purpose of establishing the truth of what was said over the telephone, but for the purpose of establishing that the room was being occupied for placing bets on horse races, and the jury was so instructed. People v. Joffe, 45 Cal.App.2d 233, 235, 113 P.2d 901; People v. Reifenstuhl, 37 Cal.App.2d 402, 405, 99 P.2d 564; People v. Radley, supra.

[5] The principal objection concerned some of the calls wherein the alleged better first asked if "Sid" or "Barney" was there. Counsel claims that this may have led the jury to believe from hearsay evidence that the caller referred to appellant Sidney Earle Almgren or one of the other defendants and that therefore that evidence was inadmissible for that purpose. No motion was made to strike any portion of the conversation complained about. The court instructed the jury that such conversation was admissible only for the purpose heretofore mentioned. Under such circumstances appellants cannot claim prejudicial error. People v. Ines, 90 Cal.App.2d 495, 203 P.2d 540.

[6] The trial court refused, as being covered, defendants' instruction that under subdivision 2, sec. 337a of the Penal Code the word "keep" or "keeping" means "to have the care of or to conduct or carry on or to manage or to maintain as an establishment, institution or the like", and the word "'occupy' * * * means to keep the possession of or to hold or keep for use * * * and denotes an exercise of dominion over the premises in question," citing People v. Yoder, 35 Cal.App.2d 347, 95 P.2d 470; People v. O'Brien, 37 Cal.App.2d 708, 100 P.2d 367; and CALJIC No. 723.

The trial court gave a similar instruction in practically the same language as the proffered one. In addition, the section and subdivision of the Penal Code under which defendants were prosecuted was read at length and the jury was told that there must be some causal connection established which would reasonably justify an inference that the defendants occupied and kept a place where such devices were utilized for the purpose of registering bets. No error appears in this respect. Other proffered instructions on this subject were properly refused.

[7] Finally, defendants registered some complaint about the admissibility of the testimony of the expert, who duly qualified as such, in relating his opinion that the papers, books and paraphernalia found *constituted book-making paraphernalia.* In this connection it is argued that an opinion on that fact was an invasion of the province of the jury and was the ultimate question to be decided by it and therefore was not a subject for expert testimony, citing People v. Taylor, 4 Cal.2d 495, 497, 50 P.2d 796. We see no merit to this contention. People v. Hinkle, 64 Cal.App. 375, 221 P. 693; People v. Miller, 67 Cal.App.2d 382, 385, 154 P.2d 435; People v. Tucker, 88 Cal.App.2d 333, 198 P.2d 941.

[8] The evidence including the testimony of the expert, leaves but little doubt, if any, that the room was being occupied by someone for such purpose. Appellants concede that the room was being occupied by defendant Ambrose for that purpose. The only question was appellants' connection therewith. Upon sufficient evidence the jury determined that issue against them.

[9] There has been no final judgment of conviction within the meaning of Sec. 1237 of the Penal Code from which an appeal may be taken. The attempted appeal from the judgment is dismissed. People v. Ormes, 88 Cal.App.2d 353, 198 P.2d 690. Order denying new trial affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

91 Cal.App.2d 278

CONSTANTINE v. CITY OF SUNNYVALE et al.

VIERRA et al. v. CITY OF SUNNYVALE et al.

No. 13894.

District Court of Appeal, First District, Division 1, California.

April 15, 1949.

Rehearing Denied May 14, 1949.

Hearing Denied June 13, 1949.

1. Trial 🔑384

Insofar as action was one in equity, trial court could dismiss jury at end of introduction of evidence for failure of plaintiffs to make out a case.

2. Appeal and error 🔑994(3)

The attitude and credibility of witnesses is not a matter which reviewing court is called upon to decide.

3. Eminent domain 🔑100(6)

Where street is wrongfully vacated by city, compensation may be recovered by abutting landowners to the extent of depreciation in value of their land.

4. Municipal corporations 🔑657(2)

City may not vacate a street for exclusive private use, but if an abutting landowner is benefited by closing a street, the order may be a mere incident if the controlling purpose was the convenience of the general public and their safety.

5. Municipal corporations ⚷658

A city cannot barter away its streets.

6. Municipal corporations ⚷657(1)

Advantage coming to the public from vacating a city street must arise from the vacation itself, and not from the future use to which the vacated street is put.

7. Municipal corporations ⚷657(2)

The question of elimination of grade crossings is a matter of state concern, but the vacation of public streets is within scope of "municipal affairs" and may be made without consent of Railroad Commission unless it interferes with operation of a railroad. Code Civ.Proc., § 1240.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Municipal Affair".

8. Municipal corporations ⚷669

The rights of an abutting landowner to access to street are the same whether his property is situated on a street in the business district of a large city or in the residential district of a small town.

9. Eminent domain ⚷106

Plaintiff owners of land abutting on avenue were not entitled to damages when city vacated avenue on ground that they were deprived of access to next intersection where a small extension street was placed so that plaintiffs and general public might travel by way of extension to another avenue leading directly to avenue from which plaintiffs claimed to be barred.

10. Municipal corporations ⚷63(1)

In determining whether a street shall be closed but an extension added, giving the abutting landowners the right to gain access to a parallel street, the city council acts legislatively, and in absence of abuse of discretion, courts will not interfere.

11. Municipal corporations ⚷671(1)

A corporation which allegedly was benefited by order of city vacating city avenue was not liable for damages to owners of land abutting on the avenue where collusive fraud between corporation and city was not shown.

Appeal from Superior Court, Santa Clara County; William F. James, Judge.

Consolidated actions by George H. Constantine and others and by Joseph Vierra and Isabel Vierra against the City of Sunnyvale, a municipal corporation, and Libby, McNeill & Libby, a corporation, to vacate an order of city abandoning a portion of an avenue, and to enjoin defendant Libby, McNeill & Libby from obstructing the avenue for travel, and for damages for some plaintiffs should court deny prayer to vacate order and enjoin obstruction. From adverse judgments, each plaintiff appeals.

Judgment affirmed.

DiMaria & DiMaria, of Palo Alto, for appellants.

Joseph A. Bonacina, of San Jose, for defendant and respondent City of Sunnyvale.

Rankin, Oneal, Luckhardt, Center & Hall, and Maurice J. Rankin, all of San Jose, for defendant and respondent Libby, McNeill & Libby.

WARD, Justice.

This is an appeal by each plaintiff from judgments in favor of defendants in two consolidated cases decreeing that plaintiffs are not entitled to the declaratory relief, injunction or damages prayed for in each complaint. The case may be termed as one "in inverse condemnation", Bacich v. Board of Control, 23 Cal.2d 343, 144 P.2d 818, 821; wherein plaintiffs sought to vacate and set aside an order of the defendant City of Sunnyvale abandoning a portion of a street or avenue and asked that the municipality and defendant Libby, McNeill and Libby, a corporation (which will be referred to as Libby), be enjoined from obstructing the avenue from travel and prayed that five designated combinations of plaintiffs in the Constantine action and two in the Vierra action be awarded damages should the court deny the respective prayers to set aside the order of abandonment and enjoin the obstruction.

Each complaint set forth two causes of action. In the first cause of action in the Constantine complaint it was alleged that the Libby corporation had petitioned the Sunnyvale City Council to close 426 feet of Pastoria Avenue; that on either side of the avenue a portion of the property was owned by Libby; that at a hearing of the council the designated portion was closed over the objections of plaintiffs; that the order of the council was for the benefit of Libby and damaged defendants' property by depriving them of an easement of ingress and egress to a street on the other side and running parallel to certain railroad tracks. The second cause of action in the Constantine complaint alleged the market value of the respective properties of the plaintiffs before and after the closing of the avenue. The Vierra complaint in the first cause of action set forth similar allegations of fraud by collusion between Libby and the council. The second cause of action set forth the alleged value of the property as the result of closing the avenue.

Defendants filed separate answers to each complaint denying the material issues raised and alleged that the claim for liability had not been filed within the time prescribed by law.

On appeal plaintiffs' five points are in effect that in ordering the closure the council acted fraudulently and with the purpose of benefiting Libby, and that plaintiffs were not awarded compensation for their inconvenience and the depreciation of the market value of their property.

[1] A jury was sworn to try the case, but at the end of the introduction of evidence the trial court concluded that plaintiffs had not made out a case and dismissed the jury. Insofar as the action was one in equity, this, of course, the trial court had a right to do. Thereupon the court filed findings and conclusions of law upon which the respective decrees and judgments are based.

The court found, "That all of the properties mentioned in the complaints * * * abut upon that portion of Pastoria Avenue lying and being outside of the city limits of the city of Sunnyvale and being in the county of Santa Clara, and that none of the same abutted upon any portion of the street taken by the order of the City Council vacating and closing the same to public use. In this connection, the court further finds that Pastoria Avenue, as it presently exists, furnishes the owners of said properties with ingress to and egress from their said respective properties. That at the time plaintiffs became the owners of their respective properties said Pastoria Avenue was open as a public way for its entire length including the portion thereafter ordered closed by the City Council of Sunnyvale.

"The Court finds that it is not true that the purpose or result of the ordinance of the City of Sunnyvale closing Pastoria Avenue was to promote the interest of Libby, McNeill & Libby as alleged by Plaintiffs, or otherwise, or at all; that the motive and purpose of the Council of the city of Sunnyvale in passing the ordinance closing said Street was to carry out a plan which said Council had long entertained for the reorganization of certain streets in the city of Sunnyvale to, in the interest and promotion of public convenience and safety, eliminate crossing over the railroad tracks of the Southern Pacific Company by closing certain streets which crossed said tracks, including Pastoria Avenue, and thereby eliminate the danger and hazard of said railroad crossings; that said ordinance was passed to promote public convenience and safety and was without fraud or collusion with Libby, McNeill & Libby, or at all, and was an honest exercise of the discretion of said Council relating to the streets of said city and was enacted solely in the interests of the safety, convenience and good of said city and the general public, and not otherwise.

"The Court finds that in lieu of the portion of Pastoria Avenue closed to travel by the ordinance herein mentioned said city has provided those having property on Pastoria Avenue, and who could possibly be affected by such closing, with a better and safer route of travel by the extension of California Avenue from Matilda Avenue to Pastoria Avenue and the said extension of California Avenue permits all the plaintiffs and others on said Pastoria Avenue to reach the main business and residence sections of the City of Sunnyvale by a safer and equally short route and does not materially add to the distance of those on Pastoria Avenue desiring to make use of the portion of Evelyn Avenue lying west of Pastoria Avenue and adds to their safety of travel.

"The court does not deem it necessary to find the value of the properties of any of the plaintiffs prior to the closing of Pastoria Avenue as the court finds that such closing has not depreciated the value of any of said properties in any respect or amount, and plaintiffs have not, nor have any of them, sustained any damage by reason of said closing."

[2] There is some evidence that one or more of the councilmen had worked for Libby or were on friendly terms with the managers of the local plant. There is also a claim that at the meetings of the council the presiding officer was abrupt in dealing with plaintiff property owners. The attitude and credibility of the witnesses is not a matter that a reviewing court is called upon to decide. All of the councilmen, on being asked what factors they considered in determining whether or not the Council should vacate that portion of the avenue, testified in substance, "In a general way I attempted to pass on the matter on the basis of the greatest good for the greatest number, and specifically I considered a closing of a railroad crossing, which was in my opinion hazardous, the elimination of a bottleneck which existed at the times when Libby was busy on Pastoria, the accomplishing of an increase of employment of people residing in the City of Sunnyvale, and an addition to the tax appraisal, thereby enlarging the City income; and, as against that, I considered what harm might come, and being of the opinion that there was a great deal more good involved to more people than could possibly be harm, I decided it would be to the best interest of the City of Sunnyvale to undertake that closing." Maps and recommendations of the Peninsula Grade Crossing Conference which had been delivered to the city engineer of Sunnyvale indicated that the crossing of Pastoria Avenue over the railroad track was superfluous. The Commissioner of Public Health endorsed the plan to close certain crossings. A small avenue was opened to an adjoining street which gave a means of travel to the next street on which train signals were operated.

[3] Plaintiff has cited authorities from other jurisdictions which are claimed to control the facts of this case, notably City of Texarkana v. Lawson, Tex.Civ.App., 168 S.W. 867. There is some resemblance between the Texarkana case and the facts of the present case. In that case it was held that compensation may be recovered to the extent of depreciation. That rule is recognized in California, but in the present case plaintiffs are not entitled to recover.

[4-6] A street may not be vacated for exclusive private use. People, ex rel. Webb v. City of San Rafael, 95 Cal.App. 733, 273 P. 138; People v. City of Los Angeles, 62 Cal.App. 781; 218 P. 63. However, if an abutting property owner is benefited by closing a street such order may be a mere incident if the controlling purpose was the convenience of the general public and, as in this case, their safety. 4 McQuillin, Municipal Corporations, 2d Ed.1943, sec. 1520, p. 344. See People ex rel. Wagner v. City of Pomona, 88 Cal.App.2d 460, 198 P.2d 959 and opinion on denial of rehearing 88 Cal.App.2d 460, 200 P.2d 176. In People ex rel. Webb v. City of San Rafael, supra, 95 Cal.App. at page 740, 273 P. at page 141 the court said, "It is, of course, true that a city cannot 'barter' away its streets. And it has been held that the advantage coming to the public from vacating a street must arise from the vacation itself, and not from the future use to which the vacated property is put. * * * The evidence showing the elimination of a dangerous grade crossing, where two grade crossings are in such close proximity, and the doing away of the public inconvenience of having both crossings blocked by stopping trains are advantages directly accruing from the street closing. And that these facts were considered by the City Council is of itself, irrespective of any other consideration, sufficient to support the finding of the court that the city council was not induced to this closing solely by

the desire to turn the land over to the railroad company, but was actuated by considerations of the public good. This is especially true in view of the testimony showing the general plan of street improvement in that vicinity, the relation of Ida street to the other streets, the traffic conditions, and the comparison of the resulting inconvenience with the benefits to the public at large." In the present case the elimination of a dangerous grade crossing as a part of a general plan of street improvement indicates proportional advantages directly accruing to the public paramount to the profit that might be gained by Libby.

[7] The question of the elimination of grade crossings is a matter of state concern, Code Civ.Proc. sec. 1240; City of San Mateo v. Railroad Commission, 9 Cal. 2d 1, 68 P.2d 713; Polk v. City of Los Angeles, 26 Cal.2d 519, 159 P.2d 931, but the vacation of public streets falls within the scope of municipal affairs and it may be made without consent of the Railroad Commission unless it interferes with the operation of a railroad. Civic Center Ass'n v. Railroad Commission, 175 Cal. 441, 166 P. 351.

[8] Plaintiffs claim that they have suffered a violation of the "next intersection rule" and are entitled to damages. "The rights of an abutting owner to access to the street are the same whether his property is situated on a street in the business district of a large city or in the residential district of a small town. The extent of the damage for interference therewith might be different, but the right of access to the street would be the same." Rose v. State of California, 19 Cal.2d 713, 730, 123 P.2d 505, 515. In Beals v. City of Los Angeles, 23 Cal.2d 381, at page 384, 144 P.2d 839, at page 841, relied upon by plaintiffs, it is stated that, "Although plaintiff's property does not abut upon the vacated portion of the alley, she is deprived of all access by means of the alley to the next intersecting street to the west, thus leaving the property in a cul-de-sac." The Beals case is based upon Bacich v. Board of Control, supra, in which it was held that a property owner has a right of ingress or egress to any intersecting street and in which it is stated 23 Cal.2d at page 352, 144 P.2d at page 824, that, "Whether or not such impairment is compensable must depend upon the character and extent of his easement of access. * * * Practically all authorities hold, and we believe correctly, that no recovery may be had where the obstruction is beyond the next intersecting street. See cases cited: 4 McQuillin, Municipal Corporations, 2d Ed., 279–280, sec. 1527; 1 Lewis on Eminent Domain, 3d Ed., 350, 383, secs. 191, 203; 25 Am.Jur., Highways, sec. 318; In re Hull, 163 Minn. 439, 204 N.W. 534, 205 N.W. 613, 49 A.L.R. [320], 330; New York, C. & S. L. R. Co. v. Bucsi, 128 Ohio St. 134, 190 N.E. 562, 93 A.L.R. [632], 639. The extent of the easement of access may be said to be that which is reasonably required giving consideration to all the purposes to which the property is adapted."

[9, 10] In the present case the closing of Pastoria Avenue has not created a "cul-de-sac". It is not a blind alley or avenue for a small extension street was placed so that plaintiffs and the general public might travel by way of the extension to another avenue leading directly to the avenue from which plaintiffs claim they have been debarred. in determining whether a street shall be closed but an extension added giving the property owners the right to gain access to a parallel street a city council is acting legislatively and in the absence of abuse of discretion courts will not interfere. Brown v. Board of Supervisors, 124 Cal. 274, 57 P. 82; Beals v. City of Los Angeles, supra; 4 McQuillin, Municipal Corporations, 2d Ed.1943, § 1527, pp. 360–361.

[11] The trial court found that the claim against Sunnyvale was not filed in time. Plaintiffs seek damages against Libby upon the theory that that company is obstructing the street. Where an order closing a street has resulted in damage to an abutting property owner the governmental agency authorizing such closing is liable for damages for the exercise of such authority and not a person or corporation who may have been benefited by the order closing the street unless collusive fraud is

apparent from all of the facts and circumstances surrounding the transaction. Heimann v. City of Los Angeles, 30 Cal.2d 746, 185 P.2d 597; Veterans' Welfare Board v. City of Oakland, 74 Cal.App.2d 818, 169 P.2d 1000.

The judgments appealed from are affirmed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; CARTER AND SCHAUER, JJ., dissenting.

MAINS v. CITY TITLE INS. CO.

No. 13936.

District Court of Appeal, First District, Division 1, California.

April 12, 1949.

Rehearing Denied May 12, 1949.

Hearing Granted June 9, 1949.*

1. Pleading 🔑403(3)

In action for money had and received, failure of complaint to allege that defendant collected and received purchase price of plaintiff's realty for plaintiff's use and benefit was cured by defendant's allegation in answer that purchaser of plaintiff's realty caused balance of purchase price to be deposited with defendant.

2. Appeal and error 🔑193(5)

Failure of complaint in action for money had and received to allege that defendant collected and received money for plaintiff's use and benefit could not be raised by defendant for first time on appeal.

3. Executors and administrators 🔑393

Administratrix who sold realty of her decedent's estate was merely bound by statute after confirmation of sale to convey all right, title, interest and estate possessed by decedent in realty at his death, and was not required to convey free and clear of deed of trust, regardless of whether sale was a judicial sale upon confirmation by court in compliance with statute. Probate Code, §§ 754–757, 786.

4. Vendor and purchaser 🔑134(1)

In normal inter vivos transactions where one contracts to sell and convey, without any provision as to title or encumbrances, the law implies agreement to convey a good title free from encumbrance, and if certain encumbrances are specifically provided for, there is an implied agreement that title shall be conveyed free from other encumbrances.

5. Trial 🔑404(5)

In administratrix' action to recover amount paid to beneficiary of deed of trust from purchase price of land belonging to plaintiff's decedent which had been received by defendant for plaintiff, finding that it was not true that realty was "purchased free and clear of, and not subject to" deed of trust, was not in effect a finding that realty was purchased free and clear of deed of trust.

6. Escrows 🔑10

Where administratrix of decedent's estate did not consent to payment of deed of trust by defendant which was to deliver or record deed to realty of estate upon receipt of purchase price, and administratrix was not obligated under statute to convey realty free and clear of deed of trust, court correctly found that payment by defendant of amount due upon deed of trust was voluntary and that amount paid by defendant was not chargeable to administratrix or estate. Probate Code, §§ 754–757, 786.

7. Money received 🔑15

An action for money received is an action at law but is governed by principles of equity.

8. Escrows 🔑10

In action to recover money paid to beneficiary of deed of trust from purchase price of realty belonging to estate of decedent, by defendant who was to receive purchase price in behalf of plaintiff administratrix and deliver or record deed upon receipt of purchase price, which money was paid without authorization or consent of administratrix, record sustained finding that plaintiff did not violate any principles of equity which would preclude recovery.

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* Subsequent opinion 212 P.2d 873.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Mary E. Mains, as administratrix of the estate of Earl L. Mains, deceased, against City Title Insurance Company, a corporation, to recover amount paid to beneficiary of deed of trust from purchase price of land belonging to estate of plaintiff's decedent which had been received by defendant for plaintiff. From an adverse judgment, defendant appeals.

Judgment affirmed.

Tobin & Tobin and Richard Raoul-Duval, all of San Francisco, for appellant.

Roland Becsey and Joseph B. Bates, both of San Francisco, for respondent.

WARD, Justice.

This is an appeal by defendant, City Title Insurance Company, from a judgment awarding plaintiff $10,292.35, plus interest and costs. The complaint alleged "That on December 20th, 1946, Roland Becsey, as agent of said plaintiff in the above entitled action, delivered to the said defendant, a deed indenture dated December 11th, 1946, from Mary E. Mains, as Administratrix of the Estate of Earl L. Mains, deceased, grantor to Alexis M. Derkatch grantee, with instructions to said defendant to deliver or record the same upon the payment to the plaintiff of the sum of $11,450.00 less the sum of $12.65 Revenue Stamps, and less the further sum of $1145.-00, being the deposit received by plaintiff from Alexis M. Derkatch, making the sum of $10,292.35 to be collected by the defendant pursuant to said instructions."

In the lower court the following facts were established: Plaintiff is the administratrix of the estate of her son, Earl Mains. He was the owner of an improved parcel of real property located in the city of San Francisco and commonly described as No. 73 Beaumont Street. At the time of decedent's death, September 2, 1946, the property was subject to a deed of trust executed by him and his wife to a corporation as trustee for a bank. At the time of the transaction here involved there was $3,834.52 owing under the deed of trust. In November of 1946, plaintiff, through her attorney, in compliance with section 780 of the Probate Code, published a notice of sale containing the following statement: "Terms and conditions of sale. Purchaser to assume the payment of and take the property purchased by him, subject to all the State and County taxes and whatsoever assessments of whatsoever name or nature which are now or may hereafter be charged as a lien against the property purchased by him."

Subsequent to the giving of the notice of sale one Alexis M. Derkatch and one Joseph Tourtouret, a real estate broker representing Derkatch, called at the office of plaintiff's attorney. They presented to the attorney a printed form entitled "Uniform Agreement of Sale and Deposit Receipt", customarily used by real estate brokers for the making of offers to purchase real property and which called for the payment of a real estate commission by the estate. The attorney refused to accept the offer because it included the commission. The following bid was submitted on behalf of Derkatch: "I, the undersigned Alexis M. Derkatch hereby bid the sum of 11,450 00/100 Dollars for the real property No. 73 Beaumont Street, San Francisco, and herewith accompany said bid with check for $1,145.00 Less 2.50 cash Dollars, being ten (10) per cent of the amount bid for said real property at said 73 Beaumont Street. It is distinctly understood and agreed that said check for $1,145.00 less $2.50 cash shall be forthwith delivered back to me, or my agent, in the event I shall not become the owner of said property on confirmation of the sale of the same by order of the Superior Court of the State of California in and for the City and County of San Francisco in the Matter of the Estate of Earl L. Main, deceased." Plaintiff accepted this offer. Evidently the question of the existence of any deed of trust was not discussed by the parties. No contention is made that there was any express representation concerning the absence of any deed of trust. On December 10, 1946, an order confirming the sale was made by the superior court in compliance with section 755 of the Probate Code.

The notice of sale, the purchaser's bid which was accepted by the seller, and the order of confirmation, construed together, did not expressly obligate the seller to convey the real property free of the deed of trust. It is defendant's contention, however, that the sale was such that the seller's obligation to convey free and clear is implied by law. See Civil Code, section 1113.

On December 20, 1946, plaintiff's attorney deposited with defendant a deed to the property, dated December 11, 1946, from plaintiff to Derkatch. He received in return a "receipt for papers" which constitutes plaintiff's Exhibit A, attached to the complaint. Plaintiff's cause of action is based on this document.

This document instructed defendant to record the deed upon the receipt of the sum of $11,450, less $12.65 for revenue stamps, and less $1145 which was the deposit made by Derkatch. The printed word "pay mortgage—deed of trust" were followed by a blank space. Defendant produced no evidence that it was expressly authorized to pay off the above-mentioned deed of trust, but when it received the purchase price from Derkatch it paid off the deed of trust. After making further deductions for recording charges, it tendered plaintiff the balance amounting to $6,456.73, which plaintiff refused to accept. Subsequently the present action was instituted.

The court found that plaintiff delivered a deed in proper form and that "the said plaintiff then and there instructed and authorized the said defendant title company, and the said defendant then and there undertook and agreed, to deliver or record the said deed upon receipt by the said defendant for the plaintiff of the sum of eleven thousand four hundred fifty dollars" subject to certain disbursements mentioned in the "receipt for papers". The court also found that the deed had been delivered and recorded by the title company in conformity with the instructions; that after the instructed disbursements there was held by the title company $10,292.35, together with an interest thereon from the date of the delivery of the deed until the entry of judgment. The court further found that the title company had paid the beneficiary of the deed of trust $3,834.52, the then amount of the indebtedness secured by the deed of trust. It was further found that such payment was without authorization from the plaintiff or any other person and that in none of the documents connected with the sale was the lien of the deed of trust mentioned.

From an examination of the pleadings and proof, it appears that there is no merit to defendant's contention that the following finding is outside of the issues, and must therefore be disregarded: "That the defendant title company did, on the 28th day of December, 1946, deliver and record the said deed of conveyance in conformity to said instructions and authority, and did thereupon receive for the use and benefit of plaintiff the said sum of $11,450.00, and did disburse out of the same the said sums of $12.65 and $1,145.00, leaving a balance had and received, and then and there held by the defendant to and for plaintiff's use and benefit, of $10,292.35; that although plaintiff has made demand upon defendant for the payment thereof, the defendant has failed, neglected and refused to pay to plaintiff the said sum of $10,292.35, and said sum is, together with interest thereupon at the rate of seven per cent per annum from December 28, 1946, until the entry of judgment herein, due and owing from defendant to plaintiff."

[1, 2] The trial court properly found that the action was one for money had and received. While it is true that there is no specific allegation in the complaint that the defendant did actually collect and receive moneys for plaintiff's use and benefit, the omission was cured by defendant's allegation in the answer that "the purchaser of said real property, caused to be deposited with the said City Title Insurance Company the balance of the purchase price of said real property * * *" The proof to this effect is uncontradicted. Furthermore, the alleged defect claimed by defendant cannot be raised for the first time on appeal. Bouey v. Porterfield, 96 Cal.App. 674, 274 P. 766; Colbert v. Colbert, 28

Cal.2d 276, 169 P.2d 633; Hart v. Olson, 68 Cal.App.2d 657, 157 P.2d 385; see also 24 Cal.Jur. 981.

Defendant contends that the record does not support the court's finding "That it is not true that the said Alexis M. Derkatch did purchase the real property the subject matter of said deed of conveyance of and from the plaintiff as administratrix of the Estate of Earl L. Mains, deceased, or otherwise, free and clear of, and not subject to, the lien and encumbrance of the said deed of trust, and it is not true that the plaintiff, as administratrix, or otherwise, did so sell said real property to him."

To support this contention, defendant urges that the sale involved herein, which was made pursuant to Probate Code sections 754, 755 and 756, obligated plaintiff to convey the real property "free and clear of the deed of trust". See Civil Code, sec. 1113. Plaintiff, however, in making the sale was an instrument of the law in the transfer of the title held by the estate. "The deed of the representative is in fact but a quit-claim deed * * * The representative merely sells such title as the estate may have and, unless the court otherwise orders, the purchaser takes the property subject to all encumbrances, such as an existing deed of trust." 11b Cal.Jur. 165-167. See also Blankenship v. Whaley, 124 Cal. 300, 57 P. 79; Miller & Lux v. Gray, 136 Cal. 261, 68 P. 770; In re Estate of Wickersham, 139 Cal. 652, 73 P. 541; In re Estate of Verwoert, 177 Cal. 488, 171 P. 105; Texas Co. v. Bank of America, etc., Ass'n, 5 Cal.2d 35, 53 P.2d 127; Hamilton v. Elvidge, 132 Cal.App. 21, 22 P.2d 239.

It is true, as pointed out by defendant, that in 1919 the requirement that "No sale of any property of an estate of a decedent is valid unless made under order of the superior court" (former Code Civ.Proc. sec. 1517, as amended by Stats.1880, p. 92) was abandoned in favor of the provision that "The executor or administrator may sell any property of the estate of a decedent without order of court, and at either public or private sale," but that "no sale of such property is valid unless" reported, under oath, to and confirmed by the court. (Stats.1919, p. 1178; basis of present Probate Code, secs. 754, 755.) It has been said that "there is doubt whether a probate sale under the present provisions can be considered as a judicial sale * * *" 11b Cal.Jur. 39. However, the change made by the legislature is mainly procedural for now "the questions whether a sale is necessary for payment of debts, expenses of administration, or legacies, and whether a sale would be for the advantage, benefit, and best interests of the estate, as provided in section 1536 (now Prob.Code sec. 754), are now to be decided upon the hearing of the return of sale and application for confirmation thereof, instead of upon the hearing of the petition for an order of sale as formerly provided by sections 1540, 1542, 1543 and 1544, which sections were repealed by the amending act of 1919." In re Estate of Benvenuto, 183 Cal. 382, 384-386, 191 P. 678; see also Wood v. Roach, 125 Cal.App. 631, 636-637, 14 P.2d 170.

Appellant argues that In re Estate of Backesto, 63 Cal.App. 265, 218 P. 597, is authority for holding that the sale by an administratrix involved herein is not a judicial sale. In that case this court held that a sale made pursuant to an express direction in the will was not a judicial sale even though title would not pass until confirmation of the sale as "it was made under the express and mandatory directions contained in the will of the deceased" 63 Cal.App. page 269, 218 P. page 598, and that there was an implied covenant of clear title. To the same effect, see In re Pearsons' Estate, 98 Cal. 603, 33 P. 451; see also In re Estate of Isaman, 68 Cal.App.2d 755, 157 P.2d 872. Respondent distinguishes the Backesto case on the ground that in the present case the requirements of Probate Code sections 754–756 as to proper notice and proof at a hearing that the sale is for the benefit of the estate had to be met, whereas, "When property is directed by the will to be sold, or authority is given in the will to sell property, the executor may sell the same either at public auction or private sale, and with or without notice, as he may determine; but he must make a return of sales and obtain confirmation thereof as in other cases. In either case no title passes unless the sale is confirmed by the court; but the necessity of the sale, or its advantage or benefit to the estate or to those interested therein, need not be shown. If directions are given in the will as to the mode of selling, or the particular property to be sold, such directions must be observed." Probate Code sec. 757.

[3] Whether the sale by the administratrix involved herein can be properly termed a judicial sale or not, upon its confirmation by the Superior Court on December 10, 1946, in compliance with Probate Code section 755, plaintiff was merely bound to "convey all the right, title, interest and estate of the decedent in the premises at the time of his death." Prob.Code, sec. 786. This court held in Hamilton v. Elvidge, supra, 132 Cal.App. at page 26, 22 P.2d at page 241, that a buyer at a probate sale "is subject to the maxim of caveat emptor, and takes without warranty of the title of the decedent" and "under the plain terms of the statute is entitled to all of the right, title, interest, and estate that the decedent owned at the time of his death or which his estate may have acquired subsequently." The appellate courts of California have not held that the 1919 legislative changes resulted in a change in the rule that "an administrator, in making sales of real estate, is the mere instrument of the law to transfer such title, and only such title, as is held by the estate." Miller & Lux v. Gray, supra, 136 Cal. at page 263, 68 P. at page 771. On the contrary, decisions rendered prior to 1919 are cited as authority. Texas Co. v. Bank of America, etc., Ass'n, supra.

[4] As plaintiff's deed was in fact but a quitclaim deed there is no need to consider that in normal inter vivos transactions "where one makes a contract to sell and convey, without any provision as to the title or encumbrances, the law implies an agreement on his part to convey a good title free from encumbrance. And if certain encumbrances are specifically provided for, there is an implied agreement that the title shall be conveyed free from others." 25 Cal.Jur. 635.

[5] Defendant also contends that the finding hereinabove quoted is in the form of a negative pregnant and is in effect a finding that Derkatch purchased the property free and clear of the deed of trust. The finding is that it is not true that the property was purchased "free and clear of, and not subject to" the deed of trust. As the meaning of the words on either side of the "and" is substantially the same, no confusion appears in said finding, and thus Mardesich v. C. J. Hendry Co., 51 Cal.App.2d 567, 572-575, 125 P.2d 595, is not in point.

[6] As plaintiff did not expressly authorize or consent to the payment of the deed of trust and as she was not obligated to convey the property free of said encumbrance, it follows that the court correctly found "That the payment of the amount then due upon said deed of trust by the defendant as aforesaid, was voluntary, without right and of its own accord and was without the authority, authorization, consent or instructions of or from the plaintiff, or of or from the said Alexis M. Derkatch, or of or from any other person, firm or corporation whomsoever, and that the said sum of $3,834.52 so paid by the defendant to the Bank of America N. T. & S. A. on the indebtedness secured by said deed of trust is not chargeable to or against, or collectible from, the plaintiff herein, or to or from the Estate of Earl L. Mains, deceased." Similarly, as the "receipt for papers" did not authorize defendant to pay any deed of trust, the court correctly found that defendant agreed "to deliver or record the said deed upon the receipt by the said defendant for the plaintiff of the sum of eleven thousand four hundred fifty dollars ($11,450.00), of which said sum the plaintiff then and there instructed and authorized the defendant, and the defendant undertook and agreed, to disburse the sum of $12.65 for federal revenue stamps to be affixed to said deed by defendant for plaintiff, and the sum of $1,145.00 to be allowed the grantee in said deed as and for a credit for a like sum theretofore paid and deposited by him * * *"

[7, 8] In defendant's reply brief it is argued for the first time that even if defendant had no implied authority to act, so that it was a mere volunteer, plaintiff should not be allowed to recover because plaintiff has not acted fairly and equitably. It is true that an action for money had and received, which is the nature of the present action, is governed by principles of equity, although the action is one at law. Philpott v. Superior Court, 1 Cal.2d 512, 36 P.2d 635, 95 A.L.R 990; Stone v. Superior Court, 214 Cal. 272, 4 P.2d 777, 77 A.L.R. 743. Here the court impliedly found that such principles had not been violated. The record supports this finding. Although plaintiff knew that there was a deed of trust outstanding, she did not know it was to be paid until defendant had done so; and the real benefit of such payment accrued, not to plaintiff, but to the purchaser, since plaintiff was not obligated to convey the property free of the deed of trust. Miller & Lux v. Gray, supra; Texas Company v. Bank of America, etc., Ass'n, supra; Hamilton v. Elvidge, supra.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

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91 Cal.App.2d 295

REFRIGERATION DISCOUNT CORPORATION et al. v. SUPERIOR COURT OF CALIFORNIA, IN AND FOR COUNTY OF TEHAMA.

Civ. No. 7661.

District Court of Appeal, Third District, California.

April 15, 1949.

1. Venue 🔑80

Where a trial court in which cause of action is originally filed has jurisdiction to pass upon motion for change of venue and makes and enters its order granting motion and transferring cause to another proper county for trial, court of such county immediately acquires sole jurisdiction and court granting motion has no power to make any further order in the premises.

2. Corporations 🔑666

Superior Court of Los Angeles County which was residence and principal place of business of foreign corporation was under venue statute, a proper court to which could be transferred for trial an action against corporation on obligation of corporation, and hence order of Superior Court of Tehama County in which action was instituted transferring action to Los Angeles Court was not void on its face and cause was immediately transferred to Los Angeles Court and Tehama Court lost jurisdiction and could not thereafter revoke such order. Code Civ.Proc. §§ 395–397; Const. art. 12, § 16.

◆

Original prohibition proceeding, instituted in the Supreme Court and transferred to the District Court of Appeal, by the Refrigeration Discount Corporation, a corporation, and T. B. McQuaid, against the Superior Court of the State of California, in and for the county of Tehama.

Writ granted.

Oswald G. Ingold and Henry Poppic, both of Berkeley, for petitioners.

Edward M. Moore, D. A., of Red Bluff, for respondent.

THOMPSON, Justice.

This is a petition for a writ of prohibition to restrain the Superior Court of Tehama County from proceeding to try a cause after having formally made and entered its order granting a motion for change of venue, and thereby transferring the cause to Los Angeles County.

No answer to the petition in this proceeding was filed. The complaint in the original action which was filed in Tehama County is not before this court. However, it does appear from the petition that an action was filed in Tehama County, entitled "Chauncey T. Burgess, as Trustee for Jack Kerr, under assignment for the benefit of creditors, Plaintiff, vs. Refrigeration Discount Corporation, a corporation, and T. B. McQuade, Defendants", to which complaint the defendants filed a demurrer. At the same time, this petitioner moved the court for a change of the place of trial, under Sections 396 and 397 of the Code of Civil Procedure, to the County of Los Angeles, which is the residence and principal place of business of the defendant corporation. The motion was duly presented upon written notice and demand, together with an affidavit of merits as required by law. An opposition to the motion was filed by plaintiff. The motion was heard upon affidavits. Petitioner's affidavit avers facts showing that it is a foreign corporation with its residence and place of business at Los Angeles as the proper place of trial, and that the other defendant, T. B. McQuaid [named in the suit as T. B. McQuade] is a resident of Alameda County. Plaintiff's affidavit in opposition to the motion avers that the obligations upon which the complaint was based "are due and payable in the County of Tehama". After hearing and arguments by respective counsel, the court made and entered a minute order on January 6, 1949, granting the motion to transfer the cause to Los Angeles County. Subsequently, upon notice to the corporation, on motion of the plaintiff to reconsider and vacate the order transferring the case for trial to Los Angeles, the court, over written opposition and protest of this petitioner on the ground that the Tehama court had lost jurisdiction of the cause, made an order vacating the order for a change of place of trial on the ground that it "is void upon its face," and thereupon denied the motion for change of venue. The order is not void upon its face, or at all. This petition for a writ of prohibition was filed in the Supreme Court on February 2, 1949, and transferred to this court on February 10th.

[1] We are convinced the Tehama court was without jurisdiction to reconsider or to set aside the former order which it had formally made and entered granting petitioner's motion for change of venue, which thereby instantly transferred the cause for trial to Los Angeles. That former order was not void on the face of the proceedings. When the motion for reconsideration was presented the cause was pending in Los Angeles County Superior Court, and the Tehama court lacked jurisdiction to revoke the order. The California authorities are uniform to the effect that when a trial court in which a cause of action is originally filed has jurisdiction to pass upon a motion for change of venue, makes and enters its order granting the motion and transferring the cause to another proper county for trial, the latter court immediately acquires sole jurisdiction, and the court which grants the motion "has no power to make any further order in the premises." Chase v. Superior Court, 154 Cal. 789, 792, 99 P. 355, 356; Searcy v. Superior Court, 47 Cal.App. 124, 190 P. 202; Searcy v. Kay, 46 Cal.App. 792, 190 P. 49; Foote v. Superior Court, 122 Cal. App. 519, 10 P.2d 539; 25 Cal.Jur. p. 913, sec. 45.

In the Chase case, supra, the Supreme Court said:

> "* * * We are of the opinion that the action was transferred to Santa Clara county when the order was finally made and entered in the superior court of the city and county of San Francisco. There must be a moment of time when the court transferring the case loses jurisdiction, and the court to which it is transferred acquires jurisdiction. When the court to which the action is transferred acquires jurisdiction, the court which made the order transferring it has no power to make any further order in the premises."

Likewise, in the case of Searcy v. Superior Court, supra, the court said:

> "When the court made its order transferring the cause to the superior court of the city and county of San Francisco, it thereby lost, for all purposes, all jurisdiction of the action. [Citing cases.]"

There are cases which hold that, within proper limitations, a court has power to amend or revoke an order for change of venue *within the term during which it was granted*. Watson v. State, 177 Ark. 708, 7 S.W.2d 980, 59 A.L.R. 356, 362. But those cases have no application to the present statutes of California, for the reason that the *terms* of trial courts no longer exist in this state. They have been abolished. Brackett v. Banegas, 99 Cal. 623, 627, 34 P. 344; 7 Cal.Jur. 607, sec. 23.

The case of Foote v. Superior Court, supra, upon which the respondent in this case relies, is not in point. That case merely held that because the trial court inadvertently transferred the case "to the wrong court," which could not possibly acquire jurisdiction, the court which made that order *exceeded its jurisdiction,* and the court to which it was wrongfully transferred "must decline to entertain it." In the present case no such erroneous transfer was made. The cause was transferred to Los Angeles, which is the residence and principal place of business of the foreign corporation. That was a proper court to which the cause was authorized, by Section 395 of the Code of Civil Procedure, to be transferred for trial. That section provides in part:

"* * * When a defendant has contracted to perform an obligation in a particular county, either the county where such obligation is to be performed, or in which the contract in fact was entered into, *or the county in which the defendant, or any such defendant, resides at the commencement of the action, shall be a proper county for the trial of an action founded on such obligation,* * * *." (Italics added.)

That section is in exact accord with Article XII, Section 16, of the California Constitution in that regard. It provides that:

"A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases."

[2] We conclude that the Tehama court erred in vacating the order granting the change of venue to Los Angeles County. It was without jurisdiction to set aside the former order for a change of venue. The cause was immediately transferred to the Superior Court of Los Angeles County, where it is now pending. The Tehama court is therefore without jurisdiction to pass upon the pending demurrer, or to try the cause.

The writ of prohibition is granted, as prayed for.

ADAMS, P. J., and PEEK, J., concur.

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91 Cal.App.2d 401

PRATT v. HODGSON.

Civ. 3771.

District Court of Appeal, Fourth District, California.

April 22, 1949.

1. Easements 🔑36(3)

Substantial evidence showed a user sufficiently continuous to establish an easement by prescription for a right of way for road purposes over lands of defendant for purposes of ingress and egress to garage and barn of plaintiff.

2. Appeal and error 🔑1010(1)

Generally whether use of right of way is adverse and hostile or whether it is permissive is a question of fact and if there is any substantial evidence to support a finding of adverse hostile use the findings of the trial court must be sustained.

3. Easements 🔑36(3)

Where a right of way for a road over lands of defendant to garage and barn of plaintiff had been used for many years, fact that a sign was posted at or near right of way reading "private entrance revocable to pass at any time" did not conclusively show that use was only permissive as to plaintiff, where plaintiff did not believe nor was she ever told by defendant that sign was intended for her or her tenants.

◆

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by Julia May Pratt against Arthur K. Hodgson for an injunction against interfering with an easement by prescription for a right of way. Judgment for plaintiff and defendant appeals.

Affirmed.

Guy Knupp, Jr., of Porterville, for appellant.

Jamison & Jamison, of Porterville, for respondent.

GRIFFIN, Justice.

Plaintiff brought this action against defendant alleging ownership of a lot near Porterville 365.65 feet in depth with a south frontage of 75 feet on Grand Avenue. Defendant owned a tract of 2.7 acres immediately west of plaintiff's lot. Plaintiff claims a right of way for road purposes over the easterly 21 feet of defendant's tract extending to her northerly lot line. Plaintiff's lot is occupied by a residence, barn, garage and a chicken house. Defendant's acreage was previously occupied by a residence, garage and other out-buildings, but all were removed at the time he purchased it in 1944. Plaintiff's husband, now deceased, acquired this lot in 1922 from one Hearn and lived thereon with plaintiff, his wife, until 1927. In 1937, plaintiff moved back onto the property. During the interim it was occupied by tenants. Plaintiff acquired title under a decree of distribution from her husband's estate in 1930. Defendant acquired his property in 1944 from one Heindel, who acquired it from one Hearn in 1930.

Plaintiff, her tenant, and predecessors in interest made various uses of the claimed right of way since the lot was acquired in 1922. It was mainly used for the purpose of giving access to her garage, barn and chicken houses, but the way also extended beyond the garage to the northerly line of her lot.

Plaintiff claims that the right of way is appurtenant to her land, has been used openly, notoriously, continuously, and adversely to defendant and his predecessors for more than 30 years, and claims an easement by prescription. The evidence showed that while plaintiff was temporarily away from her property defendant plowed up the right-of-way shortly before this action was filed, but plaintiff continued to use it thereafter. An injunction is sought enjoining defendant from destroying it, to require him to replace it in its former condition, and other general relief is sought.

Defendant denied all material averments of the complaint except he admitted that plaintiff had used the alleged right of way for ingress and egress, but did so only "sporadically". The trial court granted the injunction, found generally for plaintiff, and required defendant to replace the right of way or in lieu thereof pay plaintiff for doing so. Defendant appeals mainly upon the ground that the evidence is insufficient to show (1) User sufficiently continuous to establish an easement by prescription; and (2) To show that the user was hostile and adverse, as distinguished from merely permissive.

Defendant on appeal concedes that such use as made was continuous for at least five years and such use was open and notorious, but claims it was sporadic and not sufficient as a matter of law.

Plaintiff testified that the only way she had of getting into her garage and barn was by means of this right of way; that she had gravel hauled in on several occasions to improve it; that while they were living there she and her husband "used it all of the time"; that Hearn "was using it when they bought the property from him"; and that that was the only way he had to get to his garage and barn. Prior to the time the houses and garage on defendant's property were removed this same roadway was used for ingress and egress to and from that property.

Much reliance is had upon the fact that a sign was posted at or near the right of way reading "Private Entrance, Revocable to Pass at any Time", indicating that the use thereof was merely permissive and not adverse. Plaintiff testified that such a sign was not posted on the strip but there was some "sign over further", but she never paid any attention to it; that it had been there a "long time" but she didn't think it was there in 1922 when they purchased the property; that she thought, when they bought the property, the road belonged to it.

Plaintiff's son testified that he remembered the property in 1922; that the roadway was there; that it was used by plaintiff, himself, and others; that his brother lived on the property as tenant from 1928 to 1937 and he used it "more or less frequently"; that another tenant, Premo, used it for access to his garage; that Hearn used it for a driveway before his parents purchased the property; that he saw a sign on the west side of the roadway, 10 or 15 feet back, which said something "about private road" and that it was put there after the place was purchased in 1922; that "it was so far from the roadway and the lettering was such, I never assumed it had any reference to our roadway * * * if it had any significance it was in reference to the Lipscomb property"; that that was his "impression".

Defendant testified that there were improvements on his premises when he bought it in 1944, and he entered his garage through this private lane; that in 1947 his buildings were removed and that he ordered the roadway plowed up but did not speak to plaintiff about it; that when he purchased the property there was a sign up, just west of the road, reading "private road" but after he moved the houses he did not know if there was one there; that he knew the driveway was there many years before he purchased the property and he presumed the plaintiff was using it to get into her garage.

Mr. Hearn testified that at one time he owned both parcels of land involved; that the driveway was there when he bought the property and he recalled seeing a sign "Private Driveway" on a palm tree facing Grand Avenue; that this was when his tenant Lipscomb lived there; that he lived on the Pratt property for a while in 1920 and used this same driveway for his garage and for general use; that he put up the sign at Heindel's request; that Heindel did not say anything at that time about keeping the Pratts off the driveway.

Mrs. Lipscomb testified that she lived on the defendant's property from 1926 to 1946; that the same driveway led to both garages which were about opposite each other and that the sign was there in 1926 and continued to be there until 1946; that Pratts and their tenants continued to use the roadway between those years; that at one time the driveway from the garage to the barn was plowed up and planted to grain but Pratts continued to use it at all times.

[1, 2] There is substantial evidence to show a user sufficiently continuous to establish an easement by prescription. Sec. 459 Restatement of the Law of Property; O'Banion v. Borba, 32 Cal.2d 145, 147, 195 P.2d 10. As a general rule the question as to whether the use was adverse and hostile or whether it was permissive is a question of fact and not one of law, and if there is any substantial evidence to support a finding of adverse hostile use the findings of the trial court must be sustained. O'Banion v. Borba, supra.

The cases relied upon by defendant, such as Tarpey v. Veith, 22 Cal.App. 289, 134 P. 367; Jones v. Tierney-Sinclair, 71 Cal.App.2d 366, 162 P.2d 669; Carroll v. Agliano, 80 Cal.App.2d 46, 180 P.2d 747, involve posted roadways. In upholding the findings that the use was only permissive, it was held that the existence of a sign would tend to negative any possible presumption that the use was adverse or that it indicated such fact.

[3] It appears, therefore, that such a posted sign as here displayed was only one of the many factors to be considered by the trial court and the existence of the sign did not conclusively show that the use was only permissive as to plaintiff. In the instant action both plaintiff's and defendant's property was previously owned by the same person who used this roadway for the joint benefit of both properties in gaining access to the garages, barns and for general use. It was used as such for over 20 years. During this period one owner, as successor in interest, determined that he had the exclusive ownership of the driveway. A sign was posted at or near the entrance to it indicating to the general public that as far as this one purported owner was concerned it was a "private driveway" or "private entrance".

The record indicates that insofar as plaintiff was concerned, she did not believe nor was she ever told by defendant that this sign was intended for her or her tenants. She believed that this right of use belonged to the property at the time she purchased it. She maintained this right throughout the many years of occupancy and did not believe it was a mere matter of neighborly accommodation. The cases cited by defendant and the general rule applicable are ably discussed in the O'Banion case, which is particularly applicable to the instant case. It was there determined, as it must be here, that there was ample evidence from which the trial court could conclude that plaintiff's use was continuous, uninterrupted, adverse, and under a claim of right, with notice of which defendant and his predecessors could be charged.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

HANNULA v. HACIENDA HOMES, Inc.

Civ. 13854.

District Court of Appeal, First District,
Division 2, California.
April 13, 1949.
Hearing Granted May 16, 1949. *

Judgment 🔑720

The effect, as res judicata, of judgment determining that portion of lot in residential subdivision was not a suitable building site for house, was limited to determination of power of subdivider under restrictions involved to determine that a portion of a lot is not a suitable building site, leaving open question of propriety of subdivider's action on any future application that might be submitted to subdivider to build a particular structure on portion of lot.

◆

On rehearing.

Rehearing denied.

Prior opinion, *203 P.2d 562*.

Nathan G. Gray, of Berkeley, for appellant.

Breed, Robinson & Stewart, of Oakland, for respondent.

PER CURIAM.

On petition for rehearing appellant asserts that the only question actually litigated in the trial court was the question of the power of respondent to determine that a portion of a lot is not a suitable building site and that the question of the reasonableness of that determination in this case was by agreement of the parties not submitted to the trial court. From an examination of the record this seems to be correct. In affirming the judgment therefore we expressly hold that its effect as res judicata is limited to the determination of the power of respondent in a proper case under the restrictions involved to determine that a portion of a lot is not a suitable building site, leaving open the question of the propriety of respondent's action upon any future application which may be hereafter submitted to respondent to build a particular structure on the portion of the lot owned by appellant.

Rehearing denied.

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91 Cal.App.2d 123

GERSTNER v. SCHEUER et al.

Civ. 16863.

District Court of Appeal, Second District,
Division 2, California.
April 5, 1949.

1. Tenancy in common 🔑38(8)

Evidence sustained finding that plaintiff and defendants agreed to purchase realty as tenants in common, and pursuant to such agreement plaintiff gave defendants his contribution to apply to purchase price, and plaintiff was entitled to a proportionate interest in realty.

2. Appeal and error 🔑994(3), 1010(1)

Credibility of witnesses as well as clarity and sufficiency of evidence are matters within exclusive province of trial court, and determination thereof upon

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* Subsequent opinion 211 P.2d 302.

substantial evidence will not be upset on review.

3. Trusts 🔑63½, 72

When a person delivers money to another who uses it to acquire realty, a trust is presumed to result in favor of person by or for whom such payment is made, and neither a written agreement for use to which money paid was to be applied nor fraudulent act of recipient of money is essential to a resulting trust. Civ.Code, § 853.

4. Trusts 🔑79

Where realty was purchased by defendants with money given to them by plaintiff, trust resulted in favor of plaintiff and entitled plaintiff to an interest in realty in proportion his contribution bore to purchase price. Civ.Code, § 853.

5. Trusts 🔑79

Where plaintiff and defendants agreed to purchase realty as tenants in common and plaintiff agreed to contribute $2,400 to purchase price, $700 payment subsequently paid by plaintiff to defendants to pay off second mortgage to bring his contribution up to agreed amount was properly included as a part of his trust interest in realty. Civ.Code, § 853.

6. Trusts 🔑373

Finding that plaintiff's interest in realty was free of an indebtedness which was secured by deed of trust executed by defendants after acquisition of realty by money given to them for that purpose by plaintiff was not void on ground there was no allegation with respect to such lien where no motion was made to strike such finding and trial continued to argument and decision on theory that such trust deed was an issue in the case. Civ.Code, § 853.

7. Appeal and error 🔑1039(13)

Where parties at trial treat an issue as though it had been presented by pleadings, and judgment adjudicates that issue, it is not a prejudicial error that complaint wholly omits an allegation thereof.

8. Trusts 🔑142

Where defendants executed a deed of trust on realty acquired by money given to them for that purpose by plaintiff, resulting trust interest of plaintiff in realty was not subject to deed of trust subsequently placed thereon by defendants. Civ. Code, § 853.

◆

Appeal from Superior Court, Los Angeles County; Paul Nourse, Judge.

Suit by John E. Gerstner against Seymour Scheuer and Paula Scheuer to enforce a trust upon certain realty. From a judgment for the plaintiff, defendants appeal.

Affirmed.

Thomas W. Le Sage, of Pasadena, for appellants.

David Press, of Pasadena, for respondent.

MOORE, Presiding Justice.

Plaintiff sued to enforce a trust upon lot 9, Harvard View Tract in the city of Pasadena, to the extent of his contribution of the purchase price. From a judgment awarding him 48/115 interest in the property, defendants appeal. The judgment is attacked upon the grounds that (1) the finding of an oral agreement on July 28, 1944, of trust in cotenancy is not supported; (2) error in including respondent's payment of $700, February 5, 1945, as a part of his trust interest; (3) error in charging appellants' share only with the trust deed lien of $5,500 executed by appellants after February 5, 1945.

The Findings

The court found that on July 28, 1944, the parties agreed to purchase lot 9 as tenants in common for the sum of $5,750; respondent promised to contribute $2,400 of the purchase price, the balance to be paid by appellants; pursuant to such agreement, respondent on the same day gave appellants $1,700 in cash to apply on the purchase; defendants purchased the lot and paid Raoul Hetu, the owner, $5,000, executed a note to other parties in the sum of $3,500 and a trust deed securing same on lot 9, also a note to Hetu for $750 and a trust deed securing that note, as a second lien, but appellants took title in their own names subject to the two liens. On February 5, 1945, respondent gave appellants $700 for the purpose of paying Hetu the balance due on the note of $750 and they used it for that purpose. On the last mentioned date without the knowledge of respondent appellants paid off the $3,500 note, but contemporaneously borrowed $5,500 and to secure its payment gave a deed of trust on lot 9 which is the only encumbrance on the title. However, plaintiff is found to be the owner of 48/115 interest which, as between the parties, is free from the $5,500 debt.

The Evidence Supports the Finding.

The evidence adopted shows that the parties had been intimate and confidential friends since 1937 when they resided in Florida. After Mrs. Gerstner deceased, December 27, 1943, appellants and Mrs. Scheuer's mother moved into respondent's home and the four occupied the household and lived as one family, "on a 50-50 basis, half and half." The Scheuers were 50 and 52 years of age; respondent was 64 when they drove to California in his automobile, arriving July 19, 1944. Appellants were hearty and hale while respondent was a sufferer from asthma. Respondent then had $3,169 in money in addition to valuable personalty. Shortly after reaching Los Angeles they commenced to search for a home. After some inquiries and negotiations they determined upon lot 9 for which Mr. Hetu demanded $5,750 of which $2,500 should be cash. Respondent replied in the presence of appellants, "I couldn't begin to pay anything like that." Two days later the owner agreed to accept $1,500 cash as the down payment and a second mortgage for $750. At that time respondent "handed Mr. Scheuer $1,750 in the bank," left the deal in the hands of appellants as his "trusted friends" and told them the property "was to be bought for all of us. * * * I was in very ill health and had intentions of going away." In order to consummate the transaction appellants procured a loan on the property in the sum of $3,500. When respondent asked about the inclusion of his name on the deed as a grantee, Mr. Scheuer replied, "We can take care of that later." All three occupied the house on August 5, 1944. Respondent purchased furnishings for it during the succeeding six months. On February 5, 1945, he gave Mr. Scheuer $700 to pay off the second mortgage. At that time he had already learned that the title to lot 9 was vested in appellants' names only. Although he asked Mr. Scheuer a dozen times between July 28, 1944, and February 19, 1945, whether his name was "in the title" Scheuer's uniform reply was that "the papers had not come back." At no time was respondent informed that he had no interest in the home. On his departure for Nevada, February 19, 1945, on account of his health, Mrs. Scheuer stated that she would take care of his jewelry for his old age. At about the same time respondent executed a will in favor of appellants as his "good friends."

He returned to Pasadena June 29, 1946. There was no dispute of the evidence that during his absence and without his knowledge appellants had executed a first trust deed on the property to secure their promissory note in the sum of $5,500 which they used to discharge the $3,500 lien placed against the property at the time of the purchase.

The Evidence Was Unambiguous.

[1, 2] Appellants contend that an oral agreement of trust in cotenancy is not supported by clear, convincing and unambiguous evidence. The court made no such finding but did determine that "plaintiff and defendants entered into an oral agreement wherein and whereby they agreed to purchase as tenants in common" the property in question. The evidence is clear, convincing and unambiguous. It was neither surmise nor conjecture but on the contrary it supplied satisfactory proof of respondent's payment to appellants of the $2,400 to be applied and which was applied on the purchase of lot 9. The testimony of respondent is ample and convincing evidence that the $2,400 was given to make the particular purchase and sustains the finding. Viner v. Untrecht, 26 Cal.2d 261, 267, 158 P.2d 3; Beeler v. American Trust Company, 24 Cal.2d 1, 7, 147 P.2d 583; Tobola v. Wholey, 75 Cal.App.2d 351, 355, 170 P.2d 952. The credibility of the witnesses as well as the clarity and suf-

ficiency of the evidence are matters within the exclusive province of the trial court (ibidem) and the determination thereof upon substantial evidence will not be upset on review. Beeler v. American Trust Company, supra; Andrade v. Newhouse, 54 Cal.App.2d 339, 343, 128 P.2d 927.

A Resulting Trust

[3-4] But the judgment must be upheld upon another principle. While the finding is that the parties entered into an oral agreement in July, 1944, for the purchase of lot 9 as tenants in common whereby respondent "agreed to contribute" $2,400 to the purchase price he is not dependent upon the terms of an express trust arising out of such parol agreement but rather upon the resulting trust. When a person delivers money to another who uses it to acquire real property, "a trust is presumed to result in favor of the person by or for whom such payment is made." Civ.Code, sec. 853; Mazzera v. Wolf, 30 Cal.2d 531, 537, 183 P.2d 649. Neither a written agreement for the use to which the money paid was to be applied nor the fraudulent act of the recipient of the money is essential to a resulting trust. It arises by virtue of section 853, supra, in favor of him who furnished the money. Bradley v. Duty, 73 Cal.App.2d 522, 526, 166 P.2d 914. Not only did appellants fail to discern that they are resulting trustees by virtue of accepting and using respondent's money but they now prolong their contentions by asserting that the court erred in decreeing an oral agreement of trust "made after actual transfer of the property." Such was not the meaning of the judgment. The rights of respondent determined by the trial court's decision stem from the findings that his $1,700 and his $700 were delivered to appellants to apply to the purchase of lot 9. Respondent's interest in the property arose the moment his money was paid to the vendor and does not in any respect arise from any "agreement" made after the purchase.

The $700 Part of the Purchase Price

[5] It is contended that the court "erred in including Gerstner's payment of $700 on the second mortgage as a part of his alleged trust interest." The finding is that the parties agreed to make the purchase as tenants in common and that respondent "agreed to contribute to the purchase price * * * $2400." The proof was that he then and there paid $1,700 to appellants and told the vendor he "would see that the second mortgage was paid off" as soon as he sold his Miami property. He made the payment on February 5, 1946, prior to which day appellants had not asserted ownership to his exclusion.

[6, 7] Finally, appellants contend that the finding that respondent's interest in lot 9 is free and clear of the $5,500 indebtedness which appellants secured by a new deed of trust on the home after their acquisition thereof is void because there was no allegation in the complaint with respect to such lien. It is true that no mention of the $5,500 note given by appellants is to be found in respondent's pleading. But the evidence of the subsistence of the trust deed securing that sum was received without objection; no motion was made to strike it; and the trial continued to argument and decision on the theory that such trust deed was an issue in the case. Moreover, no objection appears to have been made to the findings in any respect and at the argument on the motion for a new trial, the transcript of the proceeding discloses that not a word was said with respect to an error in exempting respondent's interest in the property from the obligation to pay the $5,500. Therefore, despite respondent's failure to present the trust deed as an issue, since the court and counsel had it clearly in mind the decision upon the subject, in the absence of error, is final. Where the parties at the trial treat an issue as though it had been presented by the pleadings and the judgment adjudicates that issue, it is not a prejudicial error that the complaint wholly omits an allegation thereof. Drulinger v. Erskine, 71 Cal.App.2d 492, 497, 163 P.2d 48. If appellants deemed themselves aggrieved by the finding they were in the first place obliged to criticise the findings. Failing there, they should have presented the matter on their motion for a new trial. Nix v. Heald, Cal.App., 203 P.2d 847. The trial court is entitled to an opportunity to

correct its errors and to eradicate their harmful results, if any.

[8] No injustice was done appellants by the judgment's subjecting their interest only to the $5,500 trust deed. They acquired their share in the property at the time of the purchase by procuring a loan in the sum of $3,500 which with $1,500 of respondent's $1,700 constituted the down payment of $5,000. Respondent paid off the second mortgage. This series of events placed appellants in possession of the property without having invested a dime in it and in addition they have $200 of respondent's initial advance of $1,700 and the $2,000 they retained out of the $5,500 obtained when they discharged the $3,500 lien.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.

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91 Cal.App.2d 263

CRILLO v. CURTOLA et al.

Civ. 13850.

District Court of Appeal, First District,
Division 1, California.
April 15, 1949.

Rehearing Denied May 14, 1949.
Hearing Denied June 13, 1949.

1. Master and servant 🔑55

A contract requiring performance to satisfaction of employer is breached when employer is in good faith dissatisfied, regardless of whether a reasonable man would or would not have been dissatisfied, and good faith determination of employer that he is dissatisfied is conclusive on employee.

2. Appeal and error 🔑1008(3)

When question is one of construction of a written instrument unaided by evidence, question is one of law and not of fact, and appellate court is not bound by reasonable construction of instrument if it believes another construction should be applied; but where extrinsic evidence of intent has been introduced, and where evidence of inferences therefrom are conflicting on the question, the issue is one of fact, and finding of trial court, if based upon and consistent with the evidence, is binding on appellate court.

3. Contracts 🔑155

Letter containing terms of contract was to be construed most strongly against parties who drafted it. Civ.Code, § 1654.

4. Appeal and error 🔑882(17)

Where manager of restaurant sought damages for breach of employment contract, and at close of manager's case employers moved for nonsuit, and in ruling on that motion trial court clearly suggested possibility of construing contract in fashion it later did in findings, but employers offered no other evidence to rebut such construction, employers had full opportunity to meet the issue, and could not complain on appeal that court's construction was contrary to theory upon which case was tried.

5. Contracts 🔑147(1)

Primary rule in construing contracts is to ascertain, if possible, intent of the parties.

6. Master and servant 🔑55

Evidence that restaurant manager gave up important job to accept new position, and that employer agreed to give contract like that of another employee who was required to perform duties diligently to advantage of employer, supported interpretation that agreement employing restaurant manager who was to devote time necessary to perform duties diligently to advantage and satisfaction of employer intended that manager devote necessary time diligently, but not that employment was dependent solely upon satisfaction of employer. Civ. Code, §§ 1641, 1643, 1654.

7. Master and servant 🔑30(1)

Where contract is for a fixed period, employer may legally discharge employee for good cause. Labor Code, § 2924.

8. Appeal and error 🔑1071(6)

In restaurant manager's action for damages for breach of employment contract, failure of trial court to make specific finding as to whether discharge was justifiable was not prejudicial error in view of several findings clearly indicating that, had such a specific finding been requested, it would have been adverse to employer. Labor Code, § 2924.

9. Master and servant ⇨42(3)

Where contract called for employment of dining room and bar manager, a supervisory position entailing no manual labor, offer of employer, after discharge, to employ manager as chef at contract salary on condition that he do kitchen work behind a stove, did not mitigate all damages.

10. Master and servant ⇨42(3)

Where restaurant manager operated own restaurant after discharge at a loss, and closed business before end of period of original contract, court in determining damages for discharge from original employment properly deducted from total salary due the amount which manager withdrew from his own venture, rather than any salary which manager should have allowed himself during that period.

11. Master and servant ⇨42(1)

Generally, measure of damages for breach of employment contract for fixed period is difference between amount earned in fact and amount that would have been received under the contract.

12. Master and servant ⇨41(6)

Generally, in employee's action for breach of employment contract, burden is on employer to show that employee could, by diligence, have obtained employment, but employer meets burden by proof that he offered to reinstate employee in same position from which he had been discharged at same salary, but employee is not required to show that he made a good faith effort to secure employment and failed.

13. Appeal and error ⇨931(4)

In restaurant manager's action for damages for breach of employment contract, award of damages for contract period during which employee did not work at all amounted in effect to finding that employer did not sustain burden of showing that employee could, by diligence, have obtained other employment, and such conclusion was binding on appeal.

14. Master and servant ⇨40(2)

In restaurant manager's action for damages for breach of employment contract, evidence concerning transaction preceding date of contract, in which manager was offered another position by employer, was properly admitted as relevant to issue of good faith of employer's dissatisfaction with manager's services and as bearing upon proper interpretation of employment contract and intent of parties.

15. Master and servant ⇨40(2)

In restaurant manager's action for damages for breach of employment contract, testimony concerning duties and responsibilities of manager under previous employment was properly admitted on issue of good faith of employer in expressing dissatisfaction over manager's services and on intent of parties, as well as to controvert employer's evidence that job was too big for manager.

16. New trial ⇨117(2)

A premature notice of intention to move for a new trial is void for all purposes. Code Civ.Proc. § 659.

17. New trial ⇨3

Where findings of fact and conclusions of law were made in open court on 10th of December, and clerk mailed notice of judgment in favor of plaintiff, and on December 15 defendants filed notice of intention to move for new trial, but findings were not signed until December 31, no decision existed at time of notice to move for new trial, and trial court was without jurisdiction to hear motion. Code Civ.Proc. § 659.

◆

Appeal from Superior Court, Alameda County; Ralph E. Hoyt, Judge.

Action by Louis Crillo against Laurence Curtola and others, for breach of a contract of employment. From the judgment, defendants appeal.

Judgment affirmed.

Joseph L. Alioto, of San Francisco (Robert J. Drewes, of San Francisco, of counsel), for appellants.

Myron Harris, R. J. Darter and John Jewett Earle, all of Oakland, for respondent.

PETERS, Presiding Justice.

Plaintiff was hired by defendants to work for them for a period of two years at a salary of $700 per month. After working and being paid for about nine months he was discharged. This action was then brought for breach of contract. Plaintiff was awarded a judgment for $9,300, which is the amount of his salary accruing during the portion of the two-year-period during which he was unpaid, less $1,375 actually earned by him in other employments during that period. Defendants appeal.

In 1944, and for several years prior thereto, plaintiff was employed as chief steward at San Quentin Prison. In December of that year he was visited by one of the defendants, Laurence Curtola, who wanted to discuss with him the possibility of employment with the Curtola Company, a partnership. This company was then engaged in various businesses, including the operation of a group of restaurants. After some discussion, according to plaintiff, Laurence Curtola offered to plaintiff the position of manager of a restaurant near McArthur Boulevard in Oakland which Laurence proposed to buy. The original proposition was that plaintiff was to be paid a salary until Laurence recovered the amount of his investment, and then plaintiff was to be given a half interest in the business. Plaintiff accepted this oral offer, and, in reliance thereon, quit his job at San Quentin in January of 1945. A short time thereafter he was informed by Laurence that the McArthur deal had not materialized, but that the partnership had purchased the Capri Restaurant in Oakland, and would employ plaintiff as manager at $700 per month until such time as Laurence purchased another restaurant, when the original deal whereby plaintiff would ultimately receive an interest in the business would be revived. Plaintiff accepted this modification and went to work as manager of the Capri Restaurant shortly before February 1, 1945. He made several requests of Laurence for a written contract, and on February 14, 1945, was handed a letter which reads as follows:

"February 1, 1945

"Dear Louis,

"Please consider this an authorization to work for The Curtola Company, as dining room and bar manager, and to undertake other duties that may be necessary during the course of our normal restaurant operations.

"Your salary will be $700 per month. Your employment is to start February 1st, 1945, and shall continue for a period of two years to February, 1947. It is understood, of course, that you will devote the time necessary to perform your duties diligently to the advantage and satisfaction of The Curtola Company. During this period your work will be carried under my supervision. I am certain that we shall have a very pleasant relationship and that it will prove to be our mutual benefit.

"Yours very truly,
"Curtola Company
"By Laurence Curtola
"Laurence Curtola"

A day or two later plaintiff delivered to Laurence a letter reading as follows:

"San Quentin, California
"February 15, 1945

"Mr. Laurence Curtola
"Curtola Company
"2209 Telegraph Avenue
"Oakland 12, California

"Dear Laurence:

"This letter acknowledges receipt of your letter contract of February 1, 1945, in which you hired me for the period of two years starting February 1, 1945, at Seven hundred Dollars ($700.00) a month under certain conditions which you set forth.

"I accept said employment by you and your company and I assure you that I shall do everything in my power to make the relationship not only pleasant but also mutually profitable.

"Very truly yours,
"Louis Crillo
"Louis Crillo"

Plaintiff testified that during February, 1945, he acted as sole manager of the restaurant and bar, and that during that month they were operated at a profit; that in March of 1945 the defendants hired another employee, Pierre Coste, former chef of the St. Francis Hotel, and placed him in charge of the kitchen, and of all purchases for the kitchen and bar; that from that time on plaintiff was prevented from controlling those portions of the restaurant and personnel; that from March until October, 1945, when plaintiff was discharged, the restaurant and bar were operated at a loss; that plaintiff frequently complained to Laurence that he could not keep costs down because a large portion of his control had been taken from him and given to Pierre; that defendants failed to take any steps to restore this control. On October 9, 1945, plaintiff was discharged by Laurence and given two weeks' pay. Plaintiff claims that his discharge was legally unjustified. Much of plaintiff's evidence was corroborated by Jack Doritty, bookkeeper for the Curtola Company, who testified as to several conversations in which plaintiff requested restoration of his power of control over the kitchen personnel and over purchases, and in which Laurence promised to rectify the situation, but never did. Plaintiff also introduced evidence to show that the losses suffered by the Capri Restaurant from March to October were materially increased because of extensive remodelling and alterations undertaken by defendants over which plaintiff had no control. In this connection plaintiff attacked the various monthly reports prepared by defendants' accountants showing very large losses during these months, claiming that many items properly chargeable to renovation were charged to cost of operation. Laurence testified that his displeasure with the financial condition of the restaurant was caused by the increase in food and bar costs and was unaffected by the costs of remodelling.

Most of defendants' testimony was aimed at showing that plaintiff was inefficient, was unable to manage the restaurant, and did not have the cooperation of the employees. In this connection defendants introduced a considerable amount of testimony, mainly that of Laurence, that the employees threatened to quit if plaintiff remained as manager; that plaintiff was often unkempt and unshaven on the job; that plaintiff occasionally failed to lock the outer doors at night; that at least on one occasion he locked in an employee; that he insulted customers and the employees; that he induced defendants to hire an ex-convict who had been convicted of statutory rape by misinforming defendants as to the nature of the conviction; that he failed to inform appellants that another ex-convict recommended by him had two prior convictions and was subject to deportation orders. Plaintiff denied categorically all of these charges. It was the theory of defendants at the trial that, under the written contract, plaintiff was required to perform his duties to the personal satisfaction of defendants, and that the only issue involved was whether their expressed dissatisfaction was in good faith. The above evidence was offered to prove their contention that their dissatisfaction was in good faith.

Early in October, 1945, Laurence told plaintiff that he was through as manager of Capri, but offered him the position of working chef at the same salary at one of defendants' restaurants in Vallejo. Laurence told plaintiff that he could have two weeks with pay to decide whether he wanted to take the Vallejo job. Plaintiff vigorously protested being relieved of his duties at the Capri, but finally said that he would consider the Vallejo job if he could secure membership in the union. Subsequently he was informed by a member of the union at its headquarters in Vallejo that the union would not consider taking him in as a member. Plaintiff communicated this fact to Laurence and offered to continue at Capri. Laurence thereupon told him he was "through."

Plaintiff was paid by defendants until October 23, 1945. Between that date and February 1, 1947, plaintiff earned, at other employments, the sum of $1,375. The judgment of $9,300 is the full salary from October 23, 1945, to February 1, 1947, less $1,375.

The findings of the trial court are based primarily on the evidence produced by plaintiff. All major conflicts were resolved in his favor, the findings being based upon the evidence produced by him, and summarized above. On the basic issues of the intent of the parties, the meaning of the contract, and the circumstances surrounding plaintiff's dismissal, the court found: "That at no time prior to February 14th, 1945 did plaintiff and defendants agree that plaintiff should perform his duties as an employee of defendants to the advantage and satisfaction of defendants"; that plaintiff undertook his duties as manager of Capri on February 1, 1945; that, after defendants hired Pierre Coste on March 15, 1945, and placed him in charge of purchases and of the kitchen, the plaintiff "was prevented from purchasing supplies for said restaurant and bar and was prevented from controlling exclusively the selection and dismissal of kitchen help"; that from March 15, 1945, to August of that year the costs of the restaurant and bar operation greatly increased and the restaurant and bar were operated at a loss during this period; that plaintiff made frequent requests to be restored to exclusive control of the restaurant and bar, and frequently told defendants that he could not control costs of supplies and labor unless he had such control; that Laurence Curtola, on such occasions, told plaintiff not to worry and that the situation would be adjusted, but it never was; that defendants did not purchase another restaurant as promised, and did not restore plaintiff's exclusive control; that extensive alterations and repairs were undertaken by defendants over which plaintiff had no control; that all bookkeeping was under the control of defendants; that the monthly statements following February, 1945, showed a loss; "that defendants were dissatisfied with the losses and blamed plaintiff in part for said losses; that said dissatisfaction of defendants existed in good faith although defendants at no time subsequent to March 15th, 1945 restored plaintiff to the position of having sole responsibility for the management of the said restaurant and bar"; that as a result of the limitations placed on plaintiff's authority "plaintiff was prevented by defendants from performing duties as dining room and bar manager to the advantage and satisfaction of defendants"; that plaintiff "devoted the time necessary to perform his duties diligently to the advantage and satisfaction of defendants"; that all during the contract period plaintiff was ready, able and willing to perform all services required under the contract; that all during the contract period "plaintiff devoted the time necessary to perform his duties as dining room and bar manager diligently to the advantage and satisfaction of defendants. That during said time plaintiff devoted the time necessary to perform his said duties diligently and did perform his said duties diligently.

"That the written contract of employment between plaintiff and defendant[s] required plaintiff to devote the time necessary to perform his duties as dining room and bar manager diligently to the advantage and satisfaction of defendants. * * * That it was the intention of plaintiff and defendants that plaintiff should be required to devote the time necessary to perform his duties as dining room and bar manager diligently to the advantage and satisfaction of defendants. That it was not the intention of plaintiff and defendants that plaintiff should be required to perform his duties as dining room and bar manager to the advantage and satisfaction of defendants"; that by reason of the limitations imposed by defendants upon plaintiff's authority "plaintiff was prevented by defendants from performing his said duties to the advantage and satisfaction of defendants. That any disadvantage to defendants [and] * * * any dissatisfaction experienced by defendants resulted from circumstances beyond plaintiff's control."

The evidence is uncontradicted, and defendants admit, that plaintiff, from February to October, 1945, spent long hours at the restaurant and that defendants at no time were dissatisfied with the time spent by plaintiff on the job.

[1] The primary question presented on this appeal is the proper interpretation of the following sentence appearing in the letter of defendants: "It is understood, of course, that you will devote the time necessary to perform your duties diligently to the advantage and satisfaction of The Curtola Company." As will be noted, the trial court interpreted this to mean that the parties intended that plaintiff was required to devote the necessary time to his duties and did not intend that such duties had to be performed to the satisfaction of defendants. Defendants strenuously argue that this clause was clearly a "satisfaction" clause and was so intended by the parties; that the question of interpretation here involved was one of law, and if one of fact is unsupported by the evidence and is wrong as a matter of law; that such interpretation is contrary to the conduct of the parties and was first suggested by the trial court. The importance of this question is apparent. It is the law of this state that a contract requiring performance to the "satisfaction" of the employer is breached when the employer is in good faith dissatisfied, regardless of whether a reasonable man would or would not have been dissatisfied. The good faith determination of the employer that he is dissatisfied is conclusive on the employee. Tiffany v. Pacific Sewer Pipe Co., 180 Cal. 700, 182 P. 428, 6 A.L.R. 1493; Coats v. General Motors Corp., 3 Cal.App.2d 340, 39 P.2d 838; Coats v. General Motors Corp., 11 Cal.2d 601, 81 P.2d 906; Schuyler v. Pantages, 54 Cal.App. 83, 201 P. 137; see cases collected 6 Cal.Jur. p. 417, § 249, and see annotation 6 A.L.R. p. 1497. Here the trial court has found that defendants were dissatisfied with plaintiff's services and that such dissatisfaction existed in good faith, but has also found that the dissatisfaction existed because plaintiff was prevented from performing because defendants refused to give plaintiff the authority he should have had under the contract. To apply the "satisfaction" rule to such a factual situation would be most unjust, and this was undoubtedly one of the reasons that induced the trial court to interpret the contract as was done. The evidence supports the findings that defendants took from plaintiff the authority over the purchase of supplies and over the kitchen personnel and refused to restore these powers to him. The evidence shows that defendants were dissatisfied largely because the cost of supplies and the cost of labor so increased that a loss was incurred. This was the major cause of the dissatisfaction. Obviously, justice requires that the contract should be interpreted, if reasonably possible, so as not to permit defendants to create the situation that gave rise to their dissatisfaction, refuse to remedy such situation, and then fire plaintiff because they were "dissatisfied" with his failure to produce a profit. It is very doubtful whether the "satisfaction" rule should apply to such a situation.

[2] However, independently of this point, we think the trial court's interpretation is supported by the evidence, and is therefore binding on this appeal. The rules applicable to the powers of the appellate court in passing on the construction of a written instrument are well settled. When the question is simply one of construction of a written instrument, unaided by evidence, the question is one of law and not of fact, and the appellate court is not bound by a reasonable construction of the instrument if it believes another construction should be applied. In re Estate of Platt, 21 Cal.2d 343, 131 P.2d 825; Western Coal & Mining Co. v. Jones, 27 Cal.2d 819, 167 P.2d 719, 164 A.L.R. 685; Moore v. Wood, 26 Cal.2d 621, 160 P.2d 772; Moffatt v. Tight, 44 Cal.App.2d 643, 112 P.2d 910; Texas Company v. Todd, 19 Cal.App.2d 174, 64 P.2d 1180; In re Estate of O'Brien, 74 Cal.App.2d 405, 168 P.2d 432; La Lumia v. Northern California Packing Co., 75 Cal.App.2d 917, 172 P.2d 94. But where extrinsic evidence of intent has been introduced and where the evidence or inferences therefrom are conflicting on the question, the issue is one of fact. In such case the finding of the trial court, if based upon and consistent with the evidence, is binding on the appellate court. Universal Sales Corp. v. California Press Mfg. Co., 20 Cal.2d 751, 128 P.2d 665; Johnston v. Landucci, 21 Cal.2d 63, 130 P.2d 405, 148 A.L.R. 1355; Kautz v. Zurich General Ac-

cident & Liability Ins. Co., 212 Cal. 576, 300 P. 34; see many cases collected and commented upon 4 Cal.Jur., Ten Yr.Supp., p. 144, § 192. It is this last rule that is here applicable. There was evidence of the intent of the parties introduced independently of the document itself. Thus, there is the evidence of the circumstances surrounding the execution of the letter. In the preliminary negotiations of the parties it was never suggested that plaintiff was to be employed under a contract that if the defendants became dissatisfied for any reason they could fire the plaintiff. The plaintiff had a position with the state. This he gave up to accept defendants' offer. No reasonable man would terminate such a position and accept another where the employer could fire him at any time if he became dissatisfied, even though the employer created the cause of the dissatisfaction. When plaintiff insisted upon a written contract he did so upon the ground that "I have to quit my position, and I want to know where I stand." Yet, if defendants' interpretation be correct the plaintiff was getting no reasonable security at all.

[3] The most significant evidence on intent is to the effect that after plaintiff insisted, on several occasions, that he wanted a written contract, defendant Laurence Curtola stated to plaintiff: "I will tell you, Louis, I am going to give you the same kind of a contract I give Pierre [Coste]." Laurence admitted that he told plaintiff "I will give you a contract on the same basis I gave Pierre." Laurence told plaintiff to secure Pierre's contract, which plaintiff did, and it admittedly was the basis of plaintiff's contract. In that contract the controversial clause is quite different from that in plaintiff's contract. It reads: "It is understood, of course, that you will devote the time necessary to perform your duties diligently to the advantage of the Curtola Company." This clause cannot be reasonably construed as a "satisfaction" clause at all. It is quite clearly a covenant on the part of the employee to spend the time necessary properly to perform his duties. Defendants were unable to explain why the word "satisfaction" was used in plaintiff's contract and not in Pierre's. Both sides admit that they intended that plaintiff's contract should be the same as that of Pierre's. This is strong evidence that the parties did not intend plaintiff's contract to be one for the satisfaction of defendants, but intended the disputed clause to provide for the time to be spent on the job. This evidence supports the finding of the trial court. In addition, it must be remembered that the letter was drafted by defendants and therefore should be construed most strongly against them. § 1654, Civ. Code.

[4] Defendants contend that the challenged construction is contrary to the theory upon which the case was tried. At the close of plaintiff's case defendants moved for a nonsuit, and in ruling on that motion the trial court clearly suggested the possibility of construing the contract in the fashion it later did in the findings. Thus defendants had full opportunity to meet the issue, but offered no other evidence of intent, and yet admitted that there was no dissatisfaction with the time plaintiff spent on the job.

[5, 6] Defendants refer to various code sections relating to the interpretation of contracts, for example, see §§ 1641, 1643, Civ.Code, and contend that the challenged construction violates the rules set forth in these sections. The primary rule of construction is to ascertain, if possible, the intent of the parties. Here the intent has been determined from extrinsic evidence, and such determination is binding on this court.

[7, 8] Defendants next contend that, regardless of the proper interpretation of the contract, they were justified in discharging plaintiff for cause, and complain of the fact that no express finding was made on this issue. There can be no doubt, of course, that where a contract is for a fixed period the employer may legally discharge an employee for good cause. May v. New York Motion Picture Corp., 45 Cal. App. 396, 187 P. 785; § 2924, Labor Code. There is no doubt that defendants produced evidence from which the trial court could have found justifiable cause for discharge. But such evidence was directly contradicted by plaintiff. While it is true that the trial

court made no specific finding as to whether the discharge was justifiable, there are several findings that clearly indicate that, had such a specific finding been requested (it was not), it would have been adverse to defendants. Thus, the following language appears in the findings:

C.T. 17:23—"That during all of the two year period * * * plaintiff was ready, able and willing to perform all services on his part to be performed under the terms of the contract with defendants."

C.T. 17:26—"That * * * plaintiff devoted the time necessary to perform his duties * * * diligently to the advantage and satisfaction of defendants * * * and did perform his said duties diligently."

C.T. 18:21—"That any disadvantage * * * [and] dissatisfaction experienced by defendants resulted from circumstances beyond plaintiff's control."

C.T. 18:26—"That the discharge of plaintiff from his employment was wrongful * * *."

Failure to make a more specific finding on this issue was not prejudicial error. See Vaughan v. Roberts, 45 Cal.App.2d 246, 113 P.2d 884; cases collected 24 Cal. Jur. p. 942, § 187.

It is next urged that the award of damages was erroneous in three respects:

[9] 1. That defendants' offer to employ respondent as chef in the Vallejo restaurant at the contract salary mitigated all damages. Plaintiff's contract called for his employment as dining room and bar manager—a supervisory position entailing no manual labor. Plaintiff testified that the Vallejo job was offered him on condition that he put on an apron "and get behind the stove and get to work and don't duck it. You go in and work." The general rule is well settled that an employee is not obliged to seek or to accept other employment of a different kind in order to mitigate damages. De La Falaise v. Gaumont-British Picture Corp., 39 Cal.App.2d 461, 103 P.2d 447; see cases collected 28 A.L.R. 736. Anything said to the contrary in Ryan v. Mineral County High School District, 27 Colo.App. 63, 146 P. 792, referred to by defendants as a "leading case on the question" is erroneous and contrary to the overwhelming weight of authority.

[10, 11] 2. That plaintiff was not entitled to any damages for the six-month-period he operated his own restaurant at a loss. The evidence shows that during six months of the time the trial court has allowed damages, plaintiff operated his own restaurant and withdrew from the venture but $200, which sum was deducted from the total salary due in the award of damages. The theory of the defendants is that plaintiff should have allowed himself a salary during this period to be computed in mitigating damages, and that defendants cannot be charged with plaintiff's inability to operate his project at a profit. Kramer v. Wolf Cigar Stores Co., 99 Tex. 597, 91 S.W. 775, is cited in support of this contention. That case stands for no such general principle. The Texas court properly held that damages should be diminished by the amount the discharged employee took from his own business during the contract period, and then added that, under the "peculiar" facts of that case, there might be taken into consideration the fact that the services of the employee in running his own business might be of greater value than the amount actually withdrawn, inasmuch as the business was still in operation, and part of the services rendered during the contract period added to the general value of the business and so would reward the employee at a future date. That is not this case. Here the business was operated and closed up before the end of the contract period. There is no possibility of future income for services rendered during that period. The exact amount actually earned can be computed. There are no "peculiar" or other facts that would have justified the trial court in disregarding the general rule, which is, that the measure of damages for breach of an employment contract for a fixed period is the difference between the amount earned in fact and the amount that would have been received under the contract. See cases collected 8 Cal.Jur. p. 787, § 46.

[12, 13] 3. That plaintiff was not entitled to damages for the final six months of the contract period during which he did

not work at all. The evidence shows that prior to this six-month period plaintiff had been working at "Victor & Roxies" and that he left because of illness, and did not return. Defendant urges that inferentially this evidence indicates plaintiff could have returned to this employment, and that, at any rate, all of 1946 was a period of high employment and high wages, so that plaintiff could have secured work had he tried. Flickema v. Henry Kraker Co., 252 Mich. 406, 233 N.W. 362, 72 A.L.R. 1046, is cited as supporting the claimed rule that, under such circumstances, plaintiff is entitled to no damages for this period. The case stands for no such proposition. That case states the general rule that the burden of proof is on the employer to show that the employee could, by diligence, have obtained employment, but holds that the employer met that burden by proof that he offered to reinstate the employee in the same position from which he had been discharged at the same salary. The general rule, followed in California, applies here. It is also the law of this state that the employee is not required to show that he made a good faith effort to secure employment and failed. Rosenberger v. Pacific Coast Ry. Co., 111 Cal. 313, 43 P. 963. The trial court has, in effect, found that defendants did not sustain their burden. Its conclusion is binding upon us.

[14] Defendants make various contentions concerning the admission and exclusion of evidence. Thus it is urged that all the testimony and evidence concerning the McArthur restaurant transaction should have been excluded for the asserted reason that that was a different transaction unconnected with the transaction here involved. Such evidence was clearly relevant to the issue of good faith, which was one of the issues before the court, and it was upon this theory that this evidence was admitted. The evidence was also relevant and material to the question of the proper interpretation of the contract and to the question of intent.

[15] Complaint is also made of the admission over objection of Warden Duffy's testimony concerning the duties and responsibilities of the plaintiff while at San Quentin. The evidence was admissible on the issue of good faith and intent. Moreover, defendants testified that the job in Oakland was too big for plaintiff, and this evidence controverted that evidence.

The last point necessary to discuss is the correctness of the trial court's refusal to pass upon defendants' motion for a new trial. The trial ended December 2, 1947. On December 10, 1947, the county clerk mailed defendants a notice stating that in the case of Crillo v. Curtola "judgment in favor of plaintiff in the sum of $9300.00," plus interest. On December 15, 1947, defendants filed their notice of intention to move for a new trial. The record shows that the findings of fact and conclusions of law "were done in open court this 10th day of December and signed this 31st day of December, 1947." The trial court ruled that defendants' motion was a nullity because filed prematurely before findings were signed.

[16, 17] The rule in this state is that a premature notice of intention to move for a new trial is void for all purposes. § 659, Code Civ.Proc.; Tabor v. Superior Court, 28 Cal.2d 505, 170 P.2d 667; Reeve v. Jahn, 9 Cal.2d 244, 70 P.2d 610; Fong Chuck v. Chin Po Foon, 29 Cal.2d 552, 176 P.2d 705; In re Estate of Barker, 207 Cal. 112, 276 P. 992; Root v. Daugherty, 201 Cal. 12, 255 P. 181. Under the rules announced in these cases until the findings are actually signed and filed there is no decision of the court, and, until there is a decision, a notice of intention to move for a new trial is a nullity, and the trial court is without jurisdiction to hear a motion prematurely filed. The rule no doubt is a harsh one but the remedy, if one is needed, must lie with the Legislature. No sound legal reason has been suggested as to why the rule as it now exists is not here applicable.

The judgment appealed from is affirmed.

WARD and BRAY, JJ., concur.

Hearing denied; SCHAUER, J., dissenting.

91 Cal.App.2d 328

BLACK et al. v. BLACK.

BLACK v. PHILLIPS (four cases).

Civ. 16728–16732.

District Court of Appeal, Second District, Division 2, California.

April 19, 1949.

Rehearing Denied May 6, 1949.

Hearing Denied June 16, 1949.

1. Joint tenancy ⚷8

A joint tenant out of possession may not maintain action against cotenant in possession for rents and profits derived from land by occupant's labor, except under circumstances showing agreement by tenant in possession to act as bailiff or receiver of share of rents and profits belonging to tenant out of possession.

2. Joint tenancy ⚷10

Revenues received by plaintiffs' father, prior to death, from orange grove which father without consideration had quitclaimed to third person who as part of same transaction and without consideration quitclaimed to plaintiffs' father and plaintiffs as joint tenants, belonged to plaintiffs' father under evidence, and plaintiffs as joint tenants out of possession were entitled to no share of revenues.

3. Joint tenancy ⚷8

Generally, proceeds of property owned in joint tenancy retained the character of the property from which proceeds are acquired.

4. Deeds ⚷136

Under deeds to plaintiffs and their father as joint tenants, conveying the "rents, issues, and profits", quoted phrase was surplusage and created no rights in grantees in addition to those implied by grant of land in joint tenancy, so as to entitle grantees to share of revenues although father remained in possession and operated deeded orange grove to exclusion of grantees under circumstances not showing agreement that father was acting as bailiff or receiver of share of revenues belonging to grantees.

5. Joint tenancy ⚷8

The risks incurred by occupier of land owned in joint tenancy in the cultivation of crops are his, as are the profits he may enjoy or the losses he may sustain in producing crops by his industry.

6. Joint tenancy ⚷8

A joint tenant, who has not demanded possession, contributed to expense of production, or previously made himself liable for possible losses, is not entitled to share in revenues produced on land as result of labor, management, and money of joint tenant in sole possession.

7. Joint tenancy ⚷8

A joint tenancy deed entitles tenants to equal enjoyment of the proceeds of the land, all things being equal.

8. Evidence ⚷417(5)

Application of principle that a joint tenant who has not demanded possession, contributed to expense of production, or previously made himself liable for possible losses, is not entitled to share in revenues produced on land as result of labor, management and money of joint tenant in sole possession, does not infringe upon parol evidence rule.

9. Trial ⚷368

Court is to draw inferences from stipulated facts.

10. Appeal and error ⚷1008(3)

Judgment of trial court made on stipulated facts will not be upset on appeal in absence of gross abuse of discretion.

11. Appeal and error ⚷931(1)

If some parts of stipulated facts support judgment of trial court while others would defeat judgment, facts which support judgment will be accepted on appeal with the same effect as though they stood alone.

12. Witnesses ⚷178(4)

In actions against a widow and administratrix of estate of a decedent, the reading of deposition by defendants' counsel as evidence against widow, only, did not waive statutory provision making a claimant against estate incompetent as a witness, so as to permit plaintiff, whose deposition was read, to testify further against administratrix. Code Civ.Proc. § 1880.

13. Appeal and error ⚷1031(3)

Trial court's ruling on admission of evidence, and its subsequent consideration of evidence, would be presumed not to be prejudicial to appellants.

14. Appeal and error ⚷1031(1), 1032(1)

Error alone is not sufficient to warrant reversal of a judgment, and injury will not be presumed but must be affirmatively shown.

15. Appeal and error ⚷1056(5)

Where excluded deposition in actions tried to court without jury would have been cumulative with evidence contained in stipulation of facts as well as of a witness, exclusion of deposition was not prejudicial even if erroneous.

◆

Appeal from Superior Court, Los Angeles County; Byron J. Walters, Judge of Municipal Court of City of Los Angeles, Presiding as Judge of the Superior Court under designation of the Chief Justice.

Actions by John L. Black, Raleigh Black and Doris Black, husband and wife, and Archie Black, against Bessie Fae Black, for moneys defendant had received from her deceased husband, A. R. Black, consolidated with actions by Doris Black and by same plaintiffs against Pollyanna Phillips, as administratrix with will annexed of estate of A. R. Black, deceased, for share of profits earned by an orange grove. From judgments for defendant in each action, plaintiffs appeal.

Judgments affirmed.

Loughman & Loughman, of Ventura and Zeutzius & Steffes, by A. P. G. Steffes, all of Los Angeles, for appellants.

Haywood Ardis, of Downey, and Harry J. McClean, of Los Angeles (Henry F. Walker, of Los Angeles, of counsel), for respondents.

MOORE, Presiding Justice.

A. R. Black departed this life November 8, 1945. For many years he had owned and operated a 30-acre orange grove near Lindsay in Tulare County. On January 14, 1942, decedent without consideration executed and delivered a quitclaim deed to one Webb conveying to the grantee the entire grove. As part of the same transaction Webb delivered three deeds in joint tenancy reconveying the property in equal parts (a) to decedent and his son Raleigh and the latter's wife, Doris; (b) to decedent and his son John and (c) to decedent and his son Archie. No consideration was paid for any of the latter deeds. John did not hear of the dual transaction until thirty days thereafter. Archie had no knowledge thereof until after the death of his father.

After the father's decease each of the sons filed a claim with decedent's administratrix for his share of the profits earned by the grove from the date of the deeds to the date of the father's demise, Raleigh being joined by his wife, Doris. Thereafter, they instituted the instant actions against the administratrix based upon their rejected claims, and against Bessie Fae Black, the widow, for moneys she had received from her husband. Basing their actions upon their status as joint tenants with their father they alleged against the administratrix that decedent in his lifetime had received and retained specified sums for the use of each claimant. In the action against the widow they alleged she had received moneys for their use and had rejected demands therefor. Judgments were entered for the defendant in each action, based upon the conclusions derived from the stipulated facts. Whence, this appeal.

Two assignments of error are covered in the briefs: (1) The facts do not support the judgments, (2) error in limiting the applicability of Raleigh Black's testimony to the action against the widow.

The Evidence is Sufficient.

To warrant recovery against either defendant it was indispensable that appellants establish that as a matter of law a portion of the revenues from the grove after the Webb deeds were recorded belonged to appellants. A screening of the facts as agreed upon for a single trial of all five actions compels an affirmance upon that ground.

After the Webb deeds no change occurred in the manner or method of operating the grove. After as well as before the deeds all crops were sold through an association of fruit growers which paid the proceeds to decedent by checks signed by Raleigh who was its secretary. The operating expenses and taxes were paid by decedent. Raleigh and his wife continued to live on the grove, cultivated and irrigated it, for which he received $100 a month from decedent and the use of a house and some equipment which he used also on property owned by himself. No demand was ever made upon decedent for possession of the grove or for an equal right with the father to its occupancy or for an accounting as to profits. No segregation of income or expenses was made at any time prior to decedent's demise in 1945. It is a fair inference that Webb acted merely as agent for the father; the sons paid nothing for the deeds which were made to effect a transfer of ten acres to each of them upon the decease of Mr. A. R. Black without probate and free from inheritance taxes and all claims of his prospective wife or of his estate. At the time he was contemplating a matrimonial alliance with respondent Bessie Fae. At no time after recording the deeds did decedent release possession of the grove but he directed the care thereof, collected the revenues derived from the sale of its crops and paid income tax upon same. Neither son requested payment to himself of any portion of the revenues or asked to share the occupancy of the land described in the deed which had named him a joint tenant. Bills for expense of operating the entire grove were received by Raleigh and forwarded to decedent or were paid and reimbursement gained from his father. Prior to the deeds decedent had maintained a revolving fund with the citrus association. It was continued in his name. Into it were paid the proceeds from the sales of fruit. Checks of the association were drawn by Raleigh Black, its secretary, payable to such account. Raleigh owned 10 acres near the 30-acre grove of his father and used water from a well on one of its 10-acre tracts. He paid one third of the cost of repairs of the pump while his father and one Wolfe (owner of an adjacent 10 acres) paid the remainder. At all times after the deeds from Webb, Mr. A. R. Black paid all costs of pruning done and of fertilizer used on the grove and paid the taxes assessed against the 30 acres.

When the deeds were delivered by Webb appellants Raleigh and Doris understood that all revenues derived from the 30 acres would be paid to decedent. None of the brothers ever demanded a share of the proceeds from the sales of the fruit crops. None ever made a gift tax return or paid a tax on income from the grove, or paid any portion of the cost of insurance on the buildings on the thirty acres, or agreed to pay any part of the losses. Never did any of them ask the father for an accounting.

[1, 2] In view of such uncontroverted facts the contention of appellants is resolved into a claim that the trial court's conclusions do not logically follow. But because appellants were joint tenants they were not automatically entitled to share equally with their father in the fruits of the property. A joint tenant out of possession may not maintain an action against his cotenant in possession for the rents, issues and profits derived from the property by means of the occupant's own labor. Pico v. Columbet, 12 Cal. 414, 421, 73 Am. Dec. 550; Howard v. Throckmorton, 59 Cal. 79, 89; Plass v. Plass, 122 Cal. 3, 11, 54 P. 372; McWhorter v. McWhorter, 99 Cal.App. 293, 296, 278 P. 454; Schell v. Schell, 74 Cal.App.2d 785, 789, 169 P.2d 654. The only exception to the rule as established by the cited authorities is that under circumstances showing an agreement by the tenant in possession to act as bailiff or receiver of the share of rents and profits belonging to the tenant out of possession, the latter will be entitled to an accounting and payment of his share.

In the instant case it was stipulated that no such agreement was ever made. Decedent, though not in residence upon the premises, was in possession and conducted the operation of the grove both before and after the making of the deeds. While Raleigh Black resided upon the premises after Webb's deeds he was acting as the employee or agent for his father in the operation of the grove as he had been prior to the conveyances. Therefore, the income derived from the operation of the properties by decedent was his own property and subject to his sole disposition during his lifetime. It necessarily follows that decedent's widow owes no duty to account to appellants for moneys rightfully belonging to her late husband in his lifetime. He was at liberty to bequeath them or to make gifts of them causa mortis. Her withdrawals and deposits on his accounts were in accordance with a power of attorney executed in her favor by decedent in the presence of witnesses 11 months prior to his death and further substantiated by decedent's visits to the bank thereafter. Her conduct of her husband's affairs cannot be tortured into an involuntary trustee relationship by appellants' assertion that she "converted" her husband's money. As the trial court stated, her stewardship may not thus be questioned.

Since decedent during his lifetime was not obligated to account to appellants, it follows necessarily that his estate is not now obligated to account. The arguments and contentions of appellants in their actions against the administratrix were identical with those advanced in the action against decedent's widow and for that reason were appropriately consolidated therewith. The same reasons compelling the affirmance of one judgment will cause the affirmance of the others.

[3, 4] Appellants argue the usual effect of a joint tenancy deed and cite authorities for the proposition that the proceeds of property owned in joint tenancy retain the character of the property from which they were acquired. Fish v. Security First National Bank, 31 Cal.2d 378, 387, 189 P.2d 10; In re Kessler, 217 Cal. 32, 34, 35, 17 P.2d 117; 48 C.J.S., Joint Tenancy, § 9, p. 932; 33 C.J., 910. The instant actions are governed by an exception to the general rule by reason of the fact that appellants neither occupied the lands nor had any agreement with their father that they should share in the profits earned by the 30 acres. They attempt to fortify their positions by quoting the phrase of the deeds which conveyed the "rents, issues and profits," which language they assert proves decedent's specific intent that they should enjoy the revenues from the lands. The last quoted phrase was surplusage and created no rights in appellants in addition to those implied by the grant. Estate of Davis, 88 Cal.App.2d 704, 199 P.2d 755; Hart v. Kanaye Nagasawa, 218 Cal. 685, 688, 24 P.2d 815.

[5, 6] Moreover, appellants were by the Webb deeds made joint tenants with their father. He never agreed that they should have an extraordinary right to the profits from the lands. Therefore, their rights are governed by long established principles applicable to joint ownership. A joint tenant in the sole and exclusive occupancy of the land is not required to account to his cotenant for any portion of the revenues derived therefrom so long as they are the fruitage of his own capital, labor and skill. 48 C.J.S., Joint Tenancy, § 9, p. 932. The risks incurred by the occupier of land (owned in joint tenancy) in the cultivation of crops are his as are also the profits he may enjoy or the losses he may sustain in producing crops by his industry. In taking all the fruit grown upon the land decedent herein received no more than his just share inasmuch as it is no more than the reward for his own labor and capital to no part of which is his cotenant entitled. Pico v. Columbet, 12 Cal. 414, 421.* It is thus seen that there is no equity in the claim that the mere fact of being named as joint tenant entitles one to share in the revenues produced on the land as the result of the labor, management and money of him who is in sole possession when the claiming cotenant has neither demanded possession, contributed to the expense of production nor previously made himself liable for possible losses. Sargent v. Parson, 12 Mass. 149; Bird v. Bird, 15 Fla. 424, 21 Am.Rep. 296; Airington v. Airington, 79 Okl. 243, 192 P. 689; 27 A.L.R. 184; Arnold v. De

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* The rule is not applicable to the exploitation of lands or leaseholds for minerals. Dabney-Johnson Oil Corporation v. Walden, 4 Cal.2d 637, 656, 52 P.2d 237.

Booy, 161 Minn. 255, 201 N.W. 437, 39 A.L.R. 408.

[7-11] It is clear, therefore, that the application of the foregoing principle does not infringe upon the parol evidence rule. While the joint tenancy deed entitles the tenants to equal enjoyment, all things being equal, they are rendered unequal when one occupies the land, cultivates, fertilizes and irrigates it, and harvests and markets the resulting crops while his cotenant may be leading the life of the prodigal son in faraway places. Since the inferences to be drawn from stipulated facts are the function of the trial court its decision will not be upset on appeal in the absence of a gross abuse of discretion. On the contrary, if some parts of stipulated facts support while others would defeat the judgment, those which support it are to be accepted on appeal with the same effect as if they stood alone. Hansen v. Bear Film Co., Inc., 28 Cal.2d 154, 184, 168 P.2d 946; Bechtold v. Bishop & Co., Inc., 16 Cal.2d 285, 291, 105 P.2d 984.

Raleigh Black's Deposition.

[12] Appellants' final contention is that the trial court erred in ruling that portions of the deposition of Raleigh Black taken in the action against the widow were to be limited in application to that action and excluded from consideration in the actions against the administratrix. They assert that the deposition was offered in evidence in the four cases against the administratrix as well as in the action against the widow and that therefore the inhibition of section 1880 of the Code of Civil Procedure making a claimant against an estate incompetent as a witness was waived, thus permitting further testimony by the claimant. Such is contrary to the fact. The stipulation was that it might be read subject to respondents' objections. Prior to the reading of the deposition in the consolidated cases, respondents' counsel informed the court that he was limiting his reading to the action against the widow. Pursuant to respondents' motion the court limited the application of the testimony against the widow only. This was not error. The evidence was not admissible under section 1880 and neither the stipulated facts nor any other agreement entitled appellants to a different ruling.

[13-15] Not only was Raleigh's deposition not taken in an action against the administratrix, but it was not initially introduced against her. Therefore, the prohibition of the section 1880 was not waived, nor was the "door opened" for the admission of further testimony by the claimant. Moul v. McVey, 49 Cal.App.2d 101, 121 P.2d 83, cited by appellant, is not in point because the rule there enunciated is applicable only after the barrier of section 1880 has been removed. While the parties had agreed to the use of the stipulated facts in all five cases, no concerted plan for the introduction of Raleigh's deposition against the estate had been made. It was therefore not admissible over respondents' objection. Also, it must be presumed that the trial court's ruling and its subsequent consideration of the evidence was not prejudicial unless the contrary affirmatively appears from the record. Carpenter v. Pacific Mutual Life Ins. Co., 10 Cal.2d 307, 326, 74 P.2d 761. Error alone is not sufficient to warrant a reversal. Injury will not be presumed therefrom but must be affirmatively shown. Semple v. Andrews, 27 Cal.App.2d 228, 235, 81 P.2d 203. Had Raleigh's deposition been received, it would have been cumulative of the evidence contained in the stipulated facts as well as of the witness Webb. Therefore, even if it had been erroneously excluded no prejudice resulted. Tillis v. Western Fruit Growers, Inc., 44 Cal.App.2d 826, 829, 113 P.2d 267; Seibel v. Shapiro, 58 Cal.App.2d 509, 515, 137 P.2d 56; Fuller v. Vista Del Arroyo Hotel, 42 Cal.App.2d 400, 405, 108 P.2d 920. If the testimony of Raleigh was ineffective to turn the tide for appellants in the action against the widow in which it was received, surely it could have availed no advantage to appellants in the suit against the administratrix decided by the same judge. Nulty v. Price, 202 Cal. 279, 283, 260 P. 291.

The judgments are affirmed.

McCOMB and WILSON, JJ., concur.

91 Cal.App.2d 311

HEIMANN et al. v. CITY OF LOS ANGELES.

Civ. 16616.

District Court of Appeal, Second District,
Division 3, California.
April 18, 1949.

Hearing Denied June 16, 1949.

1. **Eminent domain** 🔑265(3)

An owner whose land is condemned is not entitled to recover all costs incurred by him but only all proper costs or the costs necessarily incidental to the proceeding. Const. art. 1, § 14.

2. **Costs** 🔑3

Since costs were not recoverable at common law, person claiming costs must rely on statute or rule of court awarding costs, and the measure of the statute is the measure of the right to recover costs. Rules on Appeal, rule 26(c).

3. **Costs** 🔑258

The word "briefs" in rule providing that party to whom costs are awarded may recover not exceeding $100 for printing "briefs" on appeal includes petitions for rehearing, hearing, and answers thereto. Rules on Appeal, rule 26(c).

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Briefs".

4. **Costs** 🔑258

A limit can be placed on amount to be allowed as costs for printing briefs on appeal. Rules on Appeal, rule 26(c).

5. **Costs** 🔑258

The rule providing that party to whom costs are awarded may recover not exceeding $100 for printing briefs on appeal is reasonable regulation in matter of allowing costs for printing briefs, including briefs in eminent domain case, and under such rule the trial court has no discretion to allow more than $100 for printing briefs. Rules on Appeal, rule 26(c).

6. **Eminent domain** 🔑265(4)

The rule providing that party to whom costs are awarded may recover not exceeding $100 for printing briefs on appeal permitted landowners recovering compensation for taking or damaging of land for public use to recover only $100 of the $268.98 expended for printing briefs on their appeal, as against contention that allowance of such amount resulted in reduction to extent of $168.98 of the "just compensation" to which they were entitled under Constitution. Rules on Appeal, rule 26(c); Const. art. 1, § 14.

Appeal from Superior Court, Los Angeles County; Stanley N. Barnes, Judge.

Eminent domain action by Gustave L. Heimann, and others, against the City of Los Angeles, a municipal corporation. From an order taxing their costs on appeal, plaintiffs appeal.

Order affirmed.

See also 30 Cal.2d 746, 185 P.2d 597.

John F. Poole, of Los Angeles, for appellants.

Ray L. Chesebro, City Atty. and Bourke Jones, Asst. City Atty., both of Los Angeles, for respondent.

WOOD, Justice.

Plaintiffs appeal from an order taxing their costs on appeal. Their memorandum of costs included items aggregating $268.98 for printing briefs, petitions for rehearing and hearing, and answer to petition for rehearing, in this action in eminent domain. Upon motion of defendants, the superior court taxed their costs for such printing at $100.

Appellants contend that it was error to strike $168.98 from their cost bill, for the reason that the "$100 excess rule does not apply to an eminent domain case because it would take from the plaintiff the sum of $168.98 on his recovery of damages for the taking of his property." Apparently the rule so referred to is section 26(c) of the Rules on Appeal. That section, insofar as material here, provides: "The party to whom costs are awarded may recover only the following, when actually incurred: * * * (2) the cost of printing * * * briefs, not exceeding $100 to any one party; (3) * * *." Appellants argue that such a rule, as to costs in an eminent domain case, is prohibited by the Constitution of California. Apparently they are referring to article I, section 14, of the Constitution, which provides in part as follows: "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner * * *." Appellants assert in effect that the order herein reduced their "just compensation" to the extent of $168.98, and that the order was contrary to said provision of the Constitution.

[1] In support of their contention they quote at length from the decision on the former appeal in this case, Heimann v. City of Los Angeles, 30 Cal.2d 746, on page 752, 185 P.2d 597 on page 601—the quotation being the last part of the last paragraph which begins with the words "To require the defendants", and all of the first three paragraphs 30 Cal.2d on page 753, 185 P.2d on page 601. It was said therein, in part, 30 Cal.2d on page 752, 185 P.2d on page 601, in quoting from San Francisco v. Collins, 98 Cal. 259, at page 262, 33 P. 56, as follows: "'To require the defendants in this case [the owners] to pay any portion of their costs necessarily incidental to the trial * * * would reduce the just compensation awarded by the jury. * * * Any law which casts this burden upon the owner should, in our opinion, be held to be unconstitutional and void.'" It was also said, 30 Cal.2d on page 753, 185 P.2d on page 601: "If costs should be assessed against him, his recovery would be diminished by that amount and he would be to that extent deprived of the full measure of compensation to which he is justly entitled. * * * Jurisdiction in eminent domain lies in the superior court * * * and the discretion conferred upon that court in taxing costs * * * is held to be limited by Art. I, Section 14 of the Constitution. * * Similarly, in actions like the present, the constitutional provision must be held to be a limitation upon the requirement of section 1032 of the Code of Civil Procedure that the plaintiff may not recover costs when the judgment is one which could have been rendered by a municipal court. The order granting the motion to strike the cost bill was therefore erroneous." There was no question therein as to whether the amounts or the subject-matter of the items of costs were proper. The facts in the case (upon the former appeal), insofar as material here, were: The plaintiffs sought to recover damages to their land as the result of the building of a viaduct in front of the land; they obtained judgment for $800, and filed their cost bill for trial costs; and upon motion of the defendant, the cost bill was stricken out on the ground that the judgment was such as could have been rendered by the municipal court, and therefore costs were not recoverable by plaintiffs. The Supreme Court held therein, as above shown, that the constitutional provision above referred to (art. I, sec. 14) was a limitation upon the said statutory provision (sec. 1032, Code Civ.Proc.—that a plaintiff should not recover costs when the judgment is one which could have been rendered by a municipal court), and that the cost bill should not have been stricken out. The only question on the former appeal, relative to costs, was whether in an eminent domain action, where the judgment was in an amount within the jurisdiction of the municipal court, the plaintiffs, owners, were entitled to recover *any* costs. There was no question therein as to whether the amounts or the subject-matter of the items of costs were proper. It is to be noted that in the decision of the court therein, just preceding the part quoted by appellants, the court also said 30 Cal.2d at page 752, 185 P.2d at page 601. "It has long been the rule that in a proceeding in eminent domain, the party seeking condemnation should be required to pay not only his own costs, but all *proper* costs of the owner of the land incurred in good faith." (Italics added.) The case of San Francisco v. Collins, 98 Cal. 259, 33 P. 56, which was quoted in part in the decision on the former appeal, was a condemnation proceeding wherein the owners appealed from an order apportioning the costs between the parties. The owners therein contended that the condemnor should have been required to pay not only its own costs but all *proper* costs of the owners. At the time of that proceeding, section 1255 of the Code of Civil Procedure provided that in proceedings to condemn property "costs may be allowed or not, and if allowed, may

be apportioned between the parties * * * in the discretion of the court"; and it was claimed by the condemnor that the order of the trial court apportioning the costs was a proper exercise of the discretionary power conferred by said section. The Supreme Court held therein that such discretionary power was limited by article I, section 14, of the Constitution, and that to require the owners to pay any portion of their costs *necessarily incidental* to the trial would reduce their just compensation. There was no question in that case as to whether the items of costs were proper as items of costs, but the only question was whether any of the costs *necessarily incidental* to the trial should be charged against the land owner. It therefore appears from the two opinions just referred to, the opinion in the former appeal and the opinion quoted in part therein, which are relied upon by appellants, that the Supreme Court did not hold in those cases that all costs incurred by an owner whose land is condemned were recoverable by him, but the court held that "all proper costs", or "costs necessarily incidental" to the proceeding, were recoverable by the owner.

[2-6] Since costs were not recoverable at common law, a person who claims costs must rely on a statute or rule of court which awards them, and the "measure of the statute is the measure of the right" to recover costs. See *Sime* v. *Hunter,* 55 Cal.App. 157, 159, 202 P. 967. Rule 26(c) of the Rules on Appeal provides in substance, as above stated, that the party to whom costs are awarded may recover not exceeding $100 for printing briefs on appeal. The word "briefs" therein includes petitions for rehearing, hearing, and answers thereto. Weck v. Los Angeles County Flood Control Dist., 89 Cal.App.2d 278, 200 P.2d 806. It is reasonable of course to place a limit upon the amount to be allowed as costs for printing briefs on appeal. It has been determined, under and by virtue of said rule 26(c), that a reasonable maximum amount to be allowed as "proper costs" for printing briefs on appeal is $100. Prior to the adoption of that rule it had also been determined (in 1933), as shown by section 1034 of the Code of Civil Procedure, that $100 was a reasonable maximum amount to be allowed for such costs. Said rule 26(c) is a reasonable regulation in the matter of allowing costs for printing briefs, including the briefs in an eminent domain case. The trial court ruled correctly in striking out the amount of claimed costs for printing briefs in excess of $100. Under said rule 26(c), it is not discretionary with the trial court to allow more than $100 for printing briefs. Lane v. Pacific Greyhound Lines, 30 Cal.2d 914, 918, 187 P.2d 9.

The order is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

91 Cal.App.2d 26

PEOPLE v. ARESEN.

Cr. 2564.

District Court of Appeal, First District,
Division 1, California.
April 15, 1949.
Hearing Denied April 28, 1949.

Criminal law 🔑829(3)

Instructions were not erroneous for failure to instruct under a particular section of Corporate Securities Act, where trial court, in original instructions and additional instructions requested by jury, although not mentioning such section, fully instructed on all elements of crime defined therein and charged in information. Gen. Laws, Act 3814.

Appeal from Superior Court, City and County of San Francisco; Daniel R. Shoemaker, Judge.

On petition for rehearing.

Petition denied.

Prior opinion, 204 P.2d 389.

Nils Aresen, in pro per., and W. O. Weissich, of San Francisco, for appellant.

Fred N. Howser, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

PER CURIAM.

The contention in the petition for rehearing (not heretofore made) that the court erroneously failed to instruct the jury under section 18 of the Corporate Securities Act, Gen.Laws, Act 3814, is well answered by the fact that the court in its original instructions and in the additional instructions requested by the jury, although not mentioning section 18, fully instructed on all the elements of the crime defined by that section and charged in the charging portion of count I of the information. The other contention made by petitioner is covered in our opinion.

The petition for rehearing is denied.

91 Cal.App.2d 380

PEOPLE v. WILLIAMS et al.

PEOPLE v. GREEN.

Cr. 4279, 4280.

District Court of Appeal, Second District,
Division 1, California.
April 21, 1949.

1. Criminal law ⟹260(11)

Inconsistencies and conflict in testimony were for trier of the facts.

2. Robbery ⟹24(3)

Evidence which included positive identification of defendant by victims of several robberies sustained convictions of first-degree robbery.

3. Criminal law ⟹1023(10)

Purported appeals from sentences would be dismissed.

◆

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Ernest Arthur Williams and Elijah Green were charged in two counts with first-degree robbery; in another case, Elijah Green was charged, also in two counts, with first-degree robbery. The two cases were consolidated for trial. From judgment of conviction on four counts of first-degree robbery, Elijah Green appeals.

Affirmed.

Crispus A. Wright, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Howard S. Goldin, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice.

The defendant was convicted of four counts of first degree robbery. Two cases, each with two counts against him were consolidated for trial. Defendant and his counsel waived trial by jury; upon stipulation of the district attorney and counsel for defendant, part of the testimony considered by the trial court was the reporter's transcript of the evidence on the preliminary examination before the committing magistrate.

The convictions were based upon positive identification of the defendant by the victims of the several robberies.

Defendant appeals from the judgments of conviction.

Certain inconsistencies in the testimony of witnesses for the People are urged as grounds for reversal of the case.

[1] The trial court resolved these against the defendant. Defendant also argues that his testimony denying all of the evidence against him should have been believed by the court. This conflict likewise was resolved against him by the trier of fact.

[2] A review of the record discloses substantial evidence to support the judgments. People v. Klinkenberg, 90 Cal.App.2d 608, 204 P.2d 47; People v. Warnick, 86 Cal.App.2d 900, 195 P.2d 552; People v. Lindley, 26 Cal.2d 780, 791, 161 P.2d 227; People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778; People v. Hills, 30 Cal.2d 694, 701, 185 P.2d 11; People v. Smith, 35 Cal.App.2d 73, 76, 94 P.2d 633.

[3] The judgments are, and each of them is, affirmed. The purported appeals from the sentences are dismissed.

WHITE, P. J., and DORAN, J., concur.

TAYLOR v. GEORGE.

Civ. 7573.

Sac. 5969.

District Court of Appeal, Third District,
California.

April 20, 1949.

Rehearing Denied May 19, 1949.

Hearing Granted June 16, 1949.*

1. Divorce 🔑310

Unmodified award by divorce decree against husband, of a specified sum to be paid to wife by husband for maintenance of minor child until it reaches majority or becomes self sustaining does not automatically terminate upon husband's death before expiration of term for which payments are allowed.

2. Executors and administrators 🔑202(1)

Under property settlement agreement requiring husband to pay wife a specified sum for maintenance of minor child until it reaches majority or becomes self sustaining, installments accruing subsequent to husband's death are valid claims against his estate.

3. Executors and administrators 🔑202(1)

Action based on property settlement agreement which was followed though not included or referred to in divorce decree, requiring husband to pay wife $50 per month for maintenance of child until it reached majority or became self supporting could be maintained by wife against executrix of deceased husband's estate to recover subsequently accruing installments. Probate Code, § 573.

4. Executors and administrators 🔑228(3)

Rejected claim against estate for support and maintenance of minor son of deceased husband in accordance with divorce decree was adequate foundation for maintenance of action against executrix though claim did not refer to prior property settlement agreement which obligated husband to make the payments. Probate Code, § 573.

5. Executors and administrators 🔑234

Allowance of claim against estate is mere acknowledgment of debt against the estate, whereas rejection of claim is in effect a repudiation of the claimed debt.

6. Trial 🔑388(2)

Where cause is submitted for determination upon an agreed complete statement of ultimate facts, adoption of findings by trial court is ordinarily unnecessary, but where stipulation covers evidentiary facts upon material issues, as distinguished from ultimate facts, trial court has duty to adopt findings determining such evidentiary facts.

7. Appeal and error 🔑1008(3)

Where all the material issues are covered by an agreed statement of ultimate facts, record presents mere question of law for determination of the court.

8. Appeal and error 🔑909(4)

Court of Appeals was required to assume decedent's obligation to pay installments for support and maintenance of minor son, accruing after his death, in absence of evidence showing that obligation had terminated.

9. Appeal and error 🔑1008(3)

Reviewing court is not bound by trial court's construction of contract or will unless it is clear and certain, in absence of other evidence upon the subject.

10. Appeal and error 🔑1008(3)

Reviewing court must construe language of instrument before it and determine its meaning and effect as matter of law, although where there is other evidence reasonably supporting trial court's construction of contract, reviewing court may not otherwise construe instrument.

11. Appeal and error 🔑1008(3)

Where language of contract or decree which must be construed is uncertain or ambiguous with relation to its effect upon a necessary issue involved, appellant is entitled to a finding on that subject.

12. Appeal and error 🔑717

Opinion of trial judge, though it may be included in record on appeal, may not be substituted for necessary findings, nor can it serve to modify or change findings which are adopted in decision. Rules on Appeal, rule 5(a).

13. Wills 🔑535

Recital in will that no provision was made for son because he was named beneficiary of life policies was not evidence that policy proceeds were payment of agreed installments for child's maintenance after testator's death or that gift of insurance money operated as termination of testator's obligation in that respect.

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* Subsequent opinion 212 P.2d 505.

14. Wills ⚿535

Where husband was obligated by property settlement agreement and by divorce decree to pay $50 per month as maintenance for minor child until he reached age of 21 years or became self sustaining, recital in will that no provision was made for son because he was made beneficiary of life policies did not terminate testator's obligation to pay maintenance installments accruing after death.

◆

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Action by Mary Z. Taylor, formerly Mary Zella Williams, against Marjorie George, as executrix of the last will and testament of Charles Williams, deceased, to recover an allowance for benefit of child. Judgment for defendant and plaintiff appeals.

Reversed with directions.

Mazzera, Snyder & Demartini, and J. Cal. Snyder, all of Stockton, for appellant.

O. C. Parkinson, of Stockton, for respondent.

THOMPSON, Justice.

The plaintiff has appealed from a judgment which was rendered against her in a suit against the executrix of the last will of Charles Williams, deceased. She sought to recover an allowance awarded to her in the final decree of a former divorce suit between said spouses, of $50 per month for the maintenance of their minor child until he attained twenty-one years of age. The trial court determined in this case that plaintiff was entitled to no relief by her action.

This case was heard upon a written stipulation of facts to which there were attached as exhibits the interlocutory and final decrees of divorce, the executed written settlement of property rights, including therein an agreement to pay plaintiff said $50 per month as maintenance for the child until he "attains the age of 21 years", a deed to certain real property, the last will of the decedent, and plaintiff's claim for $5,500, being the aggregate amount of said award of maintenance from the date of death of her former husband to the time when the child will reach his age of majority, November 1, 1955, which claim was duly presented to the probate court and rejected.

Assuming that the stipulation covered all essential facts, the court adopted no findings.

The stipulation of facts shows that plaintiff and Charles E. Williams were formerly husband and wife; that there was born, November 7, 1934, as the issue of said marriage, one son, Charles E. Williams, Jr.; that dissensions arose between the spouses; that they executed a written property settlement agreement on October 1, 1942, by the terms of which their community property was divided equally between them, and it was agreed the wife should have the custody of their minor child, and that the husband would pay to her, as maintenance for the child, the sum of $50 per month until it "becomes self-supporting" or "attains the age of 21 years"; that plaintiff brought suit against her husband for divorce, in which the final decree of divorce was awarded to her November 8, 1943, on the ground of his extreme cruelty. By the terms of that decree she was given exclusive custody of the child and $50 per month for its maintenance until the child becomes self-supporting, or attains the age of 21 years. It was stipulated that all of said payments were made to the time of the death of the husband; that the plaintiff thereafter married Mr. Taylor; that, on May 23, 1944, Mr. Williams executed his last will, in which he explained his failure to devise or bequeath any property to his said son, in the following language: "2. I have in mind my said son, Charles E. Williams Jr., and expressly make no provision for him in this Will for the reason that I have in force policies of life insurance upon my own life, in which he is named as Beneficiary, in the amount of

$7000.00, and feel that such provision is, and will be sufficient for his needs so far as any contribution from me is concerned."

The will gave his entire estate to his sister, Marjorie George, and named her as executrix to serve without bond. Mr. Williams died August 6, 1946. The will was admitted to probate, and the defendant was appointed and qualified as executrix thereof. Plaintiff presented in due time to the executrix of the estate of said decedent her claim for $50 per month for maintenance of the child from September 1, 1946, to November 1, 1955, aggregating the sum of $5,500, which claim was rejected.

The stipulated facts further show that plaintiff was appointed guardian of the person and estate of said minor child and that the insurance companies which issued the policies upon the life of decedent subsequently contracted with plaintiff, as guardian of the minor, to transfer to her said policies for the benefit of the minor child; that said policies so transferred were as follows: Equitable Life Insurance Company, in the sum of $5,000, Metropolitan Life Insurance Company, in the sum of $1,000, and Brotherhood of Painters, in the sum of $176.28; that a small trust fund held by the decedent in a local bank, in the sum of $43.53, was also transferred to the plaintiff in trust for said minor child.

The appellant contends that the court erred in failing to adopt a finding that the testator, by the terms of his will, intended to discharge his obligation to pay plaintiff the installments of maintenance for the child accruing after his death, by continuing in force the insurance policies on his own life for the benefit of the child; that the stipulated facts upon which this case was tried do not show that the testator intended to or did pay or provide for the payment of said installments for maintenance accruing after his death; and that the judgment that plaintiff take nothing by her action is not supported by the evidence because the award in the decree of divorce of $50 per month for maintenance of the minor child until it arrives at the age of majority, or becomes self-sustaining, did not terminate at the death of the husband, but became a valid claim against his estate for all subsequently-accruing installments.

[1, 2] It has been determined in California, contrary to the common law rule, that an unmodified award against the husband in a divorce decree of a specified sum to be paid to the wife by the husband for maintenance of their minor child until it attains the age of majority or becomes self-sustaining, does not automatically terminate upon his death when the term for which said payments are allowed has not expired. At least, it has been held such subsequently-accruing installments for maintenance of a minor child are valid claims against his estate when the husband has executed a written agreement to pay them, as he did in the present case. Newman v. Burwell, 216 Cal. 608, 612, 15 P.2d 511; Estate of Caldwell, 129 Cal.App. 613, 19 P.2d 9; Estate of Smith, 200 Cal. 654, 659, 254 P. 567; Myers v. Harrington, 70 Cal.App. 680, 684, 234 P. 412; Stone v. Bayley, 75 Wash. 184, 134 P. 820, 48 L.R.A., N.S., 429; 27 C.J.S., Divorce, § 323c, p. 1252; 17 Am.Jur., sec. 706, p. 536; 50 A.L.R. 241, note.

[3] The respondent asserts that this action will not lie against the executrix of the estate of Charles Williams, deceased, because it is not founded on contract and does not come within the provisions of Section 573 of the Probate Code. We think the action is authorized by that section. It then provided that: "Actions for the recovery of any property, real or personal, * * * and all actions founded upon contracts, may be maintained by and against executors and administrators in all cases in which the same might have been maintained by or against their respective testators or intestates, * * *."

This action is founded on the executed contract settling property rights, in which the husband agreed to pay his wife $50 per month for maintenance of the child until it attains the age of majority, or becomes self-supporting. That identical language is also included in both the interlocutory and final decrees of divorce. Regardless of the fact that the decree of divorce failed to refer to the former contract or specifically include its terms therein, the court made its order for maintenance in exact accordance with the former agreement, and it is therefore adequate to support the claim in this case. Estate of Caldwell, supra; Parker v. Parker, 193 Cal. 478, 225 P. 447.

[4, 5] The respondent also asserts that the claim which was presented to the executrix in this case and rejected is inadequate as the foundation and prerequisite to the maintenance of this suit, because it merely refers to the final decree of divorce and not to the former contract. We think the claim was adequate to inform the executrix or the probate court of the nature, extent and grounds upon which the claimant sought to charge the estate. It specifically stated that it was for "support and maintenance of Charles E. Williams, Jr., the minor son of claimant and said decedent," for $50 per month from September 1, 1946, to November 1, 1955, as provided by the final decree of divorce, a copy of which was attached to the claim, and made a part thereof. The decree to which the claim refers contained the order for maintenance in exact accordance with the stipulation of the property settlement agreement. The validity of the claim did not depend on the existence of the contract. assuming that the maintenance of the action against the estate, under Section 573 of the Probate Code, depended upon the existence of the contract, that was merely procedural in nature. As the court says in Estate of Caldwell, supra, 129 Cal.App. at page 615, 19 P.2d at page 10: "The matter of having the agreement incorporated in the divorce decree would affect the manner of enforcement only." We conclude that the claim was not defective in form merely because it did not refer to the contract or attach a copy of it to the claim. The allowance of a claim is a mere acknowledgment of a debt against the estate. Estate of Naegely, 31 Cal.App.2d 470, 475, 88 P.2d 715; Estate of Bell, 168 Cal. 253, 259, 141 P. 1179; 11A Cal.Jur. 507, sec. 574. The rejection of a claim is, in effect, a repudiation of the claimed debt. We conclude that the claim which was presented and rejected in this case is sufficient in form to comply with the statute as a necessary prerequisite to the maintenance of this action. The claim was attached to the complaint and its presentation and rejection were pleaded. The defendant failed to demur to the complaint on account of alleged defects in the form of the claim, or at all.

There is absolutely no evidence in this case of the termination of decedent's obligation to pay $50 per month for maintenance of the child until it attains the age of majority, unless the above-quoted paragraph of the will may be reasonably construed, by inference, to terminate the obligation on account of what it states with relation to the insurance policies. There is no evidence that the property agreement was ever modified or rescinded by the parties, or that the divorce decree was modified in that regard. We must assume they were not changed. This court must, therefore, determine from the language of the will whether the life insurance policies referred to therein, with the child named as beneficiary thereof, constituted a termination of the testator's obligation to pay his wife the installments for its maintenance after his death.

[6-8] When a cause is submitted for determination upon an agreed complete statement of ultimate facts, the adoption of findings by the trial court is ordinarily unnecessary. Alderson v. Cutting, 163 Cal. 503, 126 P. 157, Ann.Cas.1914A, 1; Estate of Hartman, 21 Cal.App.2d 266, 68 P.2d 744; 24 Cal.Jur. 953, sec. 192. But when the stipulation covers evidentiary facts upon material issues, as distinguished from ultimate facts, it is the duty of the trial court to adopt findings determining such evidentiary facts. The appellant is entitled to such findings. Crisman v. Lanterman, 149 Cal. 647, 655, 87 P. 89, 117 Am. St.Rep. 167; Zimmerman v. Continental Life Insurance Co., 99 Cal.App. 723, 727, 279 P. 464. When all of the material issues are covered by an agreed statement of ultimate facts the record presents a mere question of law for determination of the court. Estate of Platt, 21 Cal.2d 343, 352, 131 P.2d 825; 5 C.J.S., Appeal and Error, § 1661, p. 753; 24 Cal.Jur. 953, sec. 192. But in the present case there was no complete stipulation of ultimate or probative facts, and no findings upon the necessary issue with respect to the termination of the decedent's obligation to pay his wife maintenance installments which accrued after his death. In the absence of

evidence showing that the obligation terminated, we must assume that it continued.

[9, 10] In the absence of other evidence upon the subject, a reviewing court is not bound by the construction of the trial court of the language of a contract or the provisions of a will unless it is clear and certain. When the instrument is before the reviewing court it must construe the language and determine its meaning and effect as a matter of law. Estate of Platt, supra; La Lumia v. Northern California Packing Co., 75 Cal.App.2d 917, 172 P.2d 94; Fischer v. Means, 88 Cal.App.2d 137, 198 P.2d 389; 6 Cal.Jur. 326, sec. 192. It is true that when there is other evidence reasonably to support the trial court's construction of the language of the contract, a reviewing court may not assume the authority to otherwise construe the instrument. Estate of Rule, 25 Cal.2d 1, 11, 152 P.2d 1003, 155 A.L.R. 1319. In Estate of Norris, 78 Cal.App.2d 152, 177 P.2d 299, 303, it is said with respect to the duty of a reviewing court to construe the language of a contract, decree, or will which is involved on appeal, in the absence of other evidence of its meaning, that: "* * * Inasmuch as no extrinsic evidence was introduced on this issue, the question of the proper interpretation of the decree is a question of law and not of fact. Whatever confusion might have existed in the law on this subject prior to 1942 was set at rest by the decision in Estate of Platt, 21 Cal.2d 343, 131 P.2d 825. Since the decision of that case it is settled law that the interpretation of a document, including a will or a decree, is a question of law, and that it is the duty of an appellate court in such cases to interpret the document independent of the construction given to it by the trier of the fact, and to make a final determination in accordance with the applicable principles of law. [Citing authorities.]"

[11] When the language of a contract or decree which is required to be construed is uncertain or ambiguous with relation to its effect upon a necessary issue involved in the case the appellant is entitled to a finding on that subject.

[12] In this case no findings were adopted. It is true that the trial judge, in his "memorandum opinion" said, "The court concludes that the decedent, Charles Williams, intended that the insurance policies should be the means of payment of the sums payable for the support of his minor son," and that "the delivery of those insurance policies and other sums to the plaintiff constituted a full payment and satisfaction of any liability that may continue to survive under that decree against the estate of Charles Williams, deceased." But, in spite of the fact that the opinion of the trial judge may now be included in the record on appeal (Rule 5(a) Rules on Appeal), it may not be substituted for the omission of necessary findings nor serve to modify or change the findings which are adopted in the decision of the court. Lord v. Katz, 54 Cal.App.2d 363, 367, 128 P.2d 907; Nestor v. Burr, 124 Cal.App. 369, 12 P.2d 479; Blackwell v. Ferrari, 60 Cal.App.2d 13, 18, 139 P.2d 997; 2 Cal.Jur. 688, sec. 394; Phillips v. Hooper, 43 Cal.App.2d 467, 111 P.2d 22, 23. In the case last cited, citing with approval Goldner v. Spencer, 163 Cal. 317, 125 P. 347, the court said: "* * * It has been held that the findings of fact must be taken as embodying the conclusions of the trial court on all questions of fact submitted to it for decision. Goldner v. Spencer, 163 Cal. 317, 125 P. 347. And no antecedent expressions of the judge can in any way restrict his absolute power to declare his final conclusion, in the only manner authorized by law, to wit, by filing his 'decision' (findings of fact and conclusions of law), provided in sections 632 and 633 of the Code of Civil Procedure. [Citing authorities.]"

The respondent suggests that if a finding as to the termination of the obligation is necessary, this court is authorized by Section 956a of the Code of Civil Procedure to adopt such finding. Rule 23 of Rules on Appeal provide that when such a request is made it shall contain "a draft of the proposed findings", which does not appear in respondent's brief.

[13, 14] We are unable to construe the will as evidence that the testator gave to his minor child the proceeds of the insurance policies by making him sole beneficiary thereof as payment of his agreed installments for the child's maintenance after

his death, or that the gift of the insurance money operated as a termination of his obligation in that regard. Gainsburg v. Garbarsky, 157 Wash. 537, 289 P. 1000, 1002. We are of the opinion the previously-quoted paragraph of the will may not be construed to terminate the testator's obligation to pay said maintenance installments accruing after his death. Nor are we directed to any evidence which supports that theory. The will does not mention that obligation, or the provision of the divorce decree, or the existing property settlement agreement in which he promised to pay his wife $50 per month for maintenance of the child until it reached the age of majority. Nor was any evidence adduced to support the judgment that plaintiff was entitled to take nothing by her action. Paragraph two of the will, which contains the only reference to the insurance policies, appears to be a mere explanation of the reason why the testator gave nothing to his child by the terms of the will, realizing that an omission to mention the existence of his only blood relation who would normally be entitled to his bounty would be some evidence of an unnatural will. The will does not purport to give the proceeds of those policies to the child. It does not state that the policies had been or would be procured for the benefit of the child in lieu of the obligation to pay maintenance installments. It clearly states that "I have in force policies of life insurance upon my own life", of the value of $7,000, and that the testator feels "such provision is, and will be sufficient for his needs so far as any contribution from me [in the will] is concerned." Clearly, the policies in question were issued long before the will was executed. The policies were taken out before the execution of the property settlement agreement in October, 1942, because the agreement provides that the husband will pay all premiums on a policy of $500 then issued upon the life of the child, and that "other insurance policies" then existing on the husband's life, "shall be his [the husband's] without restriction, with right to change beneficiary, cash or otherwise dispose of the same." That statement clearly infers that when the agreement was executed the policies in question existed with the child named therein as sole beneficiary. The policies were therefore given to the child prior to the execution of that contract in which the husband agreed to pay his wife the maintenance installments. If the reservation to change the beneficiary had been intended to modify or limit the payment of maintenance installments, the contract should have so stated. The contractual obligation to pay those installments was definite and unlimited. It is evident that the husband never did change the beneficiary, for the will states that fact, and the stipulation recites that the policies were transferred by the insurance companies to plaintiff as guardian of the child after the death of the husband. The language of the will to the effect that the testator feels that "such provision is, and will be sufficient for his [the child's] needs so far as any contribution from me is concerned," read in connection with the preceding statement, should be construed to mean that since the testator has previously adequately provided for the child by means of the policies, he therefore made no further provision for it in the will.

We conclude that the will furnishes no evidence that the obligation to pay maintenance installments terminated. The stipulation of facts, contract and decree of divorce indicate that the obligation had not terminated.

For the foregoing reasons, the judgment is reversed and the trial court is directed to ascertain the amount of unpaid installments and to render judgment for plaintiff in that amount.

ADAMS, P. J., and PEEK, J., concur.

91 Cal.App.2d 299

EMPLOYEES' PARTICIPATING ASS'N v. PINE et al.

Civ. 16609.

District Court of Appeal, Second District, Division 3, California.
April 18, 1949.

1. Vendor and purchaser ⚷328

Generally, value of property to seller is the market value of property at time of breach of contract to purchase realty, in which case it is necessary to allege such value in order to plead a cause of action for damages. Civ.Code, § 3307.

2. Appeal and error ⚷193(1)

A defendant may not stand by and, without objection, allow issue to be tried as though properly pleaded and then, on appeal, escape consequences because complaint failed to properly present such issue.

3. Appeal and error ⚷193(8)

Where defendant in action to recover damages for breach of contract to purchase realty did not raise question as to sufficiency of pleading in regard to allegation of value of property at time of alleged breach but allowed case to be tried on theory that market value at time of breach was at issue, defendant could not for first time on appeal assert that complaint failed to properly present issue of market value of property at time of breach. Civ.Code, § 3307.

4. Vendor and purchaser ⚷331

Trial court, in awarding damages for breach of contract to purchase real property, was not required to set forth computation showing by what method it determined amount of damages to be awarded. Civ.Code, § 3307.

5. Vendor and purchaser ⚷330

Finding as to $2500 damages resulting from purchasers' breach of contract to purchase real property was supported by evidence, notwithstanding that no witness testified as to that amount, where there was testimony as to market value of property at time of the breach from which trial court could have found that market value of the property at time of breach had decreased considerably more than $2500 from contract price. Civ.Code, § 3307.

◆

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Action by Employees' Participating Association against Jacob Pine and others for breach of contract to purchase real property. From judgment for plaintiff, the defendants appeal.

Affirmed.

Paul Gordon and Samuel H. Sherman, both of Los Angeles, for appellants.

Paul R. Hutchinson, of Los Angeles, for respondent.

WOOD, Justice.

This is an action to recover damages for breach of contract to purchase real property. Judgment was for plaintiff for $2,500. Defendants appeal from the judgment.

The property involved herein, consisting of an improved lot and two adjoining unimproved lots, was listed with a real estate broker for sale for $25,000. On April 8, 1946, defendants entered into an agreement to purchase the property for $21,750 and paid a deposit thereon of $500. Escrow instructions were signed by the seller and the purchasers, and the seller delivered a grant deed and "a bill of sale" into escrow. About July 3, 1946, before the escrow had been closed, defendant Jacob Pine sent a notice of rescission to the escrow holder and to the plaintiff. Thereafter, plaintiff commenced this action and alleged it was damaged in the sum of $6,750.

Appellants contend that the complaint did not state facts sufficient to constitute a cause of action; that the finding of fact relating to the amount of damages was not sustained by the evidence; and that the judgment is not sustained by the evidence.

[1-3] Appellants assert that the complaint did not state facts sufficient to con-

stitute a cause of action for damages, for the reason that it did not allege the value of the property at the time of the breach. It was alleged in paragraph VII of the complaint herein, as amended, that "since defendants' breach of contract as aforesaid, the value of said property has decreased from Twenty-One Thousand Seven Hundred Fifty ($21,750.00) Dollars to Fifteen Thousand ($15,000.00) Dollars, all to the plaintiff's damage in the sum of Six Thousand Seven Hundred Fifty ($6,750.00) Dollars." The measure of damages for breach of agreement to purchase real property is stated in section 3307 of the Civil Code, which provides that the damage sustained by a seller by reason of a breach of agreement to purchase real property is the excess, if any, of the contract price "over the value of the property" to the seller. As a general rule, "the value of the property" to the seller is the market value of the property at the time of the breach, Shurtleff v. Marcus Land & Investment Co., 59 Cal.App. 520, 523, 211 P. 244; Dean v. Hawes, 21 Cal.App. 350, 355, 131 P. 885, in which case it is necessary to allege such value in order to plead a cause of action for damages. Caspar Lumber Co. v. Stowell, 37 Cal.App.2d 58, 61, 98 P.2d 744. In the present case defendants in their answer denied the allegations in paragraph VII, but did not raise a question as to the sufficiency of the pleading. At the trial evidence was introduced, without objection, as to the value of the property at the time of the breach, and the court's finding as to damages was based upon the value of the property at the time of the breach. If defendants had made a timely objection plaintiff might have remedied the defect by amending the pleadings. In the case of Caspar Lumber Co. v. Stowell, supra, which was an action for the balance due on a written contract for the sale of real property, the court held that the complaint was insufficient as a complaint for damages under section 3307 of the Civil Code because it failed to allege the market value of the property at the time of the breach. In that case, however, defendant's demurrer and special demurrer were sustained without leave to amend, and the plaintiff did not request leave to amend. In the case of Lynn v. Knob Hill Improvement Co., 177 Cal. 56, 169 P. 1009, cited by appellants, the court held that the complaint for damages, which failed to allege the value of the land at the time of the breach, did not state a cause of action. In that case, however, defendant's default was entered, no evidence of damage was offered, and no findings were made. The present case was tried on the theory that the market value at the time of the breach was at issue. A defendant may not stand by and, without objection, allow an issue to be tried as though properly pleaded and then, on appeal, escape the consequences because the complaint failed to properly present such issue. See Vaughan v. Jonas, 31 Cal.2d 586, 605, 191 P.2d 432; Slaughter v. Goldberg, Bowen & Co., 26 Cal.App. 318, 325, 147 P. 90; Abner, Doble Co. v. Keystone Consol. Min. Co., 145 Cal. 490, 495, 78 P. 1050. Appellants' contention is not sustained.

[4, 5] As to the further contention of appellants that finding number 10, relating to damages, was not supported by the evidence, they argue that there was no evidence that the value of the property at the time of the breach was $2,500 less than at the time the contract was made. They assert that no witness testified that the "figure" $2,500 was the difference between the selling price and the market price at the time of the breach, and that there was no testimony as to any combination of figures from which the sum of $2,500 could have been calculated.

The real estate broker with whom the property had been listed for sale, and who represented plaintiff in negotiating the sale with defendants, was called as a witness on behalf of the plaintiff, and testified as follows: He had been licensed to sell real property in California about 15 years and during that time had maintained his office directly across the street from the property here involved. The building on said property was erected in 1922 and the witness watched its construction from the beginning. He was familiar with the value of real property of that type in that area. He had sold the property here involved three different times. In his opinion $21,750 was a fair price for the property on April 8, 1946, the date the agreement was entered into. After the agreement was entered into the property declined in value. About the first part of July there was no demand for real property, and market prices dropped suddenly. In his opinion "$17,000 was tops" for the building and the lots on or about July 3, 1946, and they were not worth "over $17,000" at that time.

A witness called on behalf of defendants testified that he was a real estate broker and that he had entered into an agreement to purchase the property here involved on October 9, 1946. He also testified that he believed statistics would show that the value of real property decreased in June, 1946. He testified further that he believed the last witness was "more familiar" with industrial property than he was, and that the testimony of the last witness was "pretty much accurate."

There was evidence, oral and documentary, showing the selling price of the property to be $21,750, and there was expert testimony that the value of the property at the time of the breach was not "over $17,000." That evidence would have been legally sufficient to have supported a finding that the plaintiff was damaged in the sum of $4,750 (the difference between the selling price and the market value at the time of the breach). As shown above, the court awarded damages in the sum of $2,500, which was less than the amount of said difference in values. The trial court was not required to find the value of the property to be the full value stated by a witness. It was stated in the case of Roloff v. Hundeby, 105 Cal.App. 645, at pages 652–653, 288 P. 702, at page 705: "Questions of value are almost always matters of opinion, and evidence thereon usually goes no further than to give the court more or less general ideas on the subject. From the evidence thus received a trial court must draw its own conclusions of value by a process of balancing and reconciling, if possible, the varying opinions. * * * [T]he trial court, in an effort to attain an even justice, often exercises a wide discretion in awarding damages." Apparently the court herein found the market value of the property to be $19,250 at the time of the breach, (which is $2,500 less than the selling price of $21,750). A trial court need not set forth computations showing by what method it determined the amount of damages to be awarded. Roloff v. Hundeby, supra, 105 Cal.App. 645, at page 652, 288 P. 702. The case of Klegman v. Moyer, 91 Cal.App. 333, 266 P. 1009, was an action to recover damages for an alleged breach of contract to exchange real property. The trial court awarded plaintiff damages in the sum of $5,000 but did not set forth its process of computation. On appeal the court stated therein, 91 Cal. App. at page 346, 266 P. at page 1014: "We are entitled to draw necessary inferences from the findings in order to support a judgment. * * * 'It has been held that courts may find damages in a lump sum, and that any uncertainty in the findings is to be construed so as to support the judgment rather than to defeat it.'" The trial court herein had before it testimony as to the value of the property at the time of the breach, testimony regarding fluctuation in market values at the time of and immediately after the breach, evidence of the type, construction and age of the building, and conditions generally in that neighborhood. The finding as to the amount of damages is supported by the evidence.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

91 Cal.App.2d 365

GILLIS v. ROYALTY SERVICE CORPORATION, Limited, et al.

Civ. 16524.

District Court of Appeal, Second District, Division 3, California.

April 20, 1949.

Hearing Denied June 16, 1949.

1. Municipal corporations ⚷519(1)

Street improvement bonds which were a lien against land when community oil lease was made were not a lien upon royalty interest, pertaining to such land, in the oil produced upon other land in the lease.

2. Mines and minerals ⚷79(1)

The royalty interest of a lessor under a community oil lease in the oil produced upon land of his colessors is an estate in realty, an incorporeal hereditament in gross, and it is separate from his royalty interest in oil which might be produced from his own land and it can only be conveyed by specific transfer of such interest.

3. Municipal corporations ⚷579

Where pre-existing lien of street improvement bonds on land included in community oil lease was foreclosed, purchaser at foreclosure sale did not acquire, through such purchase, the royalty interests of former owners in the oil produced upon other land in community lease.

4. Mines and minerals ⚷79(1)

Foreclosure of pre-existing lien of street improvement bonds against land included in community oil lease and sale of land destroyed former owner's right as lessor to royalties from oil produced upon other land in lease, since lessor in permitting foreclosure failed to perform condition in lease whereby she warranted and agreed to defend title to the land and the consideration for lease failed as to such land.

5. Appeal and error ⚷1030

Where former owner of land included in community oil lease sought to quiet her title to royalty interest thereunder and defendants alleged ownership of such land and royalty rights pertaining thereto, any error in requiring plaintiff and defendants to interplead their rights concerning royalty interests was harmless, since court was bound to adjudicate the whole question according to the evidence and award each litigant judgment for such interest as his proofs justified.

6. Mines and minerals ⚷79(7)

Where pre-existing lien of street improvement bonds was foreclosed against land included in community oil lease, though purchaser acquired no title to royalty interest under lease as a result of foreclosure sale, evidence sustained judgment quieting title to royalty interest in purchaser's transferee as against former owner of land in view of new counterparts of community lease made by transferee and lessee.

◆

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Jean I. Gillis against Royalty Service Corporation, Limited, and others, to quiet title to royalties and for an accounting under a community oil lease, wherein named defendant filed a cross-complaint for interpleader. From an adverse judgment, plaintiff appeals.

Judgment affirmed.

Faries & McDowell, C. E. McDowell, McIntyre Faries and Willard J. Stone, all of Los Angeles, for appellant.

Verne E. Robinson, of Los Angeles, for respondent Royalty Service Corporation, Limited.

Harold L. Green, of Los Angeles, for respondents Salter.

WOOD, Justice.

Action to quiet title to royalties, and for an accounting, under a community oil lease. Judgment was in favor of defendants, and plaintiff appeals.

Plaintiff's land, which was included in the community oil lease dated April 10, 1936, was subject to liens of street improvement bonds at the time the lease was made. The liens were foreclosed in 1937, and the owner of the street improvement bonds was the purchaser at the foreclosure sale. During 1937 and 1939, five other parcels of land, which were included in the oil lease, were also sold to satisfy street improvement bond liens. About 1944 the plaintiff acquired quitclaim deeds, and assignments of interest in the community oil lease, from the company that owned those 5 parcels at the time of the foreclosure sales. In 1944 plaintiff commenced this action.

Many parcels of land, other than the 6 involved here, were included in the oil lease. The parcel of land which plaintiff owned will be referred to herein as Parcel 1, and the 5 other parcels involved here will be referred to as Parcels 2, 3, 4, 5, and 6. No well was drilled on any of the 6 parcels. Prior to 1940 the titles to Parcels 1, 2, 3, 5, and 6 acquired by the purchasers at the foreclosure sales were transferred to defendant Fred Salter, and in 1942 the title to Parcel 4 acquired by the purchaser at the foreclosure sale was transferred to defendant Amanda Salter.

The community oil lease provided that owners of other parcels of land might join in the lease by executing counterparts thereof. After defendant Fred Salter had acquired the titles to said 5 parcels he executed a new counterpart of the community lease covering said 5 parcels. For a while thereafter the lessee paid royalties to Fred and Amanda Salter as co-lessors in the proportion which the acreage of said 6 parcels bore to the total acreage in the lease and then the lessee impounded the royalties, pertaining to those parcels, pending a determination as to whom such royalties should be paid. The lessee, Royalty Service Corporation, filed herein a "Cross-complaint for Interpleader" asking that the plaintiff and defendants Salter interplead their rights to the royalties under the lease.

The trial court found that plaintiff had no right, title or interest in the property, leases, or royalties; that plaintiff and her assignor (the company that owned the 5 other parcels before foreclosure) failed to perform the conditions of the lease; and that the consideration for the lease failed so far as plaintiff and her assignor were concerned. The trial court also found that defendant Fred Salter was the owner of the royalty interest under said lease, pertaining to the 5 parcels owned by him; and the court quieted his title to that interest.

Appellant asserts, in effect, that although the purchasers at the foreclosure sales acquired the fee title to the 6 parcels of land involved herein and the right to the oil produced from those parcels, they did not acquire the right of the plaintiff, under the community lease, to share in the production of oil from the land of her co-lessors. Stated in another way, she asserts that her right to royalties from oil produced upon parcels of land in the community lease, other than said 6 parcels, was not destroyed by foreclosure of the street bond liens.

[1-4] As above stated, the 6 parcels of land were subject to the liens of street bonds at the time the lease was made. It is conceded that the purchasers at the foreclosure sales acquired the fee titles to the 6 parcels of land free and clear of the lease, and acquired the right to drill for and produce oil upon said 6 parcels. The liens of the street bonds on the 6 parcels were not liens upon the royalty interests, pertaining to those parcels, in the oil produced upon the other parcels in the lease. The royalty interest of a lessor under a community oil lease in the oil produced upon the land of his co-lessors is an estate in real property, is an incorporeal hereditament in gross, and is separate and distinct from his royalty interest in oil which might be produced from his own land, and it can only be conveyed by specific transfer of that interest. Tanner v. Title Ins. & Trust Co., 20 Cal.2d 814, 820, 129 P.2d 383. Plaintiff did not make a specific transfer, or any transfer, of that interest as to her Parcel 1, and the owners of the 5 other parcels did not make a specific transfer, or any transfer, of such interest in those parcels. The purchasers of the 6 parcels at the foreclosure sales did not acquire, through such purchases, the royalty interests of the former owners of those parcels in the oil produced upon the other parcels of land in the community lease. If the royalty interests under the community lease, which the former owners of the 6 parcels had immediately before the foreclosure sales, remained in existence after the foreclosure sales, the

title to those interests remained in the former owners. Plaintiff was one of the former owners and subsequently acquired the remaining interest, if any, of the other former owner. Therefore, if the royalty interests which the former owners had immediately before the foreclosure sales, remained in existence after the sale, the plaintiff herein had title to them. A question therefore arises as to whether any royalty interest in the oil from other parcels in the community lease, which interests had been created by including the 6 parcels in the lease under the original counterparts, existed after the foreclosure sales. Plaintiff seeks, as above stated, to quiet her title to such royalty interests and to obtain an accounting by the lessee. As above stated, the court found that plaintiff as lessor of Parcel 1, and her assignor as lessor of the 5 other parcels, failed to perform the conditions of the lease; and that the consideration for the lease failed as to said 6 parcels. Paragraph 20 of the lease provides: "Lessor hereby warrants and agrees to defend the title to the land herein described * * *." Plaintiff owned Parcel 1 which was subject to the liens of the bonds. In the foreclosure action, with respect to that parcel, she was served with summons and complaint but she defaulted, and her parcel of land was sold at foreclosure sale to the owners of the bonds. By reason of her failure to defend her title to Parcel 1, the lessee under the community lease lost its right to drill for and produce oil upon that parcel, and lost its right to use that parcel for other purposes, mentioned in the lease, which were incidental to producing oil upon the other parcels included in the community lease. Likewise, the owner of the 5 other parcels (plaintiff's assignor) failed to defend its title to said parcels, with the result that the lessee also lost its rights under the lease with respect to those parcels. The plaintiff and her assignor failed to perform the conditions to be performed by them under the lease, and they failed to furnish the consideration promised by them for the agreement on the part of the leasee to pay royalties to them. Plaintiff was not entitled to any oil royalty under the provisions of the community lease.

Plaintiff argues that the consideration for the agreement on the part of the lessee to pay royalties will not fail by reason of the loss of title to a particular parcel of land, but will fail only by reason of a loss of title to all the parcels included in the community lease; that plaintiff's loss of title herein is immaterial; and that the obligation on the part of the lessee to pay plaintiff and her assignor a share of the oil production from wells on other parcels in the lease can be terminated only by the failure of consideration with respect to the land of her co-lessors. According to that argument, it would seem that a person who enters into a community oil lease, as the purported owner of certain property when in fact he is not such owner, would be entitled to receive royalty payments from the lessee for oil produced upon the land of his co-lessors, merely because he executed the lease, to the same extent as if he were the owner of the property. This contention is not sustained.

The case of Tanner v. Title Ins. & Trust Co., supra, 20 Cal.2d 814, 129 P.2d 383, relied upon by appellant, is distinguishable from the present case. In that case, where there were 9 lots in the community oil lease and oil wells were on 2 of the lots only, the lessee and all the owners of the lots entered into a written agreement terminating the lease as to all the lots except the 2 lots upon which oil was being produced. There after all the owners continued to participate in the royalties from the 2 lots for approximately four years. Some of the lots as to which the lease had been so terminated, were, after such termination, included in a different community oil lease and oil was produced therefrom, but the owners of the 2 oil-producing lots in the first lease did not participate in the royalties from the second lease. The owners of the 2 producing lots in the first lease commenced the action (relied upon by appellant) to quiet their titles to the oil royalties under the first lease. After the first lease had been made, an owner of one of the 9 lots executed a trust deed covering his lot, but prior to doing so the lessee and that owner, upon the demand of the beneficiary named in the trust deed, executed a subrogation agreement making the lease subject to the trust deed. The trust deed was foreclosed and the beneficiary purchased the lot at the sale. In the quiet title action commenced by the owners of the 2 lots, the purchaser at that sale sought to quiet title in itself to a share of the royalties from the said 2 lots in the first lease. The owner of the lot which was sold at the foreclosure sale was not made a party to that action. It was held in that case that, under the provisions of the agreement terminating the first lease as to all the lots except said 2 lots, all the owners under the first lease were entitled to share in the royalties from oil produced upon the 2 lots. it was also held therein that the purchaser at the foreclosure sale was not entitled to have title quieted in it to a share of such royalties. It is to be noted therefore that a material respect in which said case, relied upon by appellant, is distinquishable from the present case is that the lessee and all the owners under the first lease entered into the agreement terminating the lease as to all lots except the 2 oil-producing ones, and that said agreement in legal effect reserved to the owners of the surrendered lots the right to share in the royalties from oil produced on the 2 lots.

[5, 6] It is not necessary to determine whether the court erred in requiring the plaintiff and the defendants Salter to interplead their rights concerning the royalty interests. The defendants Salter, in their answers to the second amended and supplemental complaint, pleaded that they were the owners of said parcels and the royalty rights pertaining to those properties, and they asked that their titles thereto be quieted as against the appellant. Under the pleadings the court had power to determine the matter of title as between plaintiff and the defendants Salter, and "It was the duty of the court to adjudicate the whole question according to the evidence and to award each litigant the judgment for such interest as his proofs justified." Milton E. Giles & Co. v. Bank of America Nat. Trust & Savings Ass'n, 47 Cal.App.2d 315, 323, 117 P.2d 943, 947. Although the defendant Fred Salter acquired no title to the royalty interests as a result of the foreclosure sales, the evidence was sufficient to support the judgment quieting his title in the royalty interests as against appellant in view of the new counterparts of the lease made by him and the lessee concerning his 5 parcels. As above shown, after the foreclosure sale of appellant's Lot 1, she had no title to any royalty interest in the oil produced upon the other parcels in the community lease, and she did not acquire title to any such royalty interest by reason of the quitclaim deeds to the 5 other parcels.

It appears that defendant Amanda M. Salter did not make a new counterpart of the lease covering Parcel 4 acquired by her. The court quieted her title to Parcel 4 as against plaintiff, but it appears that the court did not quiet her title to royalty interests in oil produced upon the land that remained in the community lease.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

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91 Cal.App.2d 371

In re MEALY'S ESTATE.

MELLO v. BURCHELL.

Civ. 7576.

District Court of Appeal, Third District, California.

April 20, 1949.

Hearing Denied June 16, 1949.

1. Executors and administrators ⚷21(2)

Superior court had authority to take testimony and determine identity of legatee named in holographic will in proceeding for appointment of an administrator with will annexed. Probate Code, § 105.

2. Wills ⚷18

Evidence sustained finding that purpose of nonprofit publishing corporation was not to support distribution of writings or other activities hostile to religion, law, or morals, nor was it a device for destruction or overthrow of United States government so as to invalidate bequest to such corporation on ground of public policy. Probate Code, § 27; Corporation Code, §§ 802, 9501.

3. Wills 🔑3

Amendment of section 41 of Probate Code making a limitation, as to degree of relationship of heir who could invalidate testamentary gifts to charities, to include a sister, did not amend section 43 in same article making section 41 inapplicable where a will is executed at least six months prior to death of testator leaving no spouse, children, grandchild, or parent. Probate Code, §§ 41, 43.

4. Wills 🔑13(1)

Where will of testator was executed more than nine months prior to his death and left his estate to a nonprofit corporation and his sole heir was a half-sister, she was not entitled to inherit any part of his estate. Probate Code, §§ 27, 41, 43; Corporation Code, §§ 802, 9501.

Appeal from Superior Court, Napa County; M. C. Lernhart, Judge.

Proceeding in the matter of the estate of Joseph Jewel Mealy, deceased, wherein Marilla Mello filed a petition for letters of administration, opposed by Charles E. Burchell, who filed a petition for appointment as administrator with the will annexed. From orders denying petition of petitioner and granting petition of opponent, petitioner appeals.

Affirmed.

Riggins, Rossi & Streblow, of Napa, for appellant.

Palmer & York, of Calistoga, for respondent.

ADAMS, Presiding Justice.

Appellant, who is the half-sister of Joseph Jewel Mealy, deceased, appeals from two orders of the probate court, the one granting letters of administration with the will annexed in the estate of said decedent, to the public administrator, and the other denying a petition filed by appellant to be appointed administrator.

Decedent, who died November 26, 1947, left two holographic wills, both dated January 30, 1947, one of which was found in his safe deposit box and the other in his wallet. They are approximately the same, and may be considered as one document, reading:

> "January 30th 1947
>
> "Will and Testement of Joseph J. Mealy
>
> "I being in sound mind give that I posess to the Peoples Daily World of San Francisco Calif and nominate them executer of this Will and Testement. My half sister Marilla Mello take nothing from this Will and Testement.
>
> "Joseph J. Mealy"

Appellant in the petition filed by her alleged that decedent left no will except the aforesaid documents, which she asserted purported to leave the estate to a corporation or association not competent to take or to act as executor; that therefore decedent died without leaving a will, and that she, as sole surviving heir of said decedent, was entitled to letters of administration.

The public administrator appeared in opposition to said petition, and filed his own petition for appointment as administrator with the will annexed, filing therewith the two wills and asking for probate of same.

The court denied appellant's petition, granted that of the public administrator, admitted the wills to probate and found that The Peoples Daily World is a newspaper printed by the Pacific Publishing Foundation, Inc., a corporation, and that the said corporation is the sole legatee and devisee of decedent. No contest of the wills was instituted.

Appellant's contentions are that the gift to the newspaper is void; but that, in any event, if the gift to it is sustainable at all, it constitutes a gift to charity and only one-third of the estate can go to such charity, and two-thirds must be held to descend to her, as heir; and as such heir she is entitled to letters of administration with the will annexed.

Respondent contends that the Pacific Publishing Foundation, Inc., is entitled to take the entire estate under the terms of the will; that regardless of the fact that said will designated the Peoples Daily World as the legatee the court was entitled, under section 105 of the Probate Code, to take testimony relative to the identity of the legatee, which it did, and that such testimony is ample to support the finding that the bequest was to the corporation as publisher of the publication named; also that the corporation named was authorized by law to take bequests under section 27 of the Probate Code, it being a corporation organized for literary purposes, and not a charitable or benevolent society or corporation.

[1] Appellant does not contend, on this appeal, that the trial court erred in its determination that the bequest was to the publishing corporation; and that the court was empowered to make such a determination is supported by ample authority. See In re Estate of Brehm, 116 Cal.App. 206, 208, 2 P.2d 402; In re Gibson, 75 Cal. 329, 331, 17 P. 438; In re Estate of Dol, 182 Cal. 159, 167, 187 P. 428; In re Estate of Steinman, 35 Cal.App.2d 95, 101, 94 P.2d 821.

The evidence shows that the Pacific Publishing Foundation, Inc., is a non-profit corporation whose articles of incorporation provide that its purpose is "To disseminate and distribute information and educational material in the form of books, tracts, pamphlets, newspapers, periodicals, or other printed or written material * * *," and they further recite "* * * this corporation shall at all times be operated and conducted only for educational and other non-profit purposes, and the organization of this corporation and its activities shall at no time result in financial or pecuniary gain or profit to the members thereof or to any other person."

Under section 27 of the Probate Code testamentary disposition may be made to corporations formed for religious, scientific, literary, or solely educational purposes. Section 802 of the Corporation Code provides that corporations may take real and personal property by will, gift or bequest (see In re Estate of Dol, supra, 182 Cal. at page 167, 187 P. 428) and section 9501 provides that every non-profit corporation may recieve property by devise or bequest, subject to the laws regulating the transfer of property by will.

Appellant does not argue that the evidence shows that the purposes of the corporation are other than thus stated, but she does urge that the gift to the Peoples Daily World should be held invalid as against public policy; that 60 copies of that publication, which she introduced in evidence, indicate that it is concerned with the interests of a foreign power as opposed to those of the United States; and she refers to excerpts from articles therein opposing loans or the furnishing of military aid to Greece, expressing sympathy with Russia and the campaign of Wallace for president, as well as articles by "William Z. Foster, National Chairman of the Communist Party," announcements of Communist meetings, and eulogies of persons with known Communist connections. She cites such authorities as 2 Restatement of the Law on Trusts, p. 1168, to the effect that "A trust for a purpose, the accomplishment of which is contrary to public policy, although not forbidden by law is invalid." Also 10 Am. Jur., sec. 67, p. 633, to the effect that "A trust is invalid and unenforceable, however, where its purpose is the distribution of writings, the general tendency of which is hostile to religion, to law, or to morals."

Respondent replies by asserting that no trust is involved here; that the bequest is not to the corporation in trust. If we were to assume, though we do not decide, that the principles applicable to trusts are applicable to this devise, we could not say that the purposes for which it was made and for which it may be used are necessarily "hostile to religion, to law, or to morals," or that they are contrary to public policy. It has not been shown that the purpose of the publishing company is to overthrow the government of the United States by force or violence, and much as one may disagree with its beliefs or teachings, the fact remains that its operations have not been interdicted by law. The evidence shows that the Peoples Daily World is sent through the United States mails, and is sold openly upon the streets of San Francisco.

[2] The trial court found: "The evidence adduced at the time of the hearing of the applications for Letters of Administration with the Will Annexed is insufficient to support a finding that the devise is invalid in that its purpose was to support the distribution of writings or other activities

hostile to religion, to law, or to morals nor was the devise made for the destruction or overthrow of our government. The evidence adduced is insufficient to hold the devise invalid because of public policy. If the Peoples Daily World is a newspaper engaged in the activities suggested in one of the memorandums filed with the court such fact must be established by competent and sufficient evidence."

In Re Hartman, 182 Cal. 447, 449, 188 P. 548, 549, the court said: "Nothing would seem to be more certain than that the inhabitants of the United States have both individually and collectively the right to advocate peaceable changes in our constitution, laws or form of government, although such changes may be based upon theories or principles of government antagonistic to those which now serve as their basis."

This court, in Re Campbell, 64 Cal.App. 300, 306, 221 P. 952, quoted with approval the above quoted language from the Hartman case.

In both cases the petitioners were discharged from convictions for violating local ordinances which were framed to prevent the publication or circulation of printed matter bearing some resemblance to that printed in the Peoples Daily World.

[3] Appellant's second point urged here is that at any event not more than one-third of the estate can go to the Publishing Company, citing section 41 of the Probate Code. Respondent in reply cites section 43 of said code which makes section 41 inapplicable where a will is executed six months or more before the death of a testator "who leaves no spouse, child, grandchild or parent." He points out that the wills in this case were executed some nine months prior to testator's death, and that appellant, as half sister of decedent, is not mentioned in section 43, and that, therefore, appellant would not be entitled to inherit any part of the estate. It is conceded by appellant that section 41, as enacted in 1931, did not include a sister as one entitled to inherit; but she urges that, by its amendment in 1937 to include a sister, section 43 must, perforce be assumed to have been likewise amended or impliedly repealed so as to include a sister. No authority is cited for this contention, and we cannot assume that by amending section 41 the legislature intended to effect a like amendment to section 43. Decisions to the contrary are In re Estate of Yule, 57 Cal.App.2d 652, 655, 135 P.2d 386, and In re Estate of Cottrill, 65 Cal.App.2d 222, 228, 150 P.2d 214, hearing in Supreme Court denied.

The orders appealed from are affirmed.

PEEK, and THOMPSON, JJ., concur.

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